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COURTS, AND COMMERCE COURT
OF THE UNITED STATES

JANUARY—FEBRUARY, 1914

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CASES REPORTED

	Page		Page
Ætna Life Ins. Co., Van Reen v. (D. C.)	691	Baskin v. United States (C. C. A.)	740
Albert Miller & Co. v. Wilkins (C. C. A.)	582	Becker Bros., Bush & Lane Piano Co. v. (D. C.)	233
Albert Steinfeld & Co., United States v. (D. C.)	904	Beer v. Moffatt (C. C. A.)	779
Alessandrelli v. Arbogast (D. C.)	126	Ben Levy Co. v. Tetlow (D. C.)	139
Alessandrelli v. Stroudsburg Hospital (D. C.)	129	Berry Bros. v. Snowdon (C. C. A.)	336
Alfred H. Smith Co. v. Hughes (C. C. A.)	37	Bertini, Petition of (C. C. A.)	841
American Bank Protection Co. v. Electric Protection Co. (C. C. A.)	845	Bestul, Churchill v. (C. C. A.)	766
American Brass & Copper Co., General Electric Co. v. (C. C.)	237	B. F. Startevant Co., Sirocco Engineering Co. v. (D. C.)	624
American Caramel Co., Glen Rock Co. v. (C. C. A.)	619	Bickel v. Rockwood (C. C. A.)	187
American Malting Co. v. Keitel (C. C. A.)	351	Billington, Bison State Bank v. (C. C. A.)	610
American Nat. Bank, H. D. Still's Sons v. (C. C. A.)	749	Bird, Coggey v. (C. C. A.)	803
American Nat. Bank of Macon, Barrett & Doughty v. (C. C. A.)	757	Bishop v. Sloss-Sheffield Steel & Iron Co. (C. C. A.)	840
American Nat. Bank of Macon, H. D. Still's Sons v. (C. C. A.)	757	Bison State Bank v. Billington (C. C. A.)	610
American Temperance Life Ins. Ass'n of City of New York v. Solomon (C. C. A.)	345	Blake v. Old Colony Life Ins. Co. (C. C. A.)	309
Anderson, Forty-Two Broadway Co. v. (D. C.)	991	Blakslee, Perrin & Darling v. Ocean Accident & Guarantee Corp. (D. C.)	710
Andrews & Co. v. Osborne (C. C. A.)	148	Blue Point Oyster Co. v. Haagensohn (D. C.)	278
Apollo Pub. Co., Ginn v. (D. C.)	713	Bogen, Prest-O-Lite Co. v. (C. C.)	915
Arbogast, Alessandrelli v. (D. C.)	126	Bolies, United States v. (D. C.)	682
Archer v. Imperial Mach. Co. (C. C. A.)	206	Boston & M. R. R., Donohue v. (C. C. A.)	824
A. R. Mosler & Co. v. Lurie (C. C. A.)	364	Boswell, Browning v. (C. C. A.)	788
Armour & Co. v. Miller (C. C. A.)	784	Bosworth, Chesapeake & O. R. Co. v. (D. C.)	469
Armstrong, Cullen v. (D. C.)	704	Bosworth, Cincinnati, N. O. & T. P. R. Co. v. (D. C.)	467
Arthur H. Crist Co., Huebsch v. (D. C.)	885	Bosworth, Illinois Cent. R. Co. v. (D. C.)	465
Ashley, The (D. C.)	965	Bosworth, Louisville & N. R. Co. v. (D. C.)	380
Assets Collecting Co. v. Barnes-King Development Co. (C. C. A.)	206	Bowers v. Post (D. C.)	660
Atchison, T. & S. F. R. Co. v. O'Connor (C. C. A.)	1004	Bowes, Davies v. (D. C.)	53
Automobile Supply Mfg. Co., Fischer v. (C. C. A.)	225	Bowman, Utah Implement-Vehicle Co. v. (D. C.)	942
Avery, Milwaukee Bronze Casting Co. v. (C. C. A.)	616	Bradley v. Sullivan, two cases (C. C. A.)	833
Baer Bros. Mercantile Co., Denver & R. G. R. Co. v. (C. C. A.)	577	Broadway Trust Co., Appeal of (C. C. A.)	800
Bailey, Baker Ice Mach. Co. v. (C. C. A.)	603	Brown Bros. & Co., Smith v. (D. C.)	667
Bailey, Baker Ice Mach. Co. v. (C. C. A.)	844	Browning v. Boswell (C. C. A.)	788
Baird Inv. Co. v. Harris (C. C. A.)	291	Burr Mfg. & Supply Co., In re (D. C.)	138
Baker v. United States (C. C. A.)	525	Bush v. Hunt (C. C. A.)	164
Baker Ice Mach. Co. v. Bailey (C. C. A.)	603	Bush & Lane Piano Co. v. Becker Bros. (D. C.)	233
Baker Ice Mach. Co. v. Bailey (C. C. A.)	844	Butler County R. Co. v. United States (Com. C.)	260
Barnard, Curtice Bros. Co. v. (C. C. A.)	589	Cain, In re (C. C. A.)	40
Barnes-King Development Co., Assets Collecting Co. v. (C. C. A.)	206	Cameron, First Nat. Bank v. (C. C. A.)	611
Barrett v. Grays Harbor Commercial Co. (D. C.)	95	Canadian Northern R. Co. v. Northern Mississippi R. Co. (C. C. A.)	758
Barrett & Doughty v. American Nat. Bank of Macon (C. C. A.)	757	Carey v. Donohue (C. C. A.)	328
Barry v. Harpoon Castor Mfg. Co. (C. C. A.)	207	Carl Laemmle Music Co. v. Stern (D. C.)	129
		Carson Lumber Co. v. St. Louis & S. F. R. Co. (C. C. A.)	191
		Central American Commercial Co. v. Pacific Mail S. S. Co. (D. C.)	111
		Central Electric Co. v. Socorro Electric Co. (C. C. A.)	534
		Central of Georgia R. Co. v. Railroad Commission of Alabama (D. C.)	75

	Page		Page
Central R. Co. of New Jersey v. Hudson (C. C. A.)	176	Denison v. Gifford (C. C. A.)	231
Central R. Co. of New Jersey, Strough v. (C. C. A.)	23	Denver & R. G. R. Co. v. Baer Bros. Mercantile Co. (C. C. A.)	577
Century Sav. Bank v. Robt. Moody & Son (C. C. A.)	775	Dominick & Haff v. R. Wallace & Sons Mfg. Co. (C. C. A.)	223
Charles Wirt & Co., Macallen Co. v. (D. C.)	625	Donohue v. Boston & M. R. R. (C. C. A.)	824
Chattanooga & Tennessee River Power Co. v. United States (C. C. A.)	28	Donohue, Carey v. (C. C. A.)	328
Cheatham Electric Switching Device Co. v. Transit Development Co. (C. C. A.)	229	Doyle & Son, In re (C. C. A.)	1
Chesapeake & O. R. Co. v. Bosworth (D. C.)	469	Drum v. Turner (D. C.)	854
Chesapeake & O. R. Co., Lykins v. (C. C. A.)	573	Dunn, Vacuum Engineering Co. v. (C. C. A.)	219
Chesapeake & O. R. Co. v. McKell (C. C. A.)	514	Eagen v. Lazarus (C. C. A.)	1004
Christensen v. Matson Nav. Co. (D. C.)	266	Edwards Darnell v. (D. C.)	99
Churchill, In re (C. C. A.)	766	Eichhorst v. Lindsey (D. C.)	708
Churchill v. Bestul (C. C. A.)	766	E. J. Willis Co., Parsons Non-Skid Co. v. (C. C. A.)	227
Cincinnati, N. O. & T. P. R. Co. v. Bosworth (D. C.)	467	Electric Protection Co., American Bank Protection Co. v. (C. C. A.)	845
Cincinnati, N. O. & T. P. R. Co. v. Craig (C. C. A.)	50	Elizabeth, The (D. C.)	140
City of Henderson, Herndon v., two cases (C. C. A.)	1005	Empire State Surety Co., Justice v. (D. C.)	105
City of Paris, Mackay Telegraph-Cable Co. v. (C. C. A.)	1006	Eric R. Co., United States v. (D. C.)	283
City of Pawtucket, McClintock v. (C. C. A.)	361	Erskine M. Phelps, The (D. C.)	141
City Trust Co., Missouri, K. & T. R. Co. v. (C. C. A.)	45	Eureka, The (D. C.)	373
City Trust Co., Stanley v. (C. C. A.)	45	Exum, In re (D. C.)	716
Clip Bar Mfg. Co. v. Steel Protected Concrete Co. (D. C.)	874	Fain v. United States (C. C. A.)	525
Cockrell, Robertson v. (C. C. A.)	843	Fall v. United States, two cases (C. C. A.)	547
Coffield Motor Washer Co., Wayne Mfg. Co. v. (C. C. A.)	614	Falls City Woolen Mills, Wm. B. Scaife & Sons Co. v. (C. C. A.)	210
Coggey v. Bird (C. C. A.)	803	Farmers' & Merchants' State Bank of Waco, Tex., v. Park (C. C. A.)	613
Comfort, Illinois Cent. R. Co. v. (C. C. A.)	1005	Fichtel, Hess-Bright Mfg. Co. v. (D. C.)	867
Commissioner of Immigration, United States v. (D. C.)	137	Fidelity Title & Trust Co. v. Landon (C. C. A.)	300
Condon, In re (C. C. A.)	800	First Nat. Bank v. Cameron (C. C. A.)	611
Cook, Liddle v. (C. C. A.)	182	Fischer v. Automobile Supply Mfg. Co. (C. C. A.)	225
Cooke, United States v. (C. C. A.)	607	Fiske & Co., In re (D. C.)	982
Cooney v. Dandridge (C. C. A.)	838	Ford Motor Co. v. International Automobile League (D. C.)	235
Corbett v. Riddle (C. C. A.)	811	Forty-Two Broadway Co. v. Anderson (D. C.)	991
Cotton, In re (D. C.)	124	Frank & Sons, Ex parte (D. C.)	371
Cotton Manufacturers' Sales Co., In re (D. C.)	629	F. S. Hardy & Co., Cox v. (C. C. A.)	1004
Coxe v. F. S. Hardy & Co. (C. C. A.)	1004	Geary, Phoenix R. Co. of Arizona v. (D. C.)	694
Craig, Cincinnati, N. O. & T. P. R. Co. v. (C. C. A.)	50	General Electric Co. v. American Brass & Copper Co. (C. C.)	237
Crane Iron Works v. United States (Com. C.)	238	Gifford, Denison v. (C. C. A.)	231
Crawford, McClurg v. (C. C. A.)	349	Gillespie, In re (D. C.)	1003
Crist Co., Huebsch v. (D. C.)	885	Ginn v. Apollo Pub. Co. (D. C.)	713
Cristin v. Leonard (C. C. A.)	49	Glen Rock Co. v. American Caramel Co. (C. C. A.)	619
C. S. Holmes, The (D. C.)	970	Goldstein v. Scranton R. Co. (C. C. A.)	145
Cullen v. Armstrong (D. C.)	704	Goodhart, Moss v. (D. C.)	102
Curtice Bros. Co. v. Barnard (C. C. A.)	589	Gould v. United States (C. C. A.)	730
Curtis v. Phelps (D. C.)	261	Grand Rapids Furniture Agency, In re (D. C.)	483
Czeslicki, United States v. (D. C.)	496	Grant Bros., In re (C. C. A.)	603
Dandridge, Cooney v. (C. C. A.)	838	Grant Bros., In re (C. C. A.)	844
Dandridge & Pugh, In re (C. C. A.)	838	Graves, In re (C. C. A.)	336
Darnell v. Edwards (D. C.)	99	Grays Harbor Commercial Co., Barrett v. (D. C.)	95
Davies v. Bowes (D. C.)	53	Griesheimer, In re (D. C.)	134
Davis, Prest-O-Lite Co. v. (D. C.)	917	Grinnell Washing Mach. Co. v. Woodrow (D. C.)	621
D. C. Andrews & Co. v. Osborne (C. C. A.)	148	Guaranty State Bank & Trust Co. v. Oklahoma Coal Co. (C. C. A.)	359

	Page		Page
Gwynne, United States v. (D. C.).....	993	Keitel, American Malting Co. v. (C. C. A.)	351
Haagenson, Blue Point Oyster Co. v. (D. C.).....	278	Kennerly, United States v. (D. C.).....	119
Hamilton Automobile Co., In re (C. C. A.)	596	Kerlin, In re (C. C. A.).....	42
Hanges v. Whitfield (D. C.).....	675	Kershaw Oil Mill v. National Bank of Savannah (C. C. A.).....	835
Hardy & Co., Cox v. (C. C. A.).....	1004	Keslusk, Philadelphia & Reading Coal & Iron Co. v. (C. C. A.).....	197
Harpoon Castor Mfg. Co., Barry v. (C. C. A.).....	207	Killian Mfg. Co., In re (D. C.).....	498
Harris, Schwarz v. (D. C.).....	1000	Kimball & Co. v. Johnson (C. C. A.).....	596
Harris, Thomas J. Baird Inv. Co. v. (C. C. A.).....	291	Kramer, In re (D. C.).....	627
Hartzell, In re (C. C. A.).....	775	Laemmle Music Co. v. Stern (D. C.).....	129
Havenor, United States v. (D. C.).....	988	Landon, Fidelity Title & Trust Co. v. (C. C. A.).....	300
H. D. Still's Sons v. American Nat. Bank (C. C. A.).....	749	Landon, McKinney v. (C. C. A.).....	300
H. D. Still's Sons v. American Nat. Bank of Macon (C. C. A.).....	757	Lankford, Louisville & N. R. Co. v. (C. C. A.).....	321
H. E. Pogue Distillery Co. v. Paxton Bros. Co. (D. C.).....	108	La Savoie (C. C. A.).....	203
Hendon v. Henderson, two cases (C. C. A.).....	1005	Lawlor v. Loewe (C. C. A.).....	721
Hess-Bright Mfg. Co. v. Fichtel (D. C.).....	867	Lawson v. Metal Products Corp. (C. C. A.)	51
Hillman v. New York State Steel Co. (D. C.).....	715	Lawrence Ward's Island Realty Co. v. United States (C. C. A.).....	201
Hoffman v. Le Traunik (D. C.).....	375	Lazarus, Eagen v. (C. C. A.).....	1004
Holloway, United States v., three cases (D. C.).....	266	Leonard, Cristin v. (C. C. A.).....	49
Holmes, The C. S. (D. C.).....	970	Le Traunik, Hoffman v. (D. C.).....	375
Holmes v. L. P. & J. A. Smith Co. (C. C. A.).....	47	Levy Co. v. Tetlow (D. C.).....	139
Hopkins v. McClaughry (C. C. A.).....	821	Lewis Frank & Sons, Ex parte (D. C.).....	371
Hudson, Central R. Co. of New Jersey v. (C. C. A.).....	176	Liddle v. Cook (C. C. A.).....	182
Huebsch v. Arthur H. Crist Co. (D. C.).....	885	Lighter P. R. Co. No. 250, The (D. C.).....	493
Hughes v. Alfred H. Smith Co. (C. C. A.)	37	Lindsey, Eichhorst v. (D. C.).....	708
Hunt, Bush v. (C. C. A.).....	164	Loeb v. Weil (C. C. A.).....	608
H. W. Bogen, Prest-O-Lite Co. v. (C. C. A.)	915	Loewe, Lawlor v. (C. C. A.).....	721
Hyams v. Old Dominion Co. (C. C. A.).....	808	Loggie v. Puget Sound Mills & Timber Co. (C. C. A.).....	1006
Ilex Optical Co., Wollensak Optical Co. v. (C. C. A.).....	232	Loland v. Northwest Stevedore Co. (D. C.)	626
Illinois Cent. R. Co. v. Bosworth (D. C.).....	465	Louisa, The (D. C.).....	1001
Illinois Cent. R. Co. v. Comfort (C. C. A.).....	1005	Louisell Lumber Co., In re (C. C. A.).....	784
Illinois Cent. R. Co., Slater v. (C. C. A.).....	480	Louisiana & P. R. Co. v. United States (Com. C.).....	244
Imperial Mach. Co., Archer v. (C. C. A.)	206	Louisville & N. R. Co. v. Bosworth (D. C.)	380
Insurance Co. of North America v. L. P. & J. A. Smith Co. (C. C. A.).....	47	Louisville & N. R. Co. v. Irwin (C. C. A.)	614
International Automobile League, Ford Motor Co. v. (D. C.).....	235	Louisville & N. R. Co. v. Lankford (C. C. A.).....	321
Irving v. Neal (D. C.).....	471	L. P. & J. A. Smith Co., Holmes v. (C. C. A.).....	47
Irwin, Louisville & N. R. Co. v. (C. C. A.)	614	L. P. & J. A. Smith Co., Insurance Co. of North America v. (C. C. A.).....	47
Jackson v. Virginia Hot Springs Co. (D. C.).....	979	L. P. & J. A. Smith Co., President, etc., of Ins. Co. of North America v. (C. C. A.).....	47
Jamison Bros. & Co., In re (C. C. A.).....	541	L. P. & J. A. Smith Co., Rutland Transit Co. v. (C. C. A.).....	47
J. L. Luckenbach, The (D. C.).....	142	Knabenbach, The J. L. (D. C.).....	142
J. M. Fiske & Co., In re (D. C.).....	982	Lurie, A. R. Mosler & Co. v. (C. C. A.).....	364
John F. Doyle & Son, In re (C. C. A.).....	1	Lykins v. Chesapeake & O. R. Co. (C. C. A.)	573
Johnson, Kimball & Co. v. (C. C. A.).....	596	Macallen Co. v. Charles Wirt & Co. (D. C.)	625
Jones, In re (D. C.).....	717	McCasland v. Texas & P. R. Co. (C. C. A.)	1005
Jones v. United States (C. C. A.).....	585	McClaughry, Hopkins v. (C. C. A.).....	821
Judge v. Pullman Co. (C. C. A.).....	10	McClaughry, O'Brien v. (C. C. A.).....	816
Julius Bros., In re (D. C.).....	371	McClintock v. Pawtucket (C. C. A.).....	361
Justice v. Empire State Surety Co. (D. C.).....	105	McClurg v. Crawford (C. C. A.).....	340
Kansas City Southern R. Co. v. Maynor (C. C. A.).....	611	McCurdy, MacMorris v. (C. C. A.).....	541
Keene, Waltham Watch Co. v. (C. C. A.).....	1007	McGill v. Sorensen (D. C.).....	878
		McGovern v. Philadelphia & R. R. Co. (D. C.).....	975
		McGuire v. Thames Towboat Co. (D. C.).....	1001
		Mackay Telegraph-Cable Co. v. Paris (C. C. A.).....	1006
		McKell, Chesapeake & O. R. Co. v. (C. C. A.).....	514

	Page		Page
Mackenzie v. United States (C. C. A.)....	289	O'Brien-Worthen Co. v. Stempel (C. C. A.).....	847
McKinney v. Landon (C. C. A.).....	300	Ocean Accident & Guarantee Corp., Blakelley, Perrin & Darling v. (D. C.).....	710
McKinnon, New York Assets Realization Co. v. (C. C. A.).....	791	O'Connor, Atchison, T. & S. F. R. Co. v. (C. C. A.).....	1004
MacMillan, United States v., four cases (D. C.).....	266	Offner v. United States (C. C. A.).....	749
MacMorris v. McCurdy (C. C. A.).....	541	Oklahoma Coal Co., Guaranty State Bank & Trust Co. v. (C. C. A.).....	350
McMyler Mfg. Co. v. Mehnke (C. C. A.)...	5	Old Colony Life Ins. Co., Blake v. (C. C. A.).....	309
McNeight, New England Newspaper Pub. Co. v. (C. C. A.).....	18	Old Dominion Co., Hyams v. (C. C. A.)..	808
McPhee, In re (D. C.).....	143	Olympia, The (C. C. A.).....	203
Manhattan Brush Mfg. Co., In re (D. C.)..	997	Osborne, D. C. Andrews & Co. v. (C. C. A.)	148
Manning, In re (D. C.).....	499		
Massachusetts Hide Corp., Vaughan v. (D. C.).....	667	Pacific Mail S. S. Co., Central American Commercial Co. v. (D. C.).....	111
Matson Nav. Co., Christensen v. (D. C.)...	266	Pacific Mail S. S. Co., Schmidt v. (D. C.)	264
Maynor, Kansas City Southern R. Co. v. (C. C. A.).....	611	Park, Farmers' & Merchants' State Bank of Waco, Tex., v. (C. C. A.).....	613
Mehnke, McMyler Mfg. Co. v. (C. C. A.)...	5	Parsons Non-Skid Co. v. E. J. Willis Co. (C. C. A.).....	227
Metal Products Corp., Lawson v. (C. C. A.)	51	Paxton Bros. Co., H. E. Pogue Distillery Co. v. (D. C.).....	108
M. F. Rourke Co., In re (D. C.).....	877	Peacock v. Third Nat. Bank (C. C. A.)....	1006
Miller, Armour & Co. v. (C. C. A.).....	784	Peccarich, Victor-American Fuel Co. v. (C. C. A.).....	568
Miller & Co. v. Wilkins (C. C. A.).....	582	Pedlow, In re (C. C. A.).....	841
Milwaukee Bronze Casting Co. v. Avery (C. C. A.).....	616	Phelps, Curtis v. (D. C.).....	261
Minneapolis & St. L. R. Co., Storm Lake Tub & Tank Factory v. (D. C.).....	895	Phelps, The Erskine M. (D. C.).....	141
Missouri, K. & T. R. Co. v. City Trust Co. (C. C. A.).....	45	Phelps-Dodge Mercantile Co., United States v. (D. C.).....	910
Missouri Valley Bridge & Iron Co. v. Nunnemaker (C. C. A.).....	32	Philadelphia & R. R. Co., McGovern v. (D. C.).....	975
Mobile & O. R. Co. v. United States (C. C. A.).....	605	Philadelphia & Reading Coal & Iron Co. v. Keslusky (C. C. A.).....	197
Moffatt, Beer v. (C. C. A.).....	779	Phillips, In re (D. C.).....	490
Moody & Son, Century Sav. Bank v. (C. C. A.).....	775	Phoenix R. Co. of Arizona v. Geary (D. C.)	694
Mosler & Co. v. Lurie (C. C. A.).....	364	Pick, In re (D. C.).....	999
Moss v. Goodhart (D. C.).....	102	Pittsburgh S. S. Co., Nicholas Transit Co. v. (C. C. A.).....	348
		Pogue Distillery Co. v. Paxton Bros. Co. (D. C.).....	108
National Bank of Savannah, Kershaw Oil Mill v. (C. C. A.).....	835	Portuguese Prince, The (D. C.).....	995
National Electric Signaling Co. v. Telefunken Wireless Tel. Co. of United States (D. C.).....	856	Post, Bowers v. (D. C.).....	660
Neal, Irving v. (D. C.).....	471	President, etc., of Ins. Co. of North America v. L. P. & J. A. Smith Co. (C. C. A.).....	47
Newbury & Dunham, In re (C. C. A.)....	195	Prest-O-Lite Co. v. Davis (D. C.).....	917
New England Newspaper Pub. Co. v. McNeight (C. C. A.).....	18	Prest-O-Lite Co. v. H. W. Bogen (C. C.)..	915
New York Assets Realization Co. v. McKinnon (C. C. A.).....	791	Princeton, The (C. C. A.).....	199
New York State Steel Co., Hillman v. (D. C.).....	715	Puget Sound Mills & Timber Co. v. Loggie (C. C. A.).....	1006
New York, S. & W. R. Co. v. Thierer, two cases (C. C. A.).....	316	Pugh v. Snodgrass (C. C. A.).....	325
New York & P. R. S. S. Co., United States v. (C. C. A.).....	1007	Pugliese, Ex parte (D. C.).....	720
Nicholas Transit Co. v. Pittsburgh S. S. Co. (C. C. A.).....	348	Pullman Co., Judge v. (C. C. A.).....	10
Nixon, Savage v. (D. C.).....	122		
Norcross v. United States, two cases (C. C. A.).....	13	Queen Elizabeth, The (D. C.).....	712
Norris v. Trenholm (C. C. A.).....	827		
Northern Mississippi R. Co., Canadian Northern R. Co. v. (C. C. A.).....	758	Railroad Commission of Alabama, Central of Georgia R. Co. v. (D. C.).....	75
Northwest Stevedore Co., Loland v. (D. C.)	626	Railroad Commission of Alabama, Western Ry. of Alabama v. (D. C.).....	75
Notaseme Hosiery Co. v. Straus (D. C.)...	495	Rajah Auto Supply Co. v. Rex Ignition Mfg. Co. (D. C.).....	622
Nunnemaker, Missouri Valley Bridge & Iron Co. v. (C. C. A.).....	32	Reich v. Tennessee Copper Co. (D. C.)....	880
		Rex Ignition Mfg. Co., Rajah Auto Supply Co. v. (D. C.).....	622
O'Brien v. McLaughry (C. C. A.).....	816	Rhagat Singh, In re (D. C.).....	700

	Page		Page
Richardson v. Southern Idaho Water Pow- er Co. (D. C.).....	949	Southern Pac. Co., United States v. (C. C. A.).....	562
Richmond, The (D. C.).....	488	Stanley v. City Trust Co. (C. C. A.).....	45
Riddle, Corbett v. (C. C. A.).....	811	Starr, The (D. C.).....	882
River Meander, The (D. C.).....	931	State Bank, Appeal of (C. C. A.).....	830
Roanoke, The (D. C.).....	114	Steel Protected Concrete Co., Clip Bar Mfg. Co. v. (D. C.).....	874
Robt. Moody & Son, Century Sav. Bank v. (C. C. A.).....	775	Steinfeld & Co., United States v. (D. C.)..	904
Robertson v. Cockrell (C. C. A.).....	843	Stempel, O'Brien-Worthen Co. v. (C. C. A.)	847
Rockwood, Bickel v. (C. C. A.).....	187	Stern, Carl Laemmle Music Co. v. (D. C.)	129
Rosborough, Texas & P. R. Co. v. (C. C. A.)	205	Stiger, In re (C. C. A.).....	148
Rourke Co., In re (D. C.).....	877	Still's Sons v. American Nat. Bank (C. C. A.).....	749
Russell, Wheeling Terminal R. Co. v. (C. C. A.).....	795	Still's Sons v. American Nat. Bank of Ma- con (C. C. A.).....	757
Rutland Transit Co. v. L. P. & J. A. Smith Co. (C. C. A.).....	47	Storm Lake Tub & Tank Factory v. Min- neapolis & St. L. R. Co. (D. C.).....	895
R. Wallace & Sons Mfg. Co., Dominick & Haff v. (C. C. A.).....	223	Strait v. Yazoo & M. V. R. Co. (C. C. A.)	157
St. David, The (D. C.).....	985	Straus, Notaseme Hosiery Co. v. (D. C.)..	495
St. Louis Merchants' Bridge Terminal R. Co. v. United States (C. C. A.).....	600	Stromberg-Carlson Tel. Mfg. Co., Simmons v. (C. C. A.).....	1006
St. Louis & S. F. R. Co., Carson Lumber Co. v. (C. C. A.).....	191	Stroudsburg Hospital, Alessandrelli v. (D. C.).....	129
Sampsel, United States v., two cases (D. C.).....	266	Strough v. Central R. Co. of New Jersey (C. C. A.).....	23
San Francisco Bridge Co. v. United States (D. C.).....	135	Sturtevant Co., Sirocco Engineering Co. v. (D. C.).....	624
Savage v. Nixon (D. C.).....	122	Sullivan, Bradley v., two cases (C. C. A.)	833
Savarese, In re (C. C. A.).....	830	Sullivan v. United States (C. C. A.).....	1006
Savoie, La (C. C. A.).....	203	Sundar or Sandu Singh, In re (D. C.)....	700
Scaife & Sons Co. v. Falls City Woolen Mills (C. C. A.).....	210	Taylor House Ass'n, In re (D. C.).....	924
Schmidt v. Pacific Mail S. S. Co. (D. C.)	264	Telefunken Wireless Tel. Co. of United States, National Electric Signaling Co. v. (D. C.).....	856
Schwarz v. Harris (D. C.).....	1000	Tennessee Copper Co., Reich v. (D. C.)..	880
Scranton R. Co., Goldstein v. (C. C. A.)..	145	Tetlow, Ben Levy Co. v. (D. C.).....	139
See, In re (C. C. A.).....	172	Texas & P. R. Co., McCasland v. (C. C. A.).....	1005
Simmons v. Stromberg-Carlson Tel. Mfg. Co. (C. C. A.).....	1006	Texas & P. R. Co. v. Rosborough (C. C. A.)	205
Sinaloa, The (D. C.).....	287	Thames Towboat Co., McGuire v. (D. C.)..	1001
Sinclair, United States v. (C. C. A.).....	612	Thaw, Ex parte (D. C.).....	56
Sirocco Engineering Co. v. B. F. Sturte- vant Co. (D. C.).....	624	Thaw, Ex parte (D. C.).....	954
Slater v. Illinois Cent. R. Co. (C. C.).....	480	Thierer, New York, S. & W. R. Co. v., two cases (C. C. A.).....	316
Sloss-Sheffield Steel & Iron Co., Bishop v. (C. C. A.).....	840	Third Nat. Bank, Peacock v. (C. C. A.)..	1006
Sloss-Sheffield Steel & Iron Co., Thomp- son v. (C. C. A.).....	840	Thomas J. Baird Inv. Co. v. Harris (C. C. A.).....	291
Smith, In re (D. C.).....	91	Thompson v. Sloss-Sheffield Steel & Iron Co. (C. C. A.).....	840
Smith, In re (D. C.).....	483	Thorson Bros., In re (D. C.).....	961
Smith v. Brown Bros. & Co. (D. C.).....	667	Thullen, Triumph Electric Co. v. (D. C.)..	938
Smith Co., Holmes v. (C. C. A.).....	47	Titanic, The (C. C. A.).....	513
Smith Co. v. Hughes (C. C. A.).....	37	Titanic, The (D. C.).....	501
Smith Co., Insurance Co. of North Amer- ica v. (C. C. A.).....	47	Transit Development Co., Cheatham Elec- tric Switching Device Co. v. (C. C. A.)	229
Smith Co., President, etc., of Ins. Co. of North America v. (C. C. A.).....	47	Trenholm, Norris v. (C. C. A.).....	827
Smith Co., Rutland Transit Co. v. (C. C. A.).....	47	Triumph Electric Co. v. Thullen (D. C.)..	938
Snodgrass, In re (C. C. A.).....	325	Turner, Drum v. (D. C.).....	854
Snodgrass, Pugh v. (C. C. A.).....	325	Union Gap Irr. Co., United States v. (D. C.).....	274
Snowdon, Berry Bros. v. (C. C. A.).....	336	United States v. Albert Steinfeld & Co. (D. C.).....	904
Socorro Electric Co., Central Electric Co. v. (C. C. A.).....	534	United States, Baker v. (C. C. A.).....	525
Solomon, American Temperance Life Ins. Ass'n of City of New York v. (C. C. A.)	345	United States, Baskin v. (C. C. A.).....	740
Sorensen, McGill v. (D. C.).....	876	United States v. Bolles (D. C.).....	682
Southern Idaho Water Power Co., Richard- son v. (D. C.).....	949	United States, Butler County R. Co. v. (Com. C.).....	260

	Page		Page
United States, Chattanooga & Tennessee River Power Co. v. (C. C. A.).....	28	Utah Implement-Vehicle Co. v. Bowman (D. C.).....	942
United States v. Commissioner of Immigration (D. C.).....	137	Utah Power & Light Co., United States v. (C. C. A.).....	554
United States v. Cooke (C. C. A.).....	607	Vacuum Engineering Co. v. Dunn (C. C. A.).....	219
United States, Crane Iron Works v. (Com. C.).....	238	Vaughan v. Massachusetts Hide Corp. (D. C.).....	667
United States v. Czeslicki (D. C.).....	496	Vaughn, United States v. (D. C.).....	719
United States v. Erie R. Co. (D. C.).....	283	Van Reen v. Aetna Life Ins. Co. (D. C.)...	691
United States, Fain v. (C. C. A.).....	522	Victor-American Fuel Co. v. Peccarich (C. C. A.).....	568
United States, Fall v., two cases (C. C. A.)	547	Virginia Hot Springs Co., Jackson v. (D. C.).....	979
United States, Gould v. (C. C. A.).....	730	Walker, In re (D. C.).....	144
United States v. Gwynne (D. C.).....	993	Wallace & Sons Mfg. Co., Dominick & Haff v. (C. C. A.).....	223
United States v. Havenor (D. C.).....	988	Walters, In re (D. C.).....	133
United States v. Holloway, three cases (D. C.).....	266	Waltham Watch Co. v. Keene (C. C. A.)...	1007
United States, Jones v. (C. C. A.).....	585	Ward's Island Realty Co. v. United States (C. C. A.).....	201
United States v. Kennerley (D. C.).....	119	Wayne Mfg. Co. v. Coffield Motor Washer Co. (C. C. A.).....	614
United States, Lawrence Ward's Island Realty Co. v. (C. C. A.).....	201	Weil, Loeb v. (C. C. A.).....	608
United States, Louisiana & P. R. Co. v. (Com. C.).....	244	Wenatchee Heights Orchard Co., In re (D. C.).....	84
United States, Mackenzie v. (C. C. A.)...	289	Western Fuel Co. v. United States (C. C. A.).....	13
United States v. MacMillan, four cases (D. C.).....	266	Western Ry. of Alabama v. Railroad Commission of Alabama (D. C.).....	75
United States, Mobile & O. R. Co. v. (C. C. A.).....	605	Wheeling Terminal R. Co. v. Russell (C. C. A.).....	795
United States v. New York & P. R. S. S. Co. (C. C. A.).....	1007	Whitfield, Hanges v. (D. C.).....	675
United States, Norcross v., two cases (C. C. A.).....	13	Wilkins, Albert Miller & Co. v. (C. C. A.)	582
United States, Offner v. (C. C. A.).....	749	Wm. B. Scaife & Sons Co. v. Falls City Woolen Mills (C. C. A.).....	210
United States v. Phelps-Dodge Mercantile Co. (D. C.).....	910	Willis Co., Parsons Non-Skid Co. v. (C. C. A.).....	227
United States, St. Louis Merchants' Bridge Terminal R. Co. v. (C. C. A.).....	600	Windber, The (D. C.).....	131
United States v. Sampsell, two cases (D. C.)	266	Wirt & Co., Macallen Co. v. (D. C.).....	625
United States, San Francisco Bridge Co. v. (D. C.).....	135	Wollensak Optical Co. v. Ilex Optical Co. (C. C. A.).....	232
United States v. Sinclair (C. C. A.).....	612	Woodrow, Grinnell Washing Mach. Co. v. (D. C.).....	621
United States v. Southern Pac. Co. (C. C. A.).....	562	Yazoo & M. V. R. Co., Strait v. (C. C. A.)..	157
United States, Sullivan v. (C. C. A.).....	1006	Yungbluth, In re (D. C.).....	116
United States v. Union Gap Irr. Co. (D. C.)	274		
United States v. Utah Power & Light Co. (C. C. A.).....	554		
United States v. Vaughn (D. C.).....	719		
United States, Western Fuel Co. v. (C. C. A.).....	13		

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

In re JOHN F. DOYLE & SON.

(Circuit Court of Appeals, Third Circuit. December 4, 1913.)

No. 1,762.

BANKRUPTCY (§ 143*)—ASSETS—LIQUOR LICENSE—RENEWAL.

Under a rule of the court of quarter sessions of Philadelphia county that all persons holding liquor licenses granted or transferred to them during the previous year, against whom no specific remonstrance has been filed, will be presumed to be entitled to a renewal of their licenses, where a license issued to bankrupts was unexpired at the time of their adjudication, the right to the unexpired term, with its inseparable incident, to wit, the contingent right to a renewal, ceased to belong to the bankrupts, and both passed to a purchaser under a sale by the bankrupts' receiver, so that the bankrupts could properly be compelled to join in such proceedings as were necessary to make the sale effective for the benefit of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

Petition for Review from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

In the matter of bankruptcy proceedings of John F. Doyle & Son. Petition to review an order (205 Fed. 543) denying an application of the trustee to compel the bankrupts to join in an application by a purchaser for a renewal of the bankrupts' liquor license. Reversed.

Otto Wolff, Jr., and A. M. Beitler, both of Philadelphia, Pa., for petitioner.

Michael Francis Doyle, of Philadelphia, Pa., for respondent.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. On October 16, 1912, a creditors' petition was filed against John F. Doyle & Son. The bankrupts were then selling liquor at retail in the city of Philadelphia under a license that did not expire until May 31, 1913. They owned also the bar fixtures and a small quantity of stock, but the license

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
209 F.—1

was practically their only asset. In the schedule they valued the combined property at \$12,000, and the appraisers appointed by the district court had previously valued it on November 8 at a few hundred dollars more. In the district courts of Pennsylvania (and in some other jurisdictions also) a license to sell liquor has been regarded from the beginning of the present bankruptcy law as a salable asset, although it is no doubt a peculiar kind of property and in certain aspects is often properly described as merely a personal privilege. *Re Fisher* (Ref. Mass.) 1 Am. Bankr. Rep. 557, affirmed (D. C. Mass.) 3 Am. Bankr. Rep. 406, 98 Fed. 89, affirmed (C. C. A. 2d Cir.) 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292; *Re Becker* (D. C. Pa.) 3 Am. Bankr. Rep. 412, 98 Fed. 407; *Re Emrich* (D. C. Pa.) 101 Fed. 231; *Collier on Bankruptcy* (9th Ed.) 1011. The logical step in advance was taken by Judge Holland in *Re Wiesel* (D. C. Pa.) 22 Am. Bankr. Rep. 59, 173 Fed. 718, where it was held that a bankrupt's right to apply for a renewal of his license is also an asset that passes to the trustee.

The right to apply for a renewal, which Doyle & Son were enjoying as an incident to the license itself, was made more valuable by a rule of the court of quarter sessions of Philadelphia county:

"All persons holding licenses granted to them during the last previous year, or transferred to them during that year, against whom no specific remonstrance has been filed, will be presumed to be entitled to a renewal of their licenses."

This rule expresses the general and long-established custom throughout the state. *O'Brien's License*, 1 Pa. Co. Ct. R. 363; *Justin's Application*, 2 Pa. Co. Ct. R. 22; *Rief's License*, 2 Lehigh Val. Law Rep. (Pa.) 400; *Arnold's Application*, 1 Northampton Co. R. 93. The quarter sessions has the exclusive jurisdiction in Philadelphia and elsewhere to grant, transfer, and renew licenses, and of course every transfer is subject to its approval. This fact is well understood, and, under the practice of the district court, every sale in bankruptcy is ipso facto void if such approval be not given. What the buyer gets therefore is practically nothing except the chance that he may be permitted to step into the bankrupt's shoes. But the chance is really a probability, and for this contingency buyers are readily found, and large sums of money are often bid.

As an example, we may take the case now in hand. The receiver (who was appointed on October 18 and afterwards became the trustee) sold the license with the right of renewal early in November for a sum that does not appear with precision but may be approximated from the fact that, when the sale was set aside (apparently for inadequacy of price), the objecting creditor was obliged to protect the receiver from loss on a resale by entering bond in the sum of \$18,000. This was not an excessive sum, for when the resale was had the price bid was \$19,300. This sale the court confirmed on December 4, and Michael Barbrus, the buyer, acquired thereby the rights to which we have referred, namely, the unexpired term, and also the right to a renewal, but of course subject in both particulars to the approval of the quarter sessions. Unfortunately for Barbrus

the quarter sessions refused to consent to the transfer, and this refusal necessarily destroyed whatever right Barbrus might otherwise have had to a renewal. At first the bankrupts declined to join in asking for the transfer, although they were bound to join (*Re Fisher*, supra; *Re Becker*, supra); and they only consented when the referee ordered them to do so on pain of punishment for contempt. We are not advised why the quarter sessions refused the transfer; but, as the receiver was also asking (although apparently without lawful authority) that the annual license from June 1, 1913, might be issued to himself on behalf of the creditors, it is possible that in this conflict of petitions the quarter sessions may have determined to refuse them all. At all events, the petitions both of Barbrus and of the receiver were refused on March 10; and this refusal at once set aside the sale to Barbrus and left the unexpired term of the license just where it was before the sale. The only fact up to this point that we have not mentioned is the adjudication. This was entered on January 29, and it is mainly upon this fact that the present dispute turned in the District Court.

The controversy arises in this way: On March 18 the quarter sessions granted to the bankrupts a license for the year beginning June 1, 1913. The grant was made upon an application that was presented a few days after the adjudication, and for this reason the license was regarded by the District Court as after-acquired property. After the action of the quarter sessions on March 10 and 18, the receiver applied to the District Court for a new order to sell the unexpired term with the privilege of renewal; and on March 31 Francis Canuso became the buyer for \$15,500. The sale was confirmed on April 2, but the bankrupts refused to join in applying to the court for a transfer of the unexpired term and for a renewal from June 1. The referee made an order directing them to join, and, when they persisted in refusing, he certified to the district court that they were in contempt. Thereupon the court issued an appropriate rule to show cause and after due hearing discharged the rule, holding that the bankrupts had been justified in refusing. At the same time the referee's order directing the bankrupts to join in the application to the quarter sessions was reversed, and in due season the present petition to revise both orders was applied for and granted.

The decision of the District Court was put upon the ground that the license granted to the bankrupts on March 18 was after-acquired property and was not part of the bankrupts' estate. The learned judge cited *Buck's Estate*, 185 Pa. 57, 39 Atl. 821, 64 Am. St. Rep. 816, and *Whitlock's License*, 39 Pa. Super. Ct. 34, and said *inter alia*:

"In the present case the receiver, after adjudication, applied for a renewal of the license, which application was refused by the quarter sessions court. Whatever inchoate rights existed prior to the adjudication and passed out of the bankrupt at the time of his adjudication were in the nature of a personal privilege. If the license court had seen fit to confer this privilege upon the receiver of the bankrupt estate, it would have been within its discretion to do so. The action of the court of quarter sessions in granting the license to the bankrupt vested the personal privilege arising under the license in the bankrupt as of the time the license was granted."

We think there was error in the action of the district court. The right to apply for a renewal was an inseparable incident to the unexpired term. In *Johnson's Appeal*, 115 Pa. 133, 8 Atl. 36, 2 Am. St. Rep. 539, this was decided concerning a tenant's right to renew his lease; and the right or opportunity to renew a license is put upon a similar footing in *Aschenbach v. Carey*, 224 Pa. 309, 73 Atl. 435. The Supreme Court of Pennsylvania there said, quoting with approval a part of the opinion of the orphans' court in *Buck's Estate*, *supra*:

"* * * Such a place has necessarily a greatly enhanced market value, just as it may also have by reason of good will arising from the mere carrying on of a prosperous business during a time sufficiently long to give it a reputation. If the occupancy of the license is under a lease having some time to run, the unexpired term, in case of his death, is an asset of his estate, of which good will and the opportunity of obtaining a transfer or grant of a license are inseparable incidents."

And in *Buck's Estate*, 185 Pa. at page 60, 39 Atl. at page 822, 64 Am. St. Rep. 816, the Supreme Court said:

"The opportunity to secure a transfer of the license and a renewal at the end of the year may materially affect the value of the fixtures, good will, and unexpired term of the lease."

This was approved in *Graeser's Estate*, 230 Pa. 145, 79 Atl. 242.

We think, therefore, that when the adjudication was entered the right to the unexpired term, with its inseparable incident, the contingent right to a renewal, ceased to belong to the bankrupt, and that both rights were sold to Canuso by the receiver on March 31. It follows that the bankrupts were properly ordered to join in such proceedings as were necessary to make the sale effective for the benefit of creditors.

We do not regard the decision in *Whitlock's License* as necessarily opposed to this conclusion. The order of the quarter sessions that was disapproved of in that case is shown to have been based upon petitions that were insufficient in jurisdictional averments, and this ground alone was enough to support the judgment of the Superior Court. The court recognized that the other ground that was gone into was presented upon a record that was certainly somewhat confused; but it is not to be denied that some expressions in the opinion justified the District Court in relying upon them. We should regret to differ from the Superior Court in such a matter, but we think we need not contemplate such a situation, for *Whitlock's License* did not directly present the question now under consideration, and therefore the court does not discuss it. Apparently it is taken for granted that the contingent right to a renewal continues to belong to a bankrupt after adjudication, and that the trustee and the creditors have no interest in it. But this is just the point now raised and decided, namely, that the contingent right does *not* continue to belong to the bankrupt but accompanies the license as an inseparable incident thereto. If this were not true, a bankrupt would have the power in many instances to divert from his creditors and retain for himself much of the value inherent in his license merely by filing a voluntary

petition a short time before making an application for renewal. This possibility is pointed out in the brief for the trustee, and we agree that such a result should be prevented unless established principles make it unavoidable. As already indicated, we do not find ourselves obliged to reach so undesirable a conclusion.

The order of the District Court is reversed, with directions to proceed in accordance with this opinion.

McMYLER MFG. CO. v. MEHNKE.

(Circuit Court of Appeals, Sixth Circuit. December 2, 1913.)

No. 2,369.

1. MASTER AND SERVANT (§ 228*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—STATE STATUTES.

Page & A. Gen. Code Ohio, § 6245-1, provides that, in actions for injuries to a servant, the fact that he may have been guilty of contributory negligence shall not bar recovery, where such negligence is slight and that of the employer is gross in comparison, but the damages shall be diminished in proportion to the negligence attributable to the servant. *Held*, that contributory negligence as a common-law defense in bar has not been wholly abolished, and constitutes a full and absolute bar to a servant's right of action in those cases where his negligence is as great or greater than that of the employer, and hence it was improper to charge that a servant's contributory negligence, no matter how great as compared with that of his employer, was only to be considered in mitigation of damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

2. MASTER AND SERVANT (§ 228*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK—STATUTES.

Page & A. Gen. Code Ohio, § 6245, provides that an employé shall not be held to have assumed the risk of the negligent act of any fellow servant or employé, done in obedience to the immediate or peremptory instructions or order of the employer, or any person in authority to direct, and section 6245-1 provides that a servant's contributory negligence shall not bar recovery where it is slight and that of the employer gross in comparison, but the damages shall be diminished in proportion to the servant's negligence. *Held* that, where plaintiff, a machinist in defendant's shop, was injured by the negligent manner in which other employés near him chipped a casting in obedience to immediate instructions or orders of the employer, plaintiff's act in remaining in the position he occupied, notwithstanding the work negligently done near him, was not contributory negligence, but at most an assumed risk within section 6245, and hence the employer was not entitled to an instruction that plaintiff's contributory negligence might be a bar to recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

3. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR COURT OR JURY.

Page & A. Gen. Code Ohio, § 6245, declares that a servant who is injured by the negligence of his fellow servants under stated conditions does not assume the risk thereof, and section 6245-1 declares that an employé's contributory negligence shall not bar a recovery if slight in comparison with the employer's negligence, but that the damages shall be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

diminished accordingly, and that all questions of negligence and contributory negligence shall be for the jury. *Held*, that where, in an action for injuries to a servant by the negligence of fellow servants working near him, according to immediate directions of the employer, there was no proof of any conduct on the part of the servant which might be held negligence of that character which is so distinct from assumed risk that it would survive the statutory abrogation by section 6245, there was no question of contributory negligence which was "for the jury" under the last clause of the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Action by August Mehnke against the McMyler Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Mehnke, a citizen of Russia, brought this action, in the District Court, against an Ohio corporation, to recover damages caused by injury received while he was working as a machinist in defendant's shop. His case was that other employes were set at work near him chipping a casting, and that their work was so negligently done that a flying chip destroyed his eye. On this theory, he recovered a verdict; and the company brings a writ of error. The vital questions—a fellow servant's negligence, plaintiff's contributory negligence, and plaintiff's assumption of the risk—are controlled or affected by the Ohio statute copied in the margin.¹ It is conceded that the record is such as to require us to assume, for the purpose of this review, that the chipping in progress by Mehnke's fellow servants was being done in obedience to immediate instructions or orders given by the employer, and hence it is clear, under this statute, that Mehnke had not assumed the risk of injury resulting therefrom. It may then be said that, as applied to this case, the statute abrogates the common-law defense of assumption of risk.

[1] It also seems clear enough, from reading section 6245-1, that contributory negligence, considered as a common-law defense in bar, has not been wholly abolished, but has been removed only in the specified case, that is, where plaintiff's negligence is slight as compared with defendant's negligence; and that the common-law defense, as a full and absolute bar, remains at least in those cases where the plaintiff's negligence was as great or greater than that of defendant.² Upon the trial, defendant requested an instruction to this effect, but the district judge refused the request and allowed the jury to understand the plaintiff's contributory negligence, no matter how great as compared with the defendant's, was only to be considered by the jury in reduc-

¹ The "Norris Act," 101 Ohio Laws, pp. 195, 197, §§ 6245, 6245-1, General Code of Ohio:

"Sec. 6245. * * * Such employe shall not be held to have assumed the risk of the negligent act of any fellow servant or employe of such employer, done in obedience to the immediate or peremptory instructions or orders given by the employer, or any other person who has authority to direct the doing of said act * * * or the employing or retention of any incompetent servant."

"Sec. 6245-1. That in all such actions hereafter brought, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, where his contributory negligence is slight and the negligence of the employer is gross in comparison. But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. * * * All questions of negligence and contributory negligence shall be for the jury."

² We have so considered a similar statute: *Erie R. R. Co. v. White*, 187 Fed. 556, 109 C. C. A. 322; *Erie R. R. Co. v. Kennedy*, 191 Fed. 332, 112 C. C. A. 76.

tion of damages. Whether this was reversible error is the only question to be considered; for if the facts of this case were inconsistent with the existence of any such contributory negligence as could survive the statute and remain a defense in bar, the defendant was not prejudiced.

Ford, Snyder & Tilden, of Cleveland, Ohio (D. H. Tilden, of Cleveland, Ohio, of counsel), for plaintiff in error.

T. S. Dunlap, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [2] The rule of distinction between assumption of risk and contributory negligence and the application of that rule to concrete cases have received extended consideration. The latest discussion by the Supreme Court has been in the case of *Schlemmer v. Railroad*, 205 U. S. page 1, 27 Sup. Ct. 407, 51 L. Ed. 681, and in the same case, on the second review, 220 U. S. page 590, 31 Sup. Ct. 561, 55 L. Ed. 596.³ When each, alike, constituted a complete defense, the distinction was largely academic, and it was natural that the terms should be used with some confusion; but now that statutes have made differences in the defensive value of the two things the distinction has become vital and has been the subject of much judicial inquiry. In this court, we have several times, recently, found it necessary to make the distinction.⁴

Mr. Justice Holmes said, in the first *Schlemmer Case*, 205 U. S. page 12, 27 Sup. Ct. 407, 51 L. Ed. 681, that assumption of risk "obviously shades into negligence as commonly understood," and that "the difference between the two is one of degree rather than of kind." In the second case, Mr. Justice Day says (220 U. S. page 596, 31 Sup. Ct. 561, 55 L. Ed. 596) "there is, nevertheless, a practical and clear distinction between the two." Doubtless, the explanation of this seeming conflict is, as suggested in the later opinion, that while there is a distinction in theory, which is clear and sharp in its application to some cases, yet, as applied to other cases, the distinction becomes one of degree and of shade. One class of cases is made up of those where a man goes to work or continues to work in an unsafe place or with an unsafe instrumentality, and the danger is not so extreme as to make his conduct beyond the limits of prudence. By so doing, he assumes the risk. When, in the course of his work, he carelessly uses the dangerous tool so as to be hurt, instead of using it in a safe manner, or when, working in the unsafe place, he imprudently exposes himself to additional danger not inherent in the mere continuing at work in the unsafe place, then, in each case, his additional and unnecessary act is negligence. In such case, it is easy to differentiate between the two defenses. The assumption of risk does not gradually increase and shade into negligence; the assumption of risk, with its attendant results, continues, but the negligence co-exists by the side of the assump-

³ See, also, *Texas R. Co. v. Harvey*, 228 U. S. 319, 321, 324, 33 Sup. Ct. 518, 57 L. Ed. 852.

⁴ *Sterling Paper Co. v. Hamel* (C. C. A.) 207 Fed. 300, 304; *Yazoo R. Co. v. Wright* (C. C. A.) 207 Fed. 281, 285.

tion; and we can put our finger on one part of the man's conduct and say "this was assumption" and on another part of his simultaneous conduct and say "this was negligence."

In another class of cases, however, the man uses the unsafe tool or he works in the unsafe place, but his own use and his own work are conducted with the utmost care compatible with the inherent danger. In such case he does not perform two separate acts. He does only one inseparable thing, viz., he continues working. It is true that even in this class of cases, his conduct may be denominated negligence, if the danger is so extreme that it was beyond the limits of prudence to assume the risk; but even then, the dividing line would be shifting and uncertain, and would be, as Mr. Justice Holmes said, merely a matter of degree; even then, the assumption would be the continuing foundation gradually growing into negligence.

If we apply to the former class of cases a statute abrogating assumption of risk but not affecting contributory negligence, we have no great difficulty, or none at all; but if we make the same application to a case of the latter class, we often find no definite and certain line of demarcation. The plaintiff's act is one unitary, indivisible act, viz., working in that place. It can be classified as mere assumption or as negligence, only as this jury may say that it was, or that jury may say that it was not, within the limits of reasonable prudence.

It is precisely this distinction between the two classes of cases which was applied by the Supreme Court in the *Schlemmer Case*. Upon the first review, it was thought that the case might be of the second class, and that the trial court had not clearly guarded what would then be plaintiff's rights. Upon the second review, and upon a fuller record, the case seemed to be of the first class, and was ruled accordingly. It was on the first review held to be the duty of the court to "see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name." The second opinion does not detract from the force of the legal principles announced in 205 U. S., and we think these principles clearly rule the present case. Here, plaintiff was pursuing his ordinary work in an ordinary and prudent way. The place became unsafe owing to the fault of his employer. Plaintiff remained and continued his work in the same ordinary, prudent way. His sole fault was that he continued to work instead of deserting his place. The Legislature of Ohio has said that when the plaintiff's fault consists in his keeping at work under dangerous conditions created by his fellow workmen pursuant to the immediate order of the employer, this act on the plaintiff's part shall be no bar to his action. Whether it accurately denominated such conduct as assumption of risk is not important. It was that act, whatever might be its most appropriate name, that ceased to be a defense. We think there is no escape from the conclusion that the defendant, under the Ohio statute and on the facts of this case, was not entitled to an instruction that contributory negligence might be a bar; and it follows that whatever abstract error the court made in his charge on this subject was not prejudicial.

[3] We do not overlook the provision of the statute which says that "all questions of negligence and contributory negligence shall be

for the jury," and the dependent insistence that we cannot reach the result we have announced, unless we are prepared to say that there was no evidence tending to show any negligence by Mehnke. It seems to be understood by the Ohio courts that the provision just quoted does not interfere with the power of the court to deal with a situation where there is no evidence of negligence;⁵ but it is said that only in such a case can the court decide that a right of action is or is not barred, and that to give section 6245 the effect of abrogating a defense otherwise existing under section 6245-1 is to infringe upon the power which the latter section reserves to the jury. The proof that Mehnke's conduct was of a character which could be called negligent is vague and unsatisfactory; still, we are not prepared to say that reasonable minds could not differ about its character; and so we must recognize the pertinency of the argument just recited. However, we think that argument does not give due force to section 6245. That section declares that a servant who is injured by his fellow servant's negligence, under the stated conditions, does not assume the risk of that negligence. It does not say that the injured man does not assume the risk if it is small but does assume the risk if it is great; and yet, this is the meaning which it must have, if the injured man's conduct in remaining at work in the place so made dangerous is to bar his recovery if the danger was above the limit of reasonable prudence (in other words, is contributory negligence) and is not to affect his right of action if the degree of danger was below that practically indefinite limit (in other words, is only risk assumption). We are convinced that only by the construction which we have given to these two sections can the full remedial purpose of section 6245 be preserved. We do not say that there was no evidence of any conduct by Mehnke which, except for this statute, might be thought negligence; we do say that there was no evidence of any negligence of that kind and character which is so distinct from assumption of risk that it could survive the statutory abrogation of the latter. To say there was no evidence of any negligence, except such as consisted in the mere fact of working in his customary way but in a place which had become unsafe, is no more invading the province of the jury than it is to say there was no evidence of negligence of any kind; and to say that such negligence is that very assumption of risk dealt with by section 6245, is to decide a matter of statutory construction—a question of law.

It is possible that the mere fact of working in an unsafe place may be so reckless, so palpably dangerous, that the element of assumption is merged and is no longer the foundation on which negligence rests, and that such an act should be classified as pure negligence and should be unaffected by such a statute as that here involved. We are deciding a case where the record strongly indicates that the act involved was properly classifiable as risk assumption, and such an act is of the class of which section 6245 intends to speak.

The judgment is affirmed, with costs.

⁵ See *Wagon Co. v. Gawronski*, 14 Ohio Cir. Ct. R. (N. S.) 449, 461; *Gutt v. Penn. Co.*, O. Cir. Ct., 8th Cir., May 27, 1912.

JUDGE v. PULLMAN CO. et al.

(Circuit Court of Appeals, Sixth Circuit. November 4, 1913.)

No. 2,364.

1. APPEAL AND ERROR (§ 725*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error that the court erred "in sustaining the demurrers of the respective defendants to the declaration" is sufficiently specific to comply with rule 11 of the Circuit Court of Appeals, where separate demurrers of two defendants were sustained generally by a single order of the court which did not state the grounds therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3002-3005; Dec. Dig. § 725.*]

2. MASTER AND SERVANT (§ 258*)—ACTION FOR INJURY TO SERVANT—SUFFICIENCY OF DECLARATION.

A declaration, in an action against a sleeping car company, alleging that while plaintiff was attending to her duties as an employé in charge of cleaners in a car at a station it was struck by an engine operated by a railroad company, and she was injured, does not state a cause of action; it not appearing that defendant had any knowledge of the movements of the engine, and the place being normally a safe one in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

3. RAILROADS (§ 282*)—ACTION FOR INJURY TO LICENSEE—SUFFICIENCY OF DECLARATION.

A declaration, in an action against a railroad company, alleging that defendant "carelessly, negligently, and recklessly" ran one of its switch engines against a train of cars standing at a station, in one of which plaintiff was employed, with great force and violence, throwing plaintiff down and causing her injury, and that defendant "knew that plaintiff was employed by the Pullman Company and likely to be working in and about" its cars, *held* to sufficiently state a cause of action.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910-923; Dec. Dig. § 282.*]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by Mrs. P. E. Judge against the Pullman Company and the Illinois Central Railroad Company. From an order sustaining demurrers by each defendant, plaintiff brings error. Affirmed as to the Pullman Company and reversed as to the railroad company.

Dan F. Elliotte and Bell, Terry & Bell, all of Memphis, Tenn., for plaintiff in error.

Jackson & McRee, of Memphis, Tenn., for defendant Pullman Company.

Albert W. Biggs and T. A. Evans, both of Memphis, Tenn. (Chas. N. Burch, of Memphis, Tenn., of counsel), for defendant Illinois Cent. Railroad Company.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Mrs. Judge was employed by the Pullman Company as a superintendent of car cleaners, at the Illinois Cen-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tral Station, in Memphis. As she was entering a Pullman car, one of a string of cars standing upon a track, they were struck by an Illinois Central engine backing into them, and she was thrown down and hurt. She brought an action against both companies. Each separately demurred, upon specific grounds and general grounds. The court, by one order, reciting that the case came on to be heard "on the demurrer of the defendants," ordered "that said demurrer be, and the same is hereby, sustained." The simultaneously filed memorandum does not allege the reasons for the result, excepting that the district judge does not think that the declaration states a cause of action against either of the defendants. Mrs. Judge prosecutes this writ of error, and her sole assignment of error is that the court erred "in sustaining the demurrer of the respective defendants herein to the declaration, and in dismissing her suit."

[1] 1. It is first urged that this assignment of error is insufficient under rule 11, and we are cited to cases more or less analogous. Under the situation existing here, however, it is difficult to see how the plaintiff in error could have been more specific, excepting by directing a separate assignment to the sustaining of the demurrer of the Pullman Company and a separate assignment to the sustaining of the demurrer of the railroad company; and that is the effect of the words here used. The demurrer was sustained. Neither from the order nor from the opinion could plaintiff in error learn the ground of action. She cannot say it was error to sustain (e. g.) the second or the fourth point in the demurrer of the Pullman Company, because the record does not show that this had been done. If the demurrer was good upon any one of the grounds specified therein, the action of the court was right. Such an assignment of error as this is necessarily an assertion that each of the grounds of demurrer is insufficient, and we think it satisfies the rule. Obviously, the situation is different from that where a demurrer has been overruled (as in *Anniston v. Trust Co.* [C. C. A. 6] 85 Fed. 856, 29 C. C. A. 457), or exceptions (as in *Locomotive v. Trust Co.* [C. C. A. 6] 108 Fed. 5, 47 C. C. A. 147). In such a case the demurrant or exceptant knows that each of his points has been overruled, and he knows which ones he wishes to rely upon in the appellate court. He has opportunity to specify. Not so with the plaintiff, where a general demurrer has been sustained. So, it differs from cases where a sustained demurrer goes to several different causes of action (as in *Railway Co. v. Burnham* [C. C. A. 7] 102 Fed. 669, 42 C. C. A. 584), or several distinct defenses (as in *Supreme Council v. Fidelity Co.* [C. C. A. 6] 63 Fed. 48, 11 C. C. A. 96).

[2] 2. We agree with the district judge that the declaration states no case against the Pullman Company. That company had nothing to do with the transportation or moving of the cars or the operation of the engine. See *Calhoun v. Pullman Co.* (C. C. A. 6) 159 Fed. 387, 389, 86 C. C. A. 387, 16 L. R. A. (N. S.) 575. No negligence is alleged against it, except that it did not give plaintiff a safe place to work, in that it did not warn her of the coming crash. There can be no actionable negligence, without breach of a duty. The Pullman Company had no duty to warn plaintiff of danger in a normally safe place, unless it knew, or

should have known, that there was danger. There is no allegation of such knowledge, or of any facts which charged it with such knowledge, or with any duty to know the danger. It does not appear that the Pullman Company had any representative in the vicinity other than Mrs. Judge herself. Under such circumstances, it seems to us clear that no liability is stated.

[3] 3. The question as to the railroad company is different. Its alleged negligence caused the injury, and the substantial criticisms made by the railroad upon the declaration are only two. The negligence is not sufficiently alleged, it is claimed, because the declaration says that the railroad company "negligently" ran the engine into the cars, and defendant insists this is a mere statement of a conclusion; while good pleading requires a statement of the facts which constituted negligence. Conceding this, we find that the declaration says that the railroad company "carelessly, negligently and recklessly ran one of its switch engines back, upon and against the train to which said sleeping car was attached, with great force and violence, throwing [plaintiff] to the ground" and that it "negligently ran one of its engines upon and against the said car with too much violence." The only negligence which could ever be predicated upon this general situation would be the careless and reckless pushing of the engine with great force and violence and with too much violence against the cars. The essence of the wrong is the using of more force than was proper, thus making a collision instead of a coupling. We think this allegation, taken all together, was a fair statement of the facts constituting the negligence, and that the declaration was sufficient in that respect.

4. It is next said that the railroad company owed no duty to plaintiff not to couple its cars with unnecessary violence, unless it knew or should have known that she was in a place where unusual danger to her would result, and that the declaration alleges no such knowledge. This criticism, also, would be well founded, if justified by the language of the declaration; but it further says, after reciting the circumstances of the injury, that the railroad company "knew that the plaintiff was employed by the Pullman Company, and likely to be working in and about the cars of the Pullman Company." This allegation is thoroughly inartificial. It does not specially refer to this car at this particular time, and yet, in connection with the whole declaration, it cannot mean anything else. It does not say that the railroad company was familiar with the customs of the Pullman Company and its employes, and that in the exercise of due care and caution it would have known that Mrs. Judge was entering or was on this car; but this must be what it means in alleging that the railroad company did know she was "likely" to be there. We do not think it was so totally insufficient in stating the existence of a duty as to justify sustaining the demurrer. We can get little help from the decided cases on this line. Several are brought to our attention where declarations have been held bad for, perhaps, no greater weakness than was here present; but, after all, the essential thing is that sufficient facts shall be stated so that the existence of the duty and the breach may fairly be inferred, and so that the defendant may know what it has to meet. See cases cited in Cyc.

vol. 29, pp. 565, B, 570, II; Whitten v. Nevada Co. (C. C.) 132 Fed. 782. Judged by this standard, we think this declaration is sufficient.

The judgment below will be affirmed as to the Pullman Company and reversed as to the railroad company. Plaintiff in error will recover her costs against the railroad company, and the Pullman Company its costs against the plaintiff.

NORCROSS v. UNITED STATES (two cases). †

WESTERN FUEL CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. November 20, 1913.)

Nos. 2,329; 2,328; 2,327.

GRAND JURY (§ 36*)—WITNESSES (§ 16*)—SUBPOENA DUCES TECUM.

A subpoena duces tecum to the secretary of a corporation, requiring him to produce before a grand jury the books and records of the company relating to certain matters stated, is not invalid because it contains no ad testificandum clause nor because there is no pending charge before the grand jury against the corporation or any of its officers or stockholders.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 75-78; Dec. Dig. § 36;* Witnesses, Cent. Dig. §§ 19-27; Dec. Dig. § 16.*]

In Error to and on Appeal from the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

Writs of error by David C. Norcross and the Western Fuel Company to review a judgment adjudging said Norcross guilty of contempt, for disobedience of a subpoena duces tecum requiring him to produce books of the fuel company before the grand jury. Affirmed.

The following is the statement of facts and opinion of Dooling, District Judge, in the trial court:

A subpoena duces tecum having been issued by the clerk of the court directed to D. C. Norcross, secretary of the Western Fuel Company, a corporation, and to the company itself, requiring the production before the grand jury of practically all of the books and records of the company which would show the amount of coal imported by it, and the amount sold by it and to whom, the said Norcross, for himself and for said company appeared before the grand jury, and refused to produce the books and documents called for, basing his refusal upon the following grounds:

1. That said subpoena had been issued irregularly and without authority, in that no order of court was ever made directing it to issue.
2. That no proceeding or charge was pending before said grand jury.
3. That said subpoena did not state that there was any charge, matter, or proceeding pending before said grand jury.
4. That certain officers of the said company were under indictment, the date set for their trial was almost at hand, and they needed the books and documents in the preparation of their defense.
5. That the books and documents were not desired by the grand jury in any investigation, which it was then pursuing, but were desired by the assistants to the Attorney General for the purpose of securing evidence against the indicted officials in support of the indictments already found.
6. That the subpoena was of such a sweeping character as to amount to an unreasonable search and seizure.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 10, 1914.

The fact of such refusal having been presented to the court, by the grand jury, and a citation having issued directed to said Norcross and said company to show cause why they should not be punished for contempt, the foregoing reasons were by them urged in court in response to such citation, and the matter submitted.

The court thereafter rendered the following decision upon the questions involved:

In this matter my conclusions, briefly stated, are as follows:

1. No order of court is required, either by statute or by the practice in this district as a prerequisite to the valid issuance by the clerk of a subpoena duces tecum to compel the attendance of a witness before the grand jury.

2. No formal or other charge need be pending before the grand jury to warrant the examination of witnesses by such grand jury. But the grand jury has the power and it is its duty to conduct investigations, either upon its own motion, or upon the initiative of the United States attorney, to ascertain whether a crime cognizable by the court has been committed.

3. This power should not be used for the purpose of securing evidence against defendants under indictment in support of the indictments already found.

4. If the grand jury so desire, it may decline to proceed unless informed by the United States attorney of the purpose for which a witness has been called; but, if the jury be content to let the attorney develop the matter from the witnesses as they are called without being previously advised as to the purpose in view or the matter to be investigated, the witness is in no way injured thereby and may not refuse to answer because of such fact.

5. A witness before the grand jury may properly decline to answer any question, the answer to which would have a tendency to convict him of a felony; but it would seriously affect the efficiency of the jury, and cripple its power of investigating offenses, to hold that each witness may decline to answer until informed of the purpose of the investigation and the name of the individual against whom information is sought.

6. In the present case the presentments state that respondent D. C. Norcross, as secretary of the Western Fuel Company, a corporation, was duly sworn by the foreman of the grand jury to testify as a witness in an investigation then being pursued by said grand jury concerning certain frauds alleged to have been perpetrated and committed by said Western Fuel Company against the United States. And the assistant to the Attorney General in open court made the following statements: "But I will state in good faith to counsel that there are other parties involved in these frauds who have not yet been indicted. And I will state that it is the intention of the government to ascertain to what extent these other parties have been involved, and if their action is criminal then the government will take such course as it deems proper in the premises." This statement of counsel, while not under oath, may, it seems to me, be considered by the court in passing upon the good faith of the assistants to the Attorney General and of the grand jury in calling the witness Norcross and in demanding the documents called for by the subpoena. And while the court would not come to the assistance of the grand jury if it appeared that its purpose was only to secure evidence against defendants already indicted, it should assist the grand jury in every way to discover other offenders.

7. Therefore the only serious question which presents itself is as to whether the subpoena which respondents have refused to obey is too sweeping in its demands. It is quite true that its requirements are very broad, but it seems to me that the power of the grand jury must be commensurate with the requirements of the matter under investigation. And I am not prepared to say that the documents desired are not essential for the purpose for which they are sought; that is, an investigation as to the complicity of others in frauds alleged to have been committed against the United States. That the documents are numerous, and their production would be inconvenient, cannot be urged as a reason for refusing to produce them, if they be essential to the investigation proposed, and are sought in good faith.

8. My conclusion is that under the principles laid down in *Hale v. Henkel*,

201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, *Wilson v. U. S.*, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558, and later cases following them, the respondents should be required by the court to produce before the grand jury the documents as commanded by the subpoena duces tecum, and that a failure to do so should be punished as a contempt of the court.

Such will be the order.

Samuel Knight and Stanley Moore, both of San Francisco, Cal., for appellant and plaintiff in error.

Matthew I. Sullivan and Theodore J. Roche, Sp. Asst. U. S. Attys., both of San Francisco, Cal.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. These cases were argued and submitted together. All of them depend upon the same facts, concerning which there is no substantial dispute; indeed, most of the facts are expressly agreed to. Norcross was at the times mentioned in the record, and still is, secretary of the Western Fuel Company, a corporation, and as such was and is in possession of all of the records, books, and papers of that company which were not destroyed by the great fire in San Francisco of April 18, 1906.

The record shows that at the November, 1912, term of the court below, two indictments were presented and filed against certain named individuals charging them with having entered into a certain conspiracy with divers other persons whose names were unknown to the grand jurors, "under the guise and name" of the said Western Fuel Company, to defraud the United States out of a large part of the import duties on coal imported and brought into this country by the fuel company directly and through other persons, firms, and corporations, by making and causing to be made false weights and false and fraudulent returns of weights of such importations, and in various other ways specifically set out in the indictments, the first of which charged the conspiracy to have been formed on the 1st day of January, 1904, the second charged it to have been formed on the 1st day of April, 1906, and a third and last indictment against the same defendants charged, in a somewhat altered form, the same conspiracy, alleging it to have been formed on the 1st day of April, 1906.

It appears from the record that the trial of the defendants on one of the indictments was first set for August 26, 1913, which time of trial was subsequently several times postponed, and that on the 14th day of August, 1913, the government's attorney procured to be issued out of the trial court a subpoena duces tecum in the words and figures following:

"The President of the United States of America, to D. C. Norcross, as Secretary of the Western Fuel Company, a Corporation, Greeting:

"We command you, that all business and excuses being laid aside, you appear before the grand jury of the United States of America, within and for the Northern district of California, at a district court to be held in the United States courthouse, in the Post Office Building, in the city and county of San Francisco, on the 14th day of August, 1913, at 2 o'clock in the afternoon, and that you produce before the said grand jury at the time and place aforesaid the following:

"All books, papers, records and vouchers of the Western Fuel Company, a corporation, in your possession or under your control, showing the amount and weight of coal in the bunker of the Western Fuel Company situate on Folsom Street Dock in the city and county of San Francisco on the 1st day of January, 1904, including the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker, and also showing the amount and weight of coal on the 1st day of January, 1904, in the coalyard of said Western Fuel Company connected with said bunker by a tramway and situate on East street, in said city and county of San Francisco; and also showing the amount and weight of all coal in all other bunkers and places containing, or which contained coal of the Western Fuel Company on the 1st day of January, 1904, in the state of California.

"Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker and delivered from said yard, between the 1st day of January, 1904, and the date hereof.

"Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the amount and weight of coal on this date in said bunker of said Western Fuel Company, including said off-shore and said in-shore bunker, and in said yard.

"Also all books, papers, records and vouchers of the Western Fuel Company, a corporation, in your possession or under your control showing the amount and weight of coal in the bunker of the Western Fuel Company, situate on said Folsom Street Dock, on the 1st day of May, 1906, including the amount of coal in the off-shore bunker and the amount of coal in the in-shore bunker; and also showing the amount and weight of coal on the 1st day of May, 1906, in said coalyard of said Western Fuel Company, and also showing the amount and weight of all coal in all other bunkers and places in the state of California containing or which contained coal of the Western Fuel Company on the 1st day of May, 1906.

"Also all books, papers, records and vouchers of said Western Fuel Company, in your possession or under your control, showing the total amount and weight of coal delivered from said bunker, including the off-shore bunker and the in-shore bunker, and delivered from said yard, between the 1st day of May, 1906, and the date hereof; also showing all coal delivered from any and all other bunkers and places containing, or which contained coal of the Western Fuel Company between the 1st day of January, 1904, and the date hereof, and also between the 1st day of May, 1906, and the date hereof.

"Also all books, papers, records and documents of said Western Fuel Company, a corporation, in your possession or under your control showing the weight of each load of coal taken from said in-shore and said off-shore bunker and out of said yard, and out of all other bunkers and places containing, or which contained coal of said Western Fuel Company, between the 1st day of January, 1904, and the date hereof; also showing the name of the person or persons to whom each of said loads of coal was sold or delivered, the date or dates upon which each of said loads of coal was so sold or delivered, and the amount charged to the person or persons to whom each of said loads of coal was so sold or delivered, and the amount paid for each of said loads of coal so sold or delivered.

"Also all weekly, monthly, and yearly financial and other reports made to the directors of the Western Fuel Company, showing the financial condition of the affairs of said company; also the minute books of said company containing the minutes of the meetings of the Directors and the minutes of the meetings of the stockholders of said company between the 1st day of January, 1904, and the date hereof.

"Also all stock ledgers, stock journals and stock certificate books showing the names of the various holders of shares of the capital stock of said Western Fuel Company on the 1st day of January, 1904, and at all times between January 1, 1904, and the date hereof.

"Also all ledgers, cashbooks and papers showing the expenses incurred and paid out by said Western Fuel Company between the 1st day of January, 1904, and the date hereof, and to whom said payments were made.

"Witness the Honorable Wm. C. Van Fleet, Judge of said District Court for the Northern District of California, this 14th day of August, in the year of our Lord one thousand nine hundred and thirteen.

"[Seal.]

W. B. Maling, Clerk,

"By Lyle S. Morris, Deputy Clerk."

It will be observed that the subpoena did not contain the usual ad testificandum clause.

The record shows that pursuant to the subpoena Norcross appeared before the grand jury at the time specified therein, and then and there read the following paper:

"I have been instructed by counsel that I am not obliged under this subpoena to testify before the grand jury or to produce the books and papers of the Western Fuel Company accordingly, and without any disrespect to the grand jury, I must decline to testify further or to produce the books and papers until the court has passed upon the matter."

Such refusal having been duly reported to the court by the grand jury, Norcross was cited to show cause why he should not be adjudged guilty of contempt of court, and in response to that citation appeared with counsel, and, the matter having been duly heard upon evidence, the court entered an order directing him, as secretary of the corporation mentioned, to produce before the said grand jury at a designated time and place the books, papers, records, vouchers, and documents described and referred to in the subpoena and so in his possession and under his control, and, the said Norcross having failed and refused to comply with the said last-mentioned order, the matter was again brought before the court, and, having been heard upon a practical agreement in respect to the facts, the court adjudged him guilty and sentenced him to imprisonment until he should conform to the requirements of the subpoena, from which judgment the present appeal comes; and upon stipulation of the respective parties the writs of error are made to depend upon the disposition of the appeal.

The record shows, among other things, that at the last hearing mentioned it was agreed between counsel that at the time Norcross was by the subpoena required to appear there were no proceedings pending before the grand jury against any of the defendants to the indictments looking to their further indictment, nor was there any statement made by the government's attorney to the grand jury to the effect that:

"The government desired the grand jury to take up or consider an investigation having in view the presentation of further indictments as against these defendants or any other individuals connected with the Western Fuel Company."

Upon careful consideration, we are of the opinion that the case is ruled by the decisions of the Supreme Court in the cases of *Wilson v. United States*, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558; *Warren B. Wheeler v. United States* (No. 658); *Stillman Shaw v. United States* (No. 659); *Warren B. Wheeler v. Guy Murchie*, U. S. Marshal, etc. (No. 660); *Stillman Shaw v. Guy Murchie*, U. S. Marshal, etc. (No. 661) 226 U. S. 478, 33 Sup. Ct. 158, 57 L. Ed. 309, decided January 6, 1913; and *Walter B. Grant and E. E.*

Burlingame v. United States (No. 831) 227 U. S. 74, 33 Sup. Ct. 190, 57 L. Ed. 423, decided January 20, 1913—upon the authority of which cases the judgment is affirmed.

NEW ENGLAND NEWSPAPER PUB. CO. v. McNEIGHT.

(Circuit Court of Appeals, First Circuit. November 14, 1913.)

No. 1,040.

1. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Evidence considered, in an action to recover for an injury to an employé working at a folding machine in a pressroom, and *held* insufficient to warrant the court in submitting to the jury, over defendant's objection, the question whether the light by which plaintiff was working was adequate.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 270*)—ACTION FOR INJURY TO SERVANT—EVIDENCE.

Where plaintiff's hand was injured by being caught between rolls in a newspaper folding machine from which he was taking away papers, which machine was defective, and had been for a long time, to defendant's knowledge, in that the rolls did not operate properly and failed to deliver some of the papers making it necessary for plaintiff to remove them with his hands, evidence was admissible in his behalf tending to show that a guard placed before the rolls would have lessened the danger, although there was no evidence that such guards were commonly used on machines not defective.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Action at law by Frederick McNeight against the New England Newspaper Publishing Company. Judgment for plaintiff, and defendant brings error. Reversed.

Francis P. Garland, of Boston, Mass., (J. T. Auerbach and H. S. MacPherson, both of Boston, Mass., on the brief), for plaintiff in error.

John L. Hall, of Boston, Mass. (Stuart C. Rand, of Boston, Mass., on the brief), for defendant in error.

Before PUTNAM, DODGE,* and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. This is an action brought by Frederick McNeight against the New England Newspaper Publishing Company to recover damages for an injury which he sustained by reason of his right hand being drawn between the rolls of a folding machine on a printing press, while in the employment of the defendant. The declaration contains five counts. The fourth and fifth counts were waived by the plaintiff, and the case was submitted to the jury on the remainder. The first count contains a general allegation of negli-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gence. The second alleges that the negligence consisted in setting the plaintiff at work on a dangerous machine without warning him of its dangers. The third that it consisted in setting him at work on a defective machine. The jury returned a verdict for the plaintiff, and the case is here upon writ of error.

At the time this action arose, Laws of Massachusetts 1911, c. 751, at page 998, provided that, in an action for personal injuries sustained by an employé in the course of his employment, it should not be a defense (1) that the employé was negligent; (2) that the injury was caused by the negligence of a fellow employé; and (3) that the employé had assumed the risk of injury.

The questions presented arise on the defendant's exceptions to the refusal of the court to give a requested instruction to the jury and to the admission of certain testimony.

[1] On the question whether the light provided at the place where the plaintiff was required to work was adequate, the defendant requested the court to charge the jury that they would not be justified, upon the evidence, in finding that the light was inadequate. This the court declined to do, but charged the jury as follows:

"Again, take the question of light. The master is bound to have the premises sufficiently lighted for the help employed there to do their work. Were these premises so lighted? Taking the business that was going on, taking the situation in which McNeight was set to work, was he set to work in a place improperly and insufficiently lighted; that is, that a reasonable man would have said was insufficiently and improperly lighted?"

It is thus seen that one of the grounds of negligence upon which the plaintiff was allowed to go to the jury was whether the light was inadequate. There was a general verdict for the plaintiff. From this it follows that the jury may have found that the light was inadequate, and that it was the sole cause, or one of the contributing causes, of the accident. The question, therefore, raised by the defendant's exception is whether there was evidence from which reasonable men might fairly conclude that the defendant did not exercise the care of the average man in providing light at the place where he set the plaintiff at work, and that this was the sole cause, or a contributing cause, of his injury.

The plaintiff was injured while doing the work of a pressman at one of the folders of a large three-decker Hoe newspaper printing press. The folder consisted of a large roll, designated on the sketch as the female roll *B*, which was about 14½ inches in diameter; the cutting-roll *C*, about 7 inches in diameter, and situated at the right of and close to roll *B*; and two nipping-rolls *G* and *G'* each about 3½ inches in diameter and about 3 feet long, situated directly below roll *B*. The nipping-rolls were about one-sixteenth of an inch apart, they revolved inwardly, and were located about one-fourth of an inch below roll *B*. One of these rolls was a fixed roll; the other was movable. It rode in a box held in position by springs, and had a play of three-eighths to one-half an inch. Inside of roll *B* are two folding-blades *D* and *D'*, located diametrically opposite to each other, and at points equidistant from *E* and *E'*. The paper comes down from overhead in

a triangular chute, which folds it so that as it comes between rolls *B* and *C* it is parallel with the main axis. When the end of the paper is at point *E* on roll *B*, opposite roll *C*, a pin in roll *B* attaches itself to the paper, and carries it under roll *B* and between it and rolls *G* and *G'* to *E'*; then a knife in roll *C* cuts off the paper at *E*, and the paper is released from the pin at *E'*. Simultaneously with this the folding-blade *D* thrusts the sheet between the nipping-rolls *G* and *G'*, which fold and feed the paper into the fly *H*, from which it is dropped upon the carrier tape *J*. The distance from the floor to the top of roll *B* is about 4 feet 5¾ inches, and from the floor to the top of rolls *G* and *G'* about 3 feet 3 inches, and from the floor to the point *E* about 3 feet 10½ inches.

It appeared that the nipping-rolls when on slow speed would not perform their function, and every third or fourth paper would not catch between the rolls and pass down as it should. On this account it was necessary to remove the paper, so as not to clog the nipping-rolls, and to allow the machine to operate. This failure was due to a faulty construction or adjustment of the machine. The plaintiff was set at work on the right side of the machine, as indicated in the sketch, and faced into the machine. His work required him to stand in a stooping posture, "steadily and continuously reaching down at arm's length to the tape to pick up the papers" and pack them together on a table, from which another operator took them away. When the papers did not come through the nipping-rolls he had to reach in above the rolls and remove them, so they would not clog the machine. When the machine was at high speed the papers came out at the rate of 20,000 an hour, and at slow speed at the rate of 500 per hour. The plaintiff picked up 50 papers at a time, and was required to work quite rapidly. There was a foot board 2½ to 3 feet wide immediately over his head where he worked. The press was about 20 feet high. He testified that as he stood bending down "he did not have a full view of the nipping-rolls, but saw only the lowest part of the one nearest him; that as he stood * * * he could not see the space between the two nipping-rolls;" that he had never been warned or instructed as to the danger of getting his hands too close to the nipping-rolls, and did not realize that there was any likelihood of the papers coming down and pulling his hand in. He had, however, had 10 years' experience as a pressman, and at various times for a period of nearly two months, prior to the accident, had worked on the press in question.

On the morning of the accident the press started up on the slow speed; the plaintiff took his place on the packer; and the nipping-rolls failed to draw all the papers through. When this occurred he reached in and pulled the papers out, as he had been instructed to do. After working about ten or fifteen minutes, a paper which failed to pass through the rolls turned in at the corner, and, as he tried to pull it out, another paper came down and pulled it with his right hand into the nipping-rolls. While in the act of reaching for the paper his foot slipped on the oily floor, he was thrown forward, and his hand was taken with the paper into the nipping-rolls.

On the question of light the plaintiff testified that there was an arc light on the opposite side of the press from where he worked, and that the footboard over his head was between him and this light; that he did not see three arc lights on his side of the machine, but would not say they were not there. In answer to a question as to whether he made any claim as to the light, he said, "The light would go," but "could be improved on"; that there were three lights on his side of the machine; that he did not say there were "three arc lights"; and, although he testified that he did not notice the situation of the light, he later acknowledged there was one inside of the machine, right near these very rolls where he worked; then, still later, he said he "could not state; he would not be sure a light was there;" "there may be a place for one, but * * * [he] would not say it was there;" "that it was the fault of the paper and his foot slipping together that pulled his hand in;" that the press "was running on low speed" when he was injured.

In behalf of the defendant, a witness testified that there was an arc light within six feet of the plaintiff's head, directly above where he was working, and a light inside of the frame of the press, both of which were lighted the morning of the accident. Another witness testified that on the plaintiff's side of the machine there were three big arc lights and several incandescent lights on the frame of the press, 5 or 6 feet up from the floor, and one over the folder. Several of the witnesses said they considered the pressroom well lighted; that there was sufficient to read a paper by; and that there was plenty of light to enable one to do the work.

It would seem from the testimony that the plaintiff at the trial placed little, if any, reliance upon the question of the sufficiency of the light, and that on the whole he regarded it as sufficient. In fact, from his testimony it appears that the light had nothing to do with his accident. His complaint that he did not have a full view of the nipping-rolls was not for want of light but because of the stooping position which he had to take in the performance of his work. It is apparent that, bending down, as he says he was "steadily and continuously" required to do in picking up the papers, it was impossible for him to see where the nipping-rolls came together when the paper was forced into them by the folding-blade, and that all he could see was the lowest part of the roll nearest him, and not the space between the two nipping-rolls. Further than this, he does not attribute his accident to the want of light but to the fact that when he reached up to remove a paper from the nipping-rolls another paper was thrust down by the folding-blade, and that, between this and losing his balance by slipping upon the floor, his hand was thrust and drawn into the nipping-rolls.

It does not seem to us that on the record in this case reasonable men could fairly conclude that the light was inadequate, or that the want of it was the cause, or a contributing cause, of his injury.

[2] As the case must go back for another trial, it becomes necessary to consider the questions raised by the exceptions to evidence. On the question of the defendant's negligence the plaintiff was allowed to introduce evidence tending to show that if a guard had been placed

in the vicinity of the nipping-rolls, where the plaintiff was required to remove papers when they failed to pass through the folder, it would have lessened the danger of his getting his hand into the rolls, and that it was practicable to do this and operate the folder in the way the defendant was doing. The defendant excepted to this evidence, supposedly for the reason it did not disclose that a guard was in common use at this place on such machines. Conceding that it could not be found that guards were generally used near the nipping-rolls on Hoe machines, it does not follow in this case where the defendant's machine, though procured from a reputable maker, was out of order and failed to perform its function, and this condition had existed to the defendant's knowledge for a long time, that such evidence would not be admissible to show the defendant's want of care. Men in general do not employ defective machines in the conduct of their business and subject their employes to additional dangers which they would not be required to encounter if the machines were in such condition as to properly perform their work. It was therefore the defendant's duty to remedy the defect so that the machine would perform its function, and thus obviate the necessity of the plaintiff's encountering this added peril, or, if he chose not to so, to provide such reasonable protection in the way of safeguards as was necessary for the plaintiff's safety. *English v. Amidon*, 72 N. H. 301, 303, 56 Atl. 548. The evidence under consideration tended to elucidate the subject and, under the circumstance presented by this case was competent.

In the course of the trial the plaintiff testified that the day before the accident he saw oil on the floor beside the folder, and that he "considered it a dangerous place for oil." On cross-examination he was asked if he notified anybody about it at that time, and replied that he did not. The apparent purpose of this inquiry was to enable the defendant to argue that the reason the plaintiff did not notify the defendant was because there was no oil there. On redirect examination he was asked why he did not complain about the oil, and was allowed to answer, subject to defendant's exception, that he wanted to hold his job. Whether he refrained from notifying the defendant for the reason that he did not care to take the chance of losing his employment rather than because there was no oil on the floor was legitimate matter of inquiry, in view of the fact that the defendant had opened up the subject.

The judgment of the District Court is reversed, the verdict is set aside, and the case is remanded to that court for further proceedings in accordance with this opinion; and the plaintiff in error recovers its costs of appeal.

STROUGH v. CENTRAL R. CO. OF NEW JERSEY.

(Circuit Court of Appeals, Third Circuit. December 2, 1913.)

No. 1,667.

1. NEGLIGENCE (§ 32*)—"WANTON"—"WILLFUL."

The words "wanton" and "willful," as applied to negligence toward a licensee, do not necessarily imply any purposeful design of defendant to injure plaintiff, or in fact to injure any one, but are applicable to every species of willful conduct which is reckless of the dangers that may ensue therefrom.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*

For other definitions, see Words and Phrases, vol. 8, pp. 7384, 7385, 7468-7481, 7835, 7836.]

2. RAILROADS (§§ 275, 282*)—ACCIDENTS TO TRAINS—LICENSEES—WANTON AND WILLFUL NEGLIGENCE.

Defendant's main track from B. to the New Jersey terminal was also used by the trains of the R. Company governed by defendant's rules, one of which provided that when a train was backed against the current of traffic the engineer should blow his whistle three times and await a reply before starting, and that a flagman should take a position on the front of the leading car and signal the engineman in case of need. One of defendant's trains having stopped on the main track to remove some cars, a freight train of the R. Company, of which decedent was brakeman, approached from the rear and stopped 150 feet from defendant's train. Decedent and certain of his coemployes on the R. train went forward in accordance with a custom and boarded the caboose of defendant's train for drinking water, and while there defendant's engineer returned his engine against the standing cars with such force that the train was forced back against the R. Company's engine, the caboose wrecked, and decedent caught and killed before he could escape. It also appeared that the air brakes were not working and that no whistle was blown before defendant's train was forced back, nor was any brakeman stationed on the caboose to signal the engineer as required by the rule. *Held*, that decedent was not a trespasser, but a licensee, and that the facts were sufficient to create an inference of wanton and willful negligence on the part of defendant's engineer for which it would be liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 873-877, 910-923; Dec. Dig. §§ 275, 282.*]

In Error to the District Court of the United States for the District of New Jersey; Joseph Cross, District Judge.

Action by Sarah Ann Strough, as administratrix of the estate of Edwin William Strough, deceased, against the Central Railroad Company of New Jersey. Judgment for defendant, and plaintiff brings error. Reversed.

Wilson & Carr, John O. Wilson, and Harvey F. Carr, all of Camden, N. J., for plaintiff in error.

George Holmes, William D. Edwards, and Charles E. Miller, all of Jersey City, N. J., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. Action was brought in the court below by the plaintiff, as administratrix of her deceased husband, Edwin William

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Strough, to recover damages for his death alleged to have been caused by the negligence of the defendant company. It was tried before a jury in the court below, and at the close of plaintiff's case, defendant's counsel moved for a non-suit, which was granted. The plaintiff excepted to this rule, and sued out a writ of error. The only question before the court is as to the correctness of the rule granting the non-suit.

At the time of the happening of the accident for which this suit was brought, and for a number of years prior thereto, the Reading Railway Company had, under an agreement with the defendant company, operated its trains over the tracks of the latter, the Central Railroad Company of New Jersey, from Bound Brook, in New Jersey, to Jersey City. This use was conjoint with that of the defendant company itself, and was governed by the rules of that company, although the trains of the Reading Company were moved under the control and management of its own servants.

Strough, plaintiff's intestate, was a brakeman in the employ of the Reading Railway Company. On September 29, 1910, the day of the accident, he was employed on an extra freight train running from Bridgeport, Pennsylvania, to Jersey City, New Jersey. When the Reading Company's train reached Elizabethport, New Jersey, at about three o'clock in the morning, on the tracks of the Central Company, it was brought to a stop about 150 feet from the rear of a Central Company freight train standing ahead of it on the same track. There was no definite testimony as to the number of cars in the Central Company train, but it was estimated that there were 40 or 45.

After the Reading Company train had come to a stop, three employes of that train, to wit, the conductor, fireman and decedent, went forward and entered the caboose in the rear of the Central Company train. It was testified that they entered the caboose—or at least some of them did—for the purpose of getting a drink of water, which they were not able to easily procure on their own train. It was shown that such a visit, far from being an unusual occurrence, was a common practice indulged in as a mutual convenience by the train crews of both companies. The flagman of the Central Company's train was in the caboose with these men. While these four men were in the caboose, the engineer of the Central Company's train was engaged in moving out cars from the middle thereof. When he had finished, he backed his engine and such cars as were still coupled to it, to recouple to the cars that had remained stationary. This he did with such force that his train was driven over the interval of 150 feet which separated it from the train of the Reading Company, and the caboose, in which were the four men above mentioned, was driven up against the Reading engine so violently that two men, one of them the decedent, were caught and held fast in the wreckage. So securely was the caboose wedged upon the engine, that a shifting engine was required to remove it and release the men. When this was finally done, the plaintiff's husband was found to be dead.

The plaintiff offered in evidence certain rules of the Central Railroad Company, prescribing precautions to be taken by its employes when a train was backed against the current of traffic. These rules

required, among other things, that the engineer blow his whistle three times and await a reply before starting, and that "a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need." The rules also require that air brakes be coupled and in operation. It is true, that the existence of the rules above referred to tends to show such care and foresight on the part of the defendant company, in the operation of its trains, and, as far as they go, such performance of its duty in that regard, as would absolve it from a moral or personal responsibility for the accident. The negligence charged is not as to a default of the defendant in this respect. The defendant company is responsible, not only for the existence and enforcement of proper rules regulating the operation of its trains, but also in certain cases for the defaults of its servants in relation thereto, so that the personal equation, in the practical operation of the great transportation business of such a carrier company, enters into the question of responsibility, and the unforeseen or unexpected default or negligence of a servant, who has been selected with due care, may impose upon that company a liability which its management could not have avoided. No question of the negligence of a fellow servant is here involved. The negligence of the engineer is imputable to the defendant, which was his employer, and the question to be determined here is, whether such negligence, if proved, was of such a character as would be a violation of any duty owed by the defendant to the plaintiff.

Upon the trial, there was evidence tending to show that no whistle warnings were sounded at all, and that no brakeman was posted upon the platform of the foremost car (which in this instance was the caboose) of the backing portion of the train. It was also shown that when the men in the caboose found themselves moving toward the Reading engine, they endeavored to apply the air brakes, but found them out of working order. Upon this state of the case, the defendant moved for a non-suit, and the court allowed it, on the ground that there was no evidence of any duty of care on the part of the defendant toward the plaintiff, assuming all the evidence offered by plaintiff to be true, nor of any actionable negligence on its part.

Among the general propositions stated by the defendant in error is the following:

"Except at stations and yards and at highway crossings, a railroad company is entitled to the exclusive use of its track and property; all persons who go thereon are trespassers, and no recovery can be had for an injury to such class of wrongdoers, unless there is a wanton injury, after discovery of the presence of a trespasser."

This proposition, however, is beside the question with which we are here concerned. The plaintiff was not a trespasser, in any view that can be taken of the facts disclosed in the record. A higher degree of care and a stricter duty was owing from the defendant to the plaintiff under the circumstances, than was owing to a mere trespasser. Whether the general rule, as above stated, be qualified, or not, as to a trespasser, it must be so qualified as to one not a trespasser, that if the defendant is guilty of such willful and wanton negligence as evidences a reckless disregard of the dangers naturally

ensuing therefrom, it is liable for the injury thus caused to such person, although his presence had not been discovered. It is important, therefore, to consider the relation existing between the train employes of the Reading Company and the defendant company and its employes, while the two companies were using in common the tracks of the latter.

For a distance of some twenty miles between Bound Brook and Jersey City, the two companies conjointly operated their trains on the tracks of the Central Company. It is obvious that this conjoint operation could not have been efficiently or even safely carried on without constant and intimate friendly intercourse between the servants of the two companies, and especially between the crews of their freight and passenger trains. We may take judicial notice that each company was carrying on a large traffic, which must have rendered contact and intercourse between the two sets of operating servants more frequent than would have been the case in a less congested occupation of the tracks. There was evidence tending to show that such intercourse between the crews of freight trains of the two companies, when standing still near each other from any cause, was usual, and we can conceive of circumstances under which it might be necessary. The antecedent probability that such intercourse would constantly occur, tends to strengthen the evidence as to the existence of the custom. There is no evidence that such usage or custom was discountenanced by either company, and it is impossible under the evidence to assume that it was not known to the directing and operating officers of both companies.

From all this, it clearly appears that the relation of the decedent and other employes of the Reading Company to the defendant company, in such a situation as is here established, was that of licensees. It may be conceded that as such licensee, the plaintiff "must take the conditions as he finds them, and there is no obligation to respond in damages if he is injured by the inherently dangerous nature of the place." This is the well settled law applicable to a mere licensee who is injured upon the premises upon which he is licensed to go. He takes the risk of the inherent or patent and obvious dangers of the premises, but he does not take the risk of such wanton and willful negligence of the licensor as shows a reckless disregard of the safety of the licensee; that is, he does not take the risk of a danger not inherent in the premises, or one that is not open and obvious, but caused by gross or reckless negligence of the licensor supervening the license. As said by the learned counsel for the plaintiff in error:

"When the presence of persons on the premises is reasonably to be expected, a disregard of all precautions for their safety is clearly wanton and willful negligence, within the meaning of those words."

[1] It is not necessary to discuss the numerous well considered cases cited by the plaintiff in error, in which the meaning of the word "wanton" and "willful" is applied to the negligence of which a licensee complains. The later authorities all agree that those words do not necessarily imply any purposeful design of the defendant to injure plaintiff, or in fact to injure any one. They are applicable to all willful conduct which is reckless of the dangers that may ensue therefrom.

[2] In considering whether the evidence tended to show negligence of the engineer of the defendant company, of a kind and degree as would impose a liability upon the company to this plaintiff, we again refer to the rules of the defendant company applicable to a situation where a train was backed against the current of traffic. In such cases, the engineer must blow his whistle three times and await a reply before starting; that "a flagman must take a conspicuous position on the front of the leading car and signal the enginemaster in case of need, and air brakes must be coupled and in operation."

These rules are sufficient to warn, if such warning were necessary, the engineer and others of the crew of a long freight train, that backing the same against the current of traffic was a hazardous undertaking, and that the rules prescribing the precautions to be taken must be strictly observed. We have before pointed out that the precautions enjoined by these rules were all disregarded, and their disregard tended to aggravate the negligence charged against defendant. The testimony tending to show such disregard by the engineer of the defendant company was that of the fireman and engineer of the Reading train. Some of this testimony was unquestioned, but, whether contradicted or not, it was clearly sufficient to require its submission to the jury.

In addition to the evidence as to the disregard of the precautions prescribed by the rules of the defendant company, there is also testimony as to the extraordinary character of the impact or impacts given to the defendant company's train by the engineer, whose only duty in backing up was to make a coupling with the cars remaining stationary on the defendant's track. Taking cars out of his train, placing them upon other tracks, and backing on again, must have afforded the engineer opportunity to observe that the Reading train was not far behind; but, however this may be, it must be conceded that what occurred, was extraordinary. The fireman of the Reading Company's train testified as follows:

"A. Yes, sir. We stopped about a hundred and fifty feet behind the Central Railroad freight, and I fixed my fire. After I fixed my fire I got off the engine and I went up to the Central Railroad caboose to get a drink of water. I drew a cup of water and just had it about drunk when we got a bump, but not thinking very seriously over it, because we thought he was coupling, when we got another bump and we all made a break for the door. The flagman of the Central Railroad was the first one off and he turned on the angle cock of the air hose and there was no air there—

"(Objected to.)

"Q. How do you know that?

"A. I was on the platform. The flagman jumped to the ground, and Mr. Faust jumped to the ground, and I jumped from the caboose to our engine. The caboose had already climbed the pilot of our engine, and before I knewed it, as I jumped for the running board, I was caught between our engine and their caboose, the headlight of the engine.

"Q. Was that how you lost your arm?

"A. Yes, sir.

"Q. Who was in the caboose?

"A. The flagman of the Central, Conductor Faust, of the Philadelphia & Reading, Brakeman Strough and myself.

"Q. They were all Reading men except the flagman?

"A. Yes, sir.

"Q. What happened to Mr. Strough?

"A. He was killed."

This testimony was repeated and emphasized on further examination, direct and cross, and confirmed by the testimony of the engineer of the Reading train. From the facts established by this testimony, uncontradicted or unexplained by the defendant, it seems clear, at least, that an inference could be drawn by reasonable men that the conduct of the engineer, from which these deplorable and extraordinary consequences ensued, was characterized by a reckless disregard of what might happen to those exposed to the dangers of the situation. What happened, was not to be expected of an engine backing to couple to a long heavy freight train standing stationary on the track. To have driven such a train over the intervening 150 feet onto the pilot of the Reading engine must have required a very unusual impact and force. No ordinary operation of the engine could have so overcome the inertia of the heavy train, as to not only drive it against the Reading engine, but to force it up upon the pilot of the same and cause it to "turn turtle."

We think this evidence clearly tended to raise the question, whether the conduct of the engineer evidenced a reckless disregard of the safety and rights of others; that is, whether wanton and willful negligence was not inferable from the evidence. This was a question for the jury and not for the court.

It is not necessary to speculate how the jury would or should have answered this question. They might have answered it one way or the other, and if the case had gone on, the defendant might have been able to so explain the conduct of the engineer as would give to it a different aspect. Our only concern here is, to determine whether, under the circumstances, the case should have been taken from the jury at the conclusion of the plaintiff's evidence. As we think it should not, the judgment of the court below is reversed, with an order for a venire de novo.

CHATTANOOGA & TENNESSEE RIVER POWER CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. December 2, 1913.)

No. 2,355.

MASTER AND SERVANT (§ 13*)—EIGHT-HOUR LAW—"PUBLIC WORK OF UNITED STATES."

A lock and dam across a navigable stream, constructed under a contract with the United States authorized by act of Congress, and the title to which is in the United States, although the contractor receives in payment the privilege of using the surplus water for the generating of electric power for the term of 99 years, subject to the condition that such use shall not interfere with navigation, is "a public work of the United States," within the meaning of Eight-Hour Law Aug. 1, 1892, c. 352, § 1, 27 Stat. 340 (U. S. Comp. St. 1901, p. 2521), prohibiting a contractor for such work from requiring or permitting any laborer or mechanic employed thereon to work more than eight hours in any calendar day, except in case of extraordinary emergency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

In Error to the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

Criminal prosecution by the United States against the Chattanooga & Tennessee River Power Company. Judgment of conviction, and defendant brings error. Affirmed.

Williams & Lancaster, of Chattanooga, Tenn., for plaintiff in error.
James B. Cox, U. S. Dist. Atty., of Knoxville, Tenn.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The power company, plaintiff in error, was convicted of violating the act which restricts the daily service of laborers and mechanics employed upon the public works of the United States to eight hours. Act August 1, 1892, c. 352, 27 Stat. 340 (U. S. Comp. St. 1901, p. 2521). The power company demurred to the indictment on the ground that it shows on its face that the work in question is not "a public work of the United States," within the meaning of the act alluded to. The demurrer was overruled, the company found guilty and a fine imposed; and error is prosecuted.

The indictment was returned December 5, 1911. It charges in substance that the power company entered into a contract with the United States to build a lock and dam across the Tennessee river, a navigable stream, at Hales Bar, Guild, Tenn., and, further, that while engaged in the construction of the lock and dam, "a public work of the United States," the company "employed, directed, and controlled the services of laborers and mechanics" thereon, and "intentionally required and permitted" them "to work more than eight hours in a calendar day, when there was no extraordinary emergency." The contract is incorporated into the indictment by exhibit, and specifically refers to the acts of Congress pursuant to which it was executed.

Accepting under the demurrer the recitals contained in the contract, the requisite conditions existed to authorize it to be entered into, as it was September 12, 1905, according and subject to the provisions of the act passed April 26, 1904 (33 Stat. pt. 1, p. 309, c. 1605), as amended January 7, 1905 (Id. p. 603, c. 32).¹ The task set for us is to determine whether the work described in the contract and authorized by these acts of Congress is "a public work of the United States" within the meaning of the act of August 1, 1892, commonly known as the "Eight-Hour Law"; for the fact that the power company entered into the contract with the United States, and so nominally falls within the word "contractor" found in the Eight-Hour Law, cannot be questioned. The acts authorizing the contract, and the contract itself, provide for the construction of an efficient lock and dam in the Tennessee river; and the power company is required to and does undertake at its expense to furnish everything (save only the plans and certain specified materials which the government is to furnish), and to do all that is necessary to accomplish this result, and to vest title

¹ The amendment needs to be examined only to find authority in the Secretary of War to change the location of the lock and dam from that mentioned in the act of April 26, 1904; and this act is too long to be quoted here.

to the whole in the United States; and the power company does this in consideration of receiving from the United States a grant of "such rights as it possesses to use the water power produced by said dam, and to convert the same into electric power or otherwise utilize it," for a specified time, subject, however, to the condition that "nothing shall be done in the use of the water" from the dam to interfere with navigation or with the government's use and control of the water for that purpose. This clearly limits the grant to the use only of surplus water. If, instead of this, a money consideration had been agreed upon, there could be no question touching the character or ownership of the work; indisputably it would have been one of the public works of the United States. Can it be that the medium of payment can operate to change this result?

It is true that this surplus-water power privilege is in terms to continue for 99 years; but this is subject to the right of revocation upon payment of the reasonable value of such necessary property as the company may acquire for the enjoyment of the privilege, the value of the "franchise hereby conferred" being expressly excluded. Thus the surplus-water power privilege is at most a determinable franchise; and this is further burdened with an obligation of the power company to "furnish the necessary electric current while its * * * power plant is in operation to move the gates and operate the locks and to light the United States buildings and grounds, free of cost to the United States." Now it is not the purpose to minimize the practical value of this privilege while it lasts. The attempt is simply to ascertain and define the nature of the privilege. For it is urged that the main object alike of the enactments and the contract was to produce this surplus-water power privilege and acquire part of the benefits of it, and that the lock and dam were a mere incident. It would be anomalous if the government were to regard its powers concerning navigable waters as entitling it to build locks and dams in navigable streams for the sole purpose of producing water power for the benefit of private persons; and yet this is the logic of counsel's insistence.

As Mr. Justice Brown said, in *Kaukauna Co. v. Green Bay, etc., Canal*, 142 U. S. 254, at page 273, 12 Sup. Ct. 173, at page 177 (35 L. Ed. 1004), followed in *Green Bay, etc., Canal Co. v. Patten Paper Co.*, 172 U. S. 58, 76, 77, 19 Sup. Ct. 97, 43 L. Ed. 364, when considering the effect of a statute of Wisconsin which reserved to the state the surplus water power created by the erection of a dam over the Fox river, a navigable stream:

"Upon the other hand, it is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. * * * But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the state may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement."

A rule of decision of long standing still prevails in Ohio to the effect that, upon the state's abandonment of a portion of one of its canals, it is not liable to its lessees of surplus water derived therefrom; Judge

West saying, in *Hubbard v. City of Toledo*, 21 Ohio St. 379, 398, followed in *Elevator Co. v. Cincinnati*, 30 Ohio St. 629, 642:

"If it were otherwise, the state would be compelled to maintain her canals, at any sacrifice, for the exclusive benefit of the lessees of surplus water. This cannot be. The creation of water power did not enter into the purpose of their construction. It was adventitious, incidental, and, therefore, necessarily precarious; and those obtaining grants thereof must be supposed to have taken them subject to the fluctuations of tides and the changes of time."

And Mr. Chief Justice Waite said, in *Fox v. Cincinnati*, 104 U. S. 783, at page 785 (26 L. Ed. 928), when considering a similar question originating in Ohio:

"The use of the water for hydraulic purposes is but an incident to the principal object for which the canal was built, to wit, navigation."

Furthermore, the intent to be deduced from the whole legislation was to increase the depth of the water in this portion of the Tennessee river for purposes of navigation; and there is nothing concerning the design as to *surplus* water to indicate that anything more was contemplated than a subordinate and incidental object. As Judge Sanford points out in the opinion below, Congress took steps as early as 1899 to improve this part of the river for purposes only of navigation. It appropriated \$35,000 for "improving Tennessee river between Chattanooga and Riverton," Ala., and provided that:

"In making the survey between Chattanooga and Shellmounds through that portion of the river commonly called the 'Suck,' an examination shall be made with a view to the construction of locks and dams suitable for convenient and safe navigation." Act March 3, 1899, c. 425, 30 Stat. 1142, 1143.

While it is true that the act of 1904 made provision for the water power privilege above mentioned, yet the dominant feature of the act was plainly to promote the interests of navigation. To illustrate, section 1 of the act requires the contractor to—

"purchase and pay for all the lands on either side of the river that may be necessary to the successful construction and operation of said lock and dam, including flowage rights and rights of way for ingress and egress from public highways and deed the same to the United States."

And section 7 provides that:

"To insure compliance with the terms of the contract or of this act, or to protect the interests of navigation, the Secretary of War shall have power at any time, before or after the completion of the work, to order a suspension of all privileges granted by this act."

In short, when all that the act prescribes respecting the improvement directly affecting navigation is considered in contrast with that which concerns the surplus-water privilege, no room is left for doubt as to which is the principal thing and which the incident.

It is equally clear that the main improvement comprised the lock and dam, and was intended to constitute one of the public works of the United States. It is not suggested that the power company failed to discharge, and so it is to be presumed that it performed, its obligation under the contract to purchase and within six months to convey to the government such lands as were necessary for the improvement; and, moreover, the materials for the lock and dam were to be furnished

by the government and the contractor was to do the work. Hence the case falls within the principles characterizing public works of the United States, as announced in *Title Guarantee & Trust Co. v. Crane Co.*, 219 U. S. 24, 31, 31 Sup. Ct. 140, 55 L. Ed. 72, and *Ellis v. United States*, 206 U. S. 246, 258, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589, because the title was in the United States, and the lock and dam were permanent in nature and essential to the structural unity and the use of the improvement.

In view, then, of the charges contained in the indictment and its date, as pointed out at the beginning of this opinion, the judgment below must be affirmed.

MISSOURI VALLEY BRIDGE & IRON CO. v. NUNNEMAKER.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1913.)

No. 3,766.

1. MASTER AND SERVANT (§ 190*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE APPLIANCES.

Where the superintendent in charge of defendant's work in the construction of a bridge approach directed an employé to repair certain mauls which had become defective in use, which he did by putting new handles in them, in doing such work he represented defendant, and whatever his regular employment might have been was not a fellow servant of another employé who was afterward injured because one of the handles was insufficiently wedged, permitting the maul head to fly off in use.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

2. MASTER AND SERVANT (§ 295*)—ACTION FOR INJURY TO SERVANT—INSTRUCTIONS—DEFECTIVE APPLIANCES.

Instructions, in an action for injury to a servant through a defective appliance, that plaintiff had a right to rely upon the duty of defendant to exercise reasonable care to see that the appliance was in safe condition, having been performed, and was not chargeable with assumption of the risk unless he knew of the defect or it was obvious, *held* not erroneous.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

In Error to the District Court of the United States for the Eastern District of Missouri.

Action at law by T. W. Nunnemaker against the Missouri Valley Bridge & Iron Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Lionberger Davis, of St. Louis, Mo. (Allen C. Orrick, Jones, Hocker, Hawes & Angert, and Nagel & Kirby, all of St. Louis, Mo., on the brief), for plaintiff in error.

William T. Nardin, of St. Louis, Mo. (Wilfley, Wilfley, McIntyre & Nardin, of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

SMITH, Circuit Judge. The Missouri Valley Bridge & Iron Company, plaintiff in error, hereafter called the defendant, had contracts by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which it was to construct the so-called McKinley bridge at St. Louis, Mo., and the approach thereto on the Missouri side. The defendant had taken two separate contracts, one to build the bridge and one to build the approach thereto. These contracts were not only separate but their execution was largely kept separate. T. W. Cartledge was superintendent of construction of the approach and had two foremen under him, John B. Ryker and Henry Smith. There were separate superintendent and foremen for the bridge proper. There was a blacksmith shop under the superintendent of the bridge proper at which some work was occasionally done for the approach. There was also a supply house near thereto, both standing near the river. Some blocks west and more convenient to the approach was the office of Superintendent Cartledge, and a portion of this building was occupied as a tool house and shop for the repair of tools used on the approach. T. W. Nunnemaker, the defendant in error, hereafter called the plaintiff, was a structural iron worker employed on the approach. On March 30th Mr. Ryker, the defendant's foreman, wishing plaintiff to make some repairs, told him what to do and to get the necessary tools. The work required the use of mauls and a long chisel, and he went down to the tool house, where tools ready for use were kept, and sought to find a seven-pound maul, but being unable to do so took two eight-pound mauls from among five and a chisel or cutter and returned to the work. Some trolley polls had been bent, and it was necessary to take these down and send them to be straightened. When plaintiff returned to the scene he was sent to assist the engineer on the derrick car near by. He was detained there about half an hour, during which time two men were engaged in cutting off rivets; one man holding the chisel or cutter and the other striking it with the maul. At the end of this service on the derrick plaintiff was transferred to the cutting of rivets. He held the chisel or cutter and a man named Hayes struck it with the maul. On his striking the second time the head of the maul flew off before it reached the chisel or cutter, struck the plaintiff, and knocked him off the approach about 30 feet to the ground below. He was seriously injured by the blow from the head of the maul, the fall, and the impact with the place beneath. This suit was brought for damages; the petition alleging that the maul in question was defectively repaired by the defendant in that the end of the handle which entered the head of the maul had been shaped too nearly to a point, thus leaving the handle loose in the head, the metal wedge which was driven into the handle where it passed through the head of the maul was so short and blunt that it did not properly swell the handle and make it secure and fast, and by reason of the shortness and bluntness of the wedge it did not become securely fastened in the wood of the handle and did not remain in the handle, and said wedge loosened by use and dropped out, permitting and causing the head to fly from the handle and inflict the injury of which the plaintiff complains, and that such defective condition was known, or in the exercise of ordinary care should have been known, to the defendant. There was an answer containing a general denial and pleading that the plaintiff assumed the risk and that he was guilty of contributory negligence. There was a

trial, a verdict and judgment for the plaintiff, and the defendant brought the case here on error, assigning as such the overruling of the motion to direct a verdict and the giving of portions of the charge and the refusal to give the instructions asked.

[1] It was the duty of the defendant to use reasonable care to see that tools furnished to employes were reasonably safe for their use. *Armour & Co. v. Russell*, 144 Fed. 614, 75 C. C. A. 416, 6 L. R. A. (N. S.) 602; *American Car & Foundry Co. v. Barry*, 195 Fed. 919, 115 C. C. A. 607; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612.

It appears that the men who used the mauls had nothing to do with their repair. Originally they were delivered to them as finished mauls, and when they became out of repair they were cast aside and good mauls taken. The superintendent, Mr. Cartledge, ordered that Mr. Rudolph Ganshaw, who was a hoisting engineer, handle up some mauls that were broken. Mr. Ganshaw took about five mauls to the repair shop at Superintendent Cartledge's office and there put new handles in them. All these handles were properly inserted but one. In shaping the handle of that one by reason of the grain of the wood it split off somewhat too much at the end that went through the head. Mr. Ganshaw then found he had only one wedge, and that a somewhat narrow, short, and blunt one. He went down to the blacksmith shop to get another. The blacksmith told him he had none and no time to make any. Ganshaw then went back and used the one he had. This is the particular maul the head of which came off, inflicting injuries on the plaintiff.

While it is true that ordinarily the law requires the exercise of reasonable or ordinary care to provide a reasonably safe place to work and the same degree of care to furnish reasonably safe appliances for the work, and also requires, in the exercise of such care, continuous inspection by the master of the place and appliances, this is not true of what are called simple tools, such as ordinary hammers, chisels, shovels, and the like. *Wachsmuth v. Shaw Electric Crane Co.*, 118 Mich. 275, 76 N. W. 497; *Vanderpool v. Partridge*, 79 Neb. 165, 112 N. W. 318, 13 L. R. A. (N. S.) 668; *Ruck v. C., M. & St. P. Ry. Co.* (Wis.) 140 N. W. 1074; *Lehman v. Chicago, St. P., M. & O. Ry. Co.*, 140 Wis. 497, 122 N. W. 1059; *Meyer v. Ladewig*, 130 Wis. 566, 110 N. W. 419, 13 L. R. A. (N. S.) 684; *Stork v. Stolper Cooperage Co.*, 127 Wis. 318, 106 N. W. 841, 7 Ann. Cas. 339; *Twombly v. Consolidated Electric Light Co.*, 98 Me. 353, 57 Atl. 85, 64 L. R. A. 551; *American Car & Foundry Co. v. Fess* (Ind. App.) 101 N. E. 318.

But here the question is not whether the master was compelled to constantly inspect these mauls or not. This maul, at some time anterior to the accident, was broken, and the defendant's superintendent ordered it repaired. That was the duty of the master, and whoever he assigned to do it was in the place of the master, whatever may have been his usual vocation. That is, he might have been ordinarily a fellow servant of the plaintiff, but in attempting to repair the maul he was acting in the place of the master, doing its duty, and the master was liable for what the servant did in such repairing. There is no doubt that if Cartledge and Ganshaw were negligent in repairing this maul, and it was then returned to the place where the defendant's

servants had been charged to go and get mauls, then the defendant was liable for the result of such negligence. *Lehigh Valley Coal Co. v. Warrek*, 84 Fed. 866-868, 28 C. C. A. 540. It follows the court properly overruled the motion to direct a verdict.

It is insisted, however, that, if there was any doubt about the character of the tool or the custom of repairing such tools, a mixed question of law and fact would have been raised which should have been submitted to the jury by the court. *Sowles v. Norcross Bros. Co.*, 195 Fed. 889, 115 C. C. A. 577. We are of the opinion that, conceding the maul to have been a simple tool, there was no dispute in the testimony as to the custom of repairing such tools, but in any event the defendant failed to ask any instruction upon that subject and cannot now complain.

[2] The court instructed the jury:

"A primary duty rests upon every employer of labor (that is, upon the master) to exercise reasonable care to provide reasonably safe appliances with which the servants shall work, and also reasonably safe places in which they shall work."

And:

"If, however, the servant knew at the time he entered the employment, or prior to the time of his injury, of the defective condition of the appliances, or dangerous situation in which he was put to work, or unless the said defective or dangerous condition was patent, obvious, and plain before his eyes, in either of these events (that is, in the event he knew of the dangerous condition, or in the event it was patent or plainly before him) he cannot recover. The servant has a right to rely upon the master's performing the primary and fundamental duty before stated. No obligation is cast upon the servant to use what is commonly called 'ordinary care' to inspect the premises or appliances with a view of ascertaining whether or not they are safe. He has a right to rely upon their being safe, and hence the ordinary obligation resting upon plaintiff in many other suits, namely, the exercise of ordinary care to find out whether the appliances are safe, does not rest upon him. This, however, does not relieve him from the consequences of entering into the discharge of the duty, when the danger is patent and open before him, or he knew of that danger."

And:

"If you find from the evidence in the case that the maul was not securely fastened to the handle, and that the plaintiff knew this before he was struck and injured, he cannot recover; or if the defect, if any existed, was patent or readily observable by the plaintiff before he was injured, then he cannot recover."

And again:

"There is in this case, then, no assumption of risk upon his part if he was at work on that bridge and was relying upon the master to furnish him reasonably safe appliances with which to work."

And also:

"The plaintiff had a perfect right to rely upon the tools that were furnished him being in good condition, provided he did not see, or could not see, the condition in which it was at the time he examined it."

Complaint is made of the second, fourth, and fifth subdivisions on the ground that they made of the defendant an insurer or guarantor of the safety of the tool or maul which injured the plaintiff. In this

we cannot concur. Taken together, the charge fully stated the law applicable to this case. The instructions complained of were upon the burden resting upon the plaintiff, not upon the obligations resting upon the defendant. As was natural, the court distinguished between the two and stated the obligations resting upon the defendant correctly, and in stating the obligations resting upon the plaintiff the omission of those resting upon the other party could not have been error. *St. Louis, I. M. & S. Ry. Co. v. Needham et al.*, 69 Fed. 823, 16 C. C. A. 457; *Choctaw, O. & G. R. Co. v. Tennessee*, 116 Fed. 23, 53 C. C. A. 497.

There is no evidence of contributory negligence on plaintiff's part or of assumption of risk by him that is here material. He had the right to assume that the maul had been properly repaired. He was not obliged to examine into the methods by which it had been repaired. *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984; *Texas & Pacific Ry. Co. v. Howell*, 224 U. S. 577, 32 Sup. Ct. 601, 56 L. Ed. 892; *Choctaw, Oklahoma & Gulf R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Alaska Pacific S. S. Co. v. Egan*, 202 Fed. 867, 121 C. C. A. 225. He did not observe the maul except to see if the repair had been completed by the insertion of a wedge. It would have required a quite critical examination, if not an impossible one, after the wedge had been driven in to determine whether the handle had been cut too small, and it would have been quite impossible to tell how far the wedge went in and whether it was blunt or sharp. This maul as prepared was inherently dangerous, and there was no possibility of plaintiff knowing in full its condition. It is true the evidence shows the handle was somewhat too finely shaved, but it does not appear that it was not spread so as to wholly fill the extreme end of the maul opposite the handle, and there is no evidence that the plaintiff saw or noticed its condition in that regard. True the wedge was somewhat narrow, but there appears no reason to believe that the maul was unsafe by reason thereof if the handle was swelled to the size of the end of the maul and the wedge was sufficiently long and tapering to hold itself and the handle in. Questions with reference to obvious defects have therefore no application.

Complaint is made that the court failed to instruct the jury that, if plaintiff knew the maul was defective and dangerous, he could not recover, but there was no evidence that he knew that fact, and it would have been error to so instruct the jury.

No other points are suggested which seem worthy of separate consideration. No error appears, and the judgment is affirmed.

HOOK, Circuit Judge, took no part in the decision of this case.

HUGHES et al. v. ALFRED H. SMITH CO.

ALFRED H. SMITH CO. v. HUGHES et al.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 94.

1. TRADE-MARKS AND TRADE-NAMES (§ 44*)—REGISTRATION—PRIOR USE.

In a suit to restrain infringement of a trade-mark consisting of the word "Ideal," as applied to brushes, evidence *held* to warrant a finding that the word was used and understood in the United States as indicating brushes sold by complainant H. and his predecessors, and not brushes made exclusively by P. in England, and that an application for registration of the word as a trade-mark, accompanied by a declaration that it had been used by H. for ten years in his business, was properly granted.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 50-52; Dec. Dig. § 44.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 3*)—PRIOR USE—DESCRIPTIVE WORD.

Where the word "Ideal," as applied to brushes, had been used by H. in his business for ten years prior to the passage of Trade-Mark Act (Act Feb. 20, 1905, c. 592, 33 Stat. 724 [U. S. Comp. St. Supp. 1911, p. 1459]), he was entitled to have the same registered as a trade-mark without reference to whether it was descriptive.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 45*)—REGISTRATION—CERTIFICATE.

Certificate of registration of a trade-mark is sufficient *prima facie* evidence of compliance with all the regulations enacted therefor, and the burden of showing noncompliance is on him who asserts it.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 53, 59; Dec. Dig. § 45.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 21*)—WORDS SUBJECT TO APPROPRIATION—SPECIFIC OR GENERIC NAME.

Where the word "Ideal," as applied to brushes, was registered as a trade-mark in the United States by complainants, and such word had been applied by complainants only to a hairbrush of a particular shape and grade sold by complainant H. and his predecessors, the fact that such word had been applied to a patented brush in England, and that the brush sold by H. and his predecessors under such name had the features of the patented brush, was insufficient to show that the name had acquired a generic meaning to represent the patented article so as to deprive complainants of the right to register the same as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. § 21.*]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, entered in favor of complainants restraining infringement of a trade-mark. The trade-mark was registered June 26, 1908, No. 54,282, being described as "the word 'Ideal' " shown in script, appropriated to brushes; the particular class of brushes to which it is appropriated being stated to be hairbrushes. It was registered by Henry L. Hughes, his application stating that "this trade-mark has been continuously used in his business since December 21, 1886." This business, as the testimony showed, was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

conducted originally by predecessors of Hughes to whose rights he succeeded. The defendant is selling agent in this country of the successors of the original house of Mason Pearson located in England, which manufactures hairbrushes and has sold them here under the name "Ideal." Affirmed.

The opinion of Judge Ray will be found in 205 Fed. 302.

J. L. Stewart, Sidney R. Perry, and Francis X. Brosnan, all of New York City, for appellant.

Otto Horwitz, of New York City, Frank C. Curtis, of Troy, N. Y., and W. J. Rosenstein, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. [1] Judge Ray has exhaustively narrated the facts upon which both sides rely; reference may be had to his opinion for the details of the transaction. In this opinion, unless otherwise indicated the word "Pearson" will be used as including the original Pearson and his successors and the word "Hughes" will be used as including complainant's predecessors in business.

On December 21, 1886, Pearson obtained United States Letters Patent, No. 345,583, for a single bristle rubber cushion "hair or other brush." He had already taken out an English patent for the same device, so that his American patent expired, probably, in 1899. He at once began the manufacture and sale of hairbrushes made in conformity to the patent, in England, under the name "Very." In 1888 one Reid and some other of Hughes' predecessors undertook the selling of like brushes in this country. Reid had talked with Pearson about the matter and an arrangement was entered into whereby Pearson was to sell his brushes, in the United States, solely to Reid and his associates. It was decided that the brushes sold here should be called "Ideal" and it is a controverted question of fact, who selected that name. Complainant's evidence tends to show that it was one of his predecessors. The widow of the original Pearson testified that her husband suggested it to Reid. We do not find her recollection of a conversation listened to many years before she testified especially persuasive; it appears that, whoever suggested the word, it was adopted by Reid and his associates and the first die for stamping on the handle was made here and sent to Pearson. Subsequently another die—containing the word "England," in compliance with Custom House requirements—was made in England. Hughes' predecessors apparently were not the mere consignees or agents of Pearson; they bought the brushes outright and resold them here as a business of their own and they had exclusive license for sale of the same in this country. Without rehearsing the evidence we concur with Judge Ray that the word "Ideal" was used and understood in this country as indicating brushes sold by Hughes and his predecessors, not as brushes made exclusively by Pearson. Application for a registered trade-mark, therefore, accompanied by declaration that it had been used ten years in his business, was properly made by Hughes.

[2] We are satisfied that the word "Ideal" so applied to a brush is not descriptive and therefore was entitled to registration as a trade-mark. But even if it were descriptive, it was in use for ten years prior to the passage of the Trade-Mark Act of 1905. It would therefore be entitled to registration under our decision in *Thaddeus Davids Co. v. Davids*, 178 Fed. 801, 102 C. C. A. 249.

[3] A technical objection is raised to the validity of the registration on the ground that it does not appear that the applicant made oath to the actual use of the mark as a trade-mark. Neither does it appear that he did not make such oath. The certificate of the office is sufficient *prima facie* to indicate compliance with all its regulations; the burden of showing noncompliance is on the person asserting it.

[4] Defendant contends that in 1906 the word "Ideal" could not have been appropriated by any one as a trade-mark for the reason that it had been so associated with the patented article as to become the "generic name" of the patented article, so that persons wishing to buy a brush constructed in conformity to the specifications of the patent would express their wish by asking for the "Ideal." This contention is based on *Singer v. June*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, and similar cases. The difficulty with it, however, is that the facts are different from those in the *Singer Case*. The only use of the word "Ideal" was specific, not generic; it was applied to a hairbrush of a particular shape and of a particular grade sold by Hughes' predecessors. Irrespective of what happened in England, the testimony shows that during the life of the patent Hughes himself sold here a cheaper grade of the patented brush under the mark "Hughes," also another variety of the patented brush, known as military brushes, which were not stamped "Ideal." Brushes in shape exactly like the "Ideal" and "Hughes," manufactured by Pearson and marked "Very," were sold in England, sent over here by the purchaser, and sold in this market as "Very" brushes. Customers who knew and liked the "Hughes" brush, or the "Very" brush, and who wished to purchase another, would presumably ask for it by the only name they knew, "Hughes" or "Very." Purchasers of military brushes would ask for them in some way which would indicate that they wanted such brushes made in accordance with the patent like those they had bought before. Certainly these purchasers would not ask for "Ideal," although it was a brush having the features of the patent, which they wanted. Under these circumstances we do not see how it can be found that, during the life of the patent the name "Ideal" became the "identifying and generic name of the thing patented."

On all other points covered by his opinion we concur generally with Judge Ray.

The decree is affirmed, with costs of this appeal.

In re CAIN, U. S. Atty.

(Circuit Court of Appeals, Ninth Circuit. November 17, 1913.)

No. 2,340.

CRIMINAL LAW (§ 1192*)—APPEAL—REVERSAL—NEW TRIAL—CONSENT.

Where a judgment against accused was reversed on writ of error for invalidity of the sentence imposed, and a mandate issued directing the court to impose a proper sentence, but pending this the Department of Justice, believing that the conviction was based on perjured testimony, instructed the district attorney not to oppose efforts to obtain a new trial, which was thereupon granted, the government thereby waived its right to a sentence pursuant to the mandate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3231-3240, 3243; Dec. Dig. § 1192.*]

Petition for writ of mandate to be directed to the Judge of the United States District Court for the Eastern District of Washington, commanding that he pronounce judgment on a mandate of the Circuit Court of Appeals against one C. E. Mitchell, or show cause why he should not be required to do so. Denied.

Benjamin L. McKinley, U. S. Atty., of San Francisco, Cal., for petitioner.

Before MORROW, Circuit Judge, and VAN FLEET and DOOLING, District Judges.

MORROW, Circuit Judge (orally). This is a petition for a writ of mandate to be directed to the judge of the United States District Court for the Eastern district of Washington, commanding said judge to pronounce judgment upon a mandate of this court issued in the case of United States v. C. E. Mitchell, or to show cause before this court why he should not be required so to do.

It appears that Mitchell was indicted in the Eastern district of the state of Washington for use of the mails of the United States for the purpose of carrying out a scheme to defraud certain persons; that he was tried upon the indictment, found guilty, and sentenced by the court to imprisonment in the United States penitentiary at McNeil Island for a period of one year at hard labor, and to pay the costs of the proceedings; that a motion for a new trial was made and denied. The case was brought to this court upon writ of error. Among the errors assigned in this court was an assignment that the sentence was not in accordance with law and was unauthorized. The statute (section 5480 of the Revised Statutes, as amended by the Act of March 2, 1889, c. 393, § 1, 25 Stat. 873 [U. S. Comp. St. 1901, p. 3696]) provided that the punishment for its violation should be a fine of not more than \$500 and by imprisonment for not more than 18 months, or by both such punishments, at the discretion of the court. The reason why the court imposed the punishment of hard labor is not necessary to be stated here. It is sufficient to say that this court reversed the judgment of the court below, with directions to enter such judgment on the verdict of the jury as the justice of the case required and the acts of Congress

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

authorized. *Mitchell v. United States*, 196 Fed. 874, 116 C. C. A. 436. The mandate of this court going down to the District Court, the United States Attorney for the Eastern district of Washington submitted to the court a communication from the Department of Justice in which it was stated:

"After consideration of the matters presented in connection with the case of C. E. Mitchell, I have become satisfied that the conviction was obtained partly at least upon perjured testimony—the testimony of Dwyer—and that this testimony, according to the affidavits of two of the jurors, influenced them or caused them to agree to a verdict against Mitchell. Under these circumstances it would be manifestly unjust to permit the verdict to stand. You are instructed, therefore, not to oppose but to assist Mitchell in his efforts to secure a new trial and to communicate these views to the court."

Thereupon the court granted the motion for a new trial. Thereafter the United States Attorney, by direction of the Attorney General of the United States, moved the court for judgment and sentence in accordance with the mandate of this court, notwithstanding the order granting a new trial which had theretofore been made and entered of record. This latter motion the District Court has denied, and it is upon this state of facts that the present petition is presented to this court. With this petition the United States Attorney has filed the opinion of the District Judge denying the motion to enforce the judgment of this court. The opinion is short, and, after stating the facts, is as follows:

"The contention of the government is that inasmuch as the mandate of the Circuit Court of Appeals contained specific directions to enter a judgment on the verdict, within the limits prescribed by the acts of Congress, this court had no discretion but to execute that mandate according to its terms, and that the order awarding a new trial was granted without jurisdiction and is a nullity. Had the government stood on its rights under the mandate and moved for judgment in accordance therewith, its present position would be unassailable; but did it not waive its rights under the mandate by consenting to a new trial? In my opinion it did.

"In *Atlanta, K. & N. Ry. Co. v. Hooper*, 105 Fed. 550 [44 C. C. A. 586], the mandate on the first writ of error contained specific directions, 'to grant a new trial, to sustain the plea of the statute of limitations to the declaration as amended, and to enter judgment for the defendant.' In the face of this mandate the Circuit Court permitted the plaintiff to enter a voluntary nonsuit, and on the second writ of error to review this judgment the Appellate Court said: 'In the present case this court did not assume the power of arbitrarily compelling the plaintiff to go on with his suit after his judgment had been reversed, but simply directed what judgment should be entered in case he elected to go on to a final determination in the court below. This is the reasonable construction of the mandate. The judgment of the Circuit Court is affirmed, with costs.'

"So here, the Circuit Court of Appeals did not assume the power to arbitrarily compel the government to go on with the prosecution or to take judgment on its mandate, but simply directed what judgment should be entered in the event the government elected to proceed to a final determination of the case in this court.

"It is well settled by the authorities, in the absence of some statutory provision to the contrary, that a nolle prosequi may be entered by the prosecuting officer at any time before judgment. 12 Cyc. 374, and cases cited.

"In *Commonwealth v. Tuck*, 20 Pick. [Mass.] 356, the court said: 'There are three periods of a prosecution, in which a nolle prosequi may be entered—before a jury is impaneled, while the case is before the jury, and after verdict. * * * After a verdict of guilty is rendered, the defendant is to be

sentenced on motion of the attorney general; and we have no doubt of his authority to enter a nolle prosequi after verdict. It cannot operate to the injury of the defendant. If the indictment is sufficient, this act of the Attorney General saves him from the sentence of the law. If it be insufficient, it can do him no harm, for no judgment could be rendered upon the indictment, and so it would not bar another indictment. This practice of entering a nolle prosequi after verdict has prevailed, without objection, for many years. The power is found to be highly useful, if not necessary, to the due administration of criminal law. Many cases may occur in which its exercise would be very beneficial. It may be discovered after verdict that the defendant, though convicted, is really innocent. It may become important to use him as a witness. The power to enter a nolle prosequi is held by the Attorney General virtute officii. He exerts it upon his official responsibility. The court has no right to interfere with its exercise. They can only judge of the effect of the act when done, and of the legal consequences which may follow from it. They will take care that it shall not operate to the prejudice of the defendant's rights.'

"It is well established, therefore, that the prosecuting officer may enter a nolle prosequi before final judgment, notwithstanding the mandate of an Appellate Court; and, if so, why can he not consent to the granting of a new trial? The greater power would seem to necessarily include the lesser; and, if the ends of justice require that a prosecution should be dismissed after verdict in some instances, may not the same ends of justice require that a new trial should be granted in a proper case? The officers of the Department of Justice concluded that a new trial should be granted in this case in furtherance of justice, and upon that conclusion the court acted. For these reasons I am of opinion that the court acted within its jurisdiction and not in contravention of the mandate when it granted the new trial at the instance of the prosecuting officers of the government, and that its order in that behalf is a complete bar to the present motion. If I am in error in this, the error can be corrected upon application to the Appellate Court for a further mandate, which this court will cheerfully obey. Motion denied."

We consider this opinion would be a sufficient showing in answer to any order to show cause that we might issue herein, and, as it is a matter of record on this application, we will consider it as the equivalent of an answer to an order to show cause. We think it is also sufficient in substance upon the merits of the motion. The Attorney General in the first instance had waived the enforcement of the judgment of this court, and having done so, and a new trial having been granted, we think the proper proceeding is on the order of the court granting a new trial.

The petition is denied.

In re KERLIN.

(Circuit Court of Appeals, Sixth Circuit. November 4, 1913.)

No. 2,367.

BANKRUPTCY (§ 58*)—ACTS OF BANKRUPTCY—TRANSFER OF PROPERTY.

An alleged bankrupt and another were sued on a note for \$122 on which they were indorsers. Their attorney settled the suit for \$15, which he himself paid, and had not been repaid at the time the petition in bankruptcy was filed. *Held*, that the transaction was merely a substitution of creditors, with advantage to the debtor's estate, and was not a transfer of property to a creditor with intent to prefer, made an act of bank-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruptcy by Bankr. Act July 1, 1898, c. 541, § 3a (2), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), even though defendant was insolvent at the time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 72-79, 83; Dec. Dig. § 58.*]

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

In the matter of Richard G. Kerlin, alleged bankrupt. From orders adjudging Kerlin bankrupt, appeal is taken. Reversed, and involuntary petition dismissed.

H. & R. Newbegin, of Toledo, Ohio (J. H. Tyler, of Toledo, Ohio, of counsel), for appellant.

Calkins & Storey, of Toledo, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This is an appeal from an order of July 24, 1912, adjudging Richard G. Kerlin, bankrupt. The proceeding was commenced by petition of certain of his creditors in involuntary bankruptcy, alleging that, while insolvent, he, in conjunction with E. M. Kerlin, committed an act of bankruptcy on January 26, 1911, by transferring and paying \$15 of their money to Merton L. Bamer in settlement of a claim against them as indorsers on a promissory note; that this was done with "intent by Richard G. Kerlin to prefer Merton L. Bamer over his other creditors." In his answer Kerlin denies that he committed an act of bankruptcy, but does not deny insolvency.

The Kerlins had been sued in a justice's court upon the promissory note mentioned; the balance due being about \$122. The settlement, with their consent, was conducted by their counsel, Mr. Newbegin, who delivered his individual check in payment of the amount, and received a transfer of the note in favor of the Kerlins without recourse. It is stated in the instrument of settlement that Bamer received the \$15 of "E. M. and R. G. Kerlin jointly," through their attorney, and it is earnestly contended that this shows that the money belonged to the Kerlins; but testimony was heard by the trial judge distinctly showing that the money was paid from the individual funds of the attorney, and that he has in no wise been reimbursed. The court so treated the transaction, and concluded that the Kerlins were "jointly and severally indebted" to the attorney in the amount so expended; and we see no sufficient reason to disturb this interpretation of the evidence.

The case, then, in its last analysis, amounts only to a substitution of creditors of the alleged bankrupt, and with the result that the indebtedness involved in the transaction was greatly reduced, the old debt of \$122 in favor of Bamer having been converted into a debt of \$15 in favor of Newbegin. It was neither alleged nor attempted to be proved that any preconcerted or later arrangement was made between the Kerlins and their attorney touching an intent through reimbursement of Newbegin to effect a preference of Bamer over the other creditors. In short, this is not a case at all of a transfer of property to a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

creditor; if it were, and it involved a substantial portion of the debtor's property, an intent to prefer the creditor might, *prima facie*, at least, in view of the admitted insolvency, be implied (*Toof v. Martin*, 13 Wall. 40, 48, 20 L. Ed. 481; *John Naylor & Co. v. Christiansen Harness Mfg. Co.*, 158 Fed. 290, 292, 85 C. C. A. 522 [C. C. A. 6th Cir.]; *Loveland on Bankruptcy* [4th Ed.] §§ 145-147, and citations; *Remington on Bankruptcy*, §§ 129-132, and citations); but since the amount involved is so small, and since no scheme of fraud or undue advantage concerning creditors, as between the insolvent debtor and the person who furnished and paid the money, was in issue, such facts cannot be presumed, but must await allegation and proof.

The case fails upon the very hypothesis of fact upon which it was based. It is not an answer to say, as is suggested here, that it would be difficult, if not impossible, to prove an ulterior purpose between client and counsel touching repayment and intent to prefer. Whether this would arise from the meager sum involved is not stated; but our attention has not been called to any decision sustaining counsel's theory. This payment and the obligation it created constituted a business transaction, involving the relation of debtor and creditor, which, as it seems to us, is clearly open to ordinary rules of evidence.

It is helpful to bear in mind that the transaction did not deplete Kerlin's estate (*Continental Trust Co. v. Chi. Title Co.*, 229 U. S. 435, 443, 445, 33 Sup. Ct. 829, 57 L. Ed. 1268); on the contrary, as already stated, the settlement reduced the indebtedness, and to that extent in effect increased the estate. Such a fact is apparently opposed to the idea of an intent to prefer. However, it is insisted that the case just cited, and kindred cases, are not applicable, because they relate only to voidable transactions covered by section 60 of the Bankruptcy Act. Hence, distinction is urged between the preference defined by that section and the preference forbidden by section 3, art. 2. The difference between a transfer "with intent to prefer," which is made an act of bankruptcy by the latter provision, and the "preference" denounced by the former, even since the amendment of 1910 (Act June 25, 1910, c. 412, § 11, 36 Stat. 842 [U. S. Comp. St. Supp. 1911, p. 1506]) of section 60b, is, as respects the present issue, formal rather than material. True, "intent to prefer" within the meaning of section 3, art. 2, relates to the debtor, while "reasonable cause to believe," under section 60b, refers to the creditor; but this difference can affect only the evidence calculated to reveal the debtor's intent in the one instance, and the creditor's belief in the other; for there is complete identity between the object of a preference made under the one and that received under the other. Their ultimate effect upon the debtor's estate and his other creditors is obviously the same, and so the question of depletion of estate is alike relevant and important in either case (see *Swarts v. Fourth National Bank of St. Louis*, 117 Fed. 1, 3, 54 C. C. A. 387 [C. C. A. 8th Cir.], respecting similarity of such preferences). Upon the whole we are convinced that Kerlin did not commit an act of bankruptcy within the fair intendment of the law.

The order is reversed, with costs, and with direction to dismiss the petition.

MISSOURI, K. & T. RY. CO. v. CITY TRUST CO. et al.

STANLEY et al. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1913.)

Nos. 3,812, 3,813.

RECEIVERS (§ 155*)—INSOLVENCY—OPERATION CLAIMS—PRIORITY OVER MORTGAGES.

In foreclosure proceedings against a street railway company, a commercial railroad company filed a claim for repairs to a crossing of its tracks and those of the street railway company and for the latter's proportion of the wages of a flagman maintained at the crossing. Another claim was by a coal company for coal sold and delivered, both debts being incurred within a few months prior to the institution of proceedings to foreclose a mortgage on the street railway company's property, and according to their agreement or understanding both claims were payable during the month succeeding that in which they were incurred and out of current earnings. *Held*, that such claims were necessary maintenance and operation expenses; and it appearing that the operating income of the street railway company, during the term the debts were incurred, exceeded the operating expenses, the surplus being used to improve the property, claimants were entitled to priority of payment as against the mortgagees.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 283-292; Dec. Dig. § 155.*]

Appeal from the District Court of the United States for the Western District of Missouri; John C. Pollock, Judge.

Claims by the Missouri, Kansas & Texas Railway Company and by Robert A. Stanley and another, doing business as the Stanley Coal Company, against the City Trust Company, as receiver of the Sedalia Light & Traction Company, and others, to obtain an equitable preference over the lien of prior mortgage bondholders. From orders denying such relief, claimants appeal. Reversed and remanded.

Lee Montgomery, of Sedalia, Mo. (Sangree & Bohling, of Sedalia, Mo., Joseph M. Bryson, of St. Louis, Mo., and Montgomery & Montgomery, of Sedalia, Mo., on the brief), for appellants.

A. E. Spencer, of Joplin, Mo., and George F. Longan, of Sedalia, Mo., for appellees.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. These cases involve the right of appellants, the Missouri, Kansas & Texas Railway Company and the Stanley Coal Company, as creditors of the Sedalia Light & Traction Company, to an equitable preference over the lien of prior mortgage bondholders. In a suit by the trustee to foreclose the mortgage upon the physical property and the franchises and income of the traction company, the appellants intervened for a preference, but the trial court sustained demurrers to their petitions. The petitions disclose the following: The claim of the railway company is for repairs to a cross-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing of its railroad tracks and the street railroad tracks of the traction company, and also the latter's proportion of the wages of flagmen maintained at the crossing. The items aggregate \$280.54. The claim of the coal company for \$1,166.86 is for coal sold and delivered. The debts were incurred within a few months before the trust company sued to foreclose the mortgage. The maintenance of the crossing and the services of the flagmen were necessary to the safe conduct of the business of both railroad companies and the performance of their public duties. Under the arrangement between them the items should have been paid by the traction company monthly. The coal sold by the coal company was for current use from day to day and was so used. It was essential to the operation of the property of the traction company and the performance of its franchise obligations, and by agreement and understanding the payments should have been made monthly out of the current income. During the time the debts were incurred, and also after the receivers took charge, the income of the business of the traction company exceeded the ordinary expenses of operation, and the excess for each period, which was more than enough to pay the interveners, was diverted by the company and the receivers, respectively, to the betterment and improvement of the mortgaged property resulting in an inequitable advantage to the bondholders; also, the receivers now have enough of the surplus income to pay the claims in question.

It is well settled that a railroad mortgagee impliedly agrees that the current debts incurred in the ordinary course of the mortgagor's business shall be paid from current income before his claim thereto attaches. It is immaterial that the creditor has not reduced his claim to judgment or that it arose and was not asserted before the mortgagee impounded the income in a suit to foreclose. The operation of the property in the ordinary course is essential to the very life of the franchises of the mortgagor, to the value of the property embraced in the mortgage, and to the performance of the obligations of the mortgagor to the public. That it be operated is to the advantage of the mortgagee and he is held to have so contemplated and to have consented to the necessary attendant current expense. So when labor, materials, and supplies are furnished, not on the personal credit of the mortgagor, but with the expectation or understanding that they will be paid for out of current income, the creditor has an equity superior to the lien of the mortgagee and the bondholders he represents which is not destroyed by the appointment of receivers. Where such claims are not paid and there has been a diversion of income to the betterment or improvement of the mortgaged property, and therefore to the benefit of the bondholders, or to the payment of interest to them, equity may require restoration when the mortgage is being foreclosed. These principles have been frequently expressed. See *Rodger Ballast Car Co. v. Railroad*. 83 C. C. A. 403, 154 Fed. 629, and cases cited. The interveners aver that an excess of income, sufficient to discharge their claims, both before and after the receivers took charge, was diverted to the benefit of the bondholders and also is now in the possession of the receivers. It is not necessary therefore to consider

whether, failing in proof of these averments, they can resort to the corpus of the mortgaged estate.

The decrees are reversed, and the causes remanded for further proceedings.

RUTLAND TRANSIT CO. v. L. P. & J. A. SMITH CO. PRESIDENT AND
DIRECTORS OF INS. CO. OF NORTH AMERICA v. SAME.
HOLMES v. SAME.

(Circuit Court of Appeals, Sixth Circuit. December 2, 1913.)

Nos. 2370, 2371, 2372.

NAVIGABLE WATERS (§ 26*)—OBSTRUCTION BY PIER UNDER CONSTRUCTION—IN-
JURY TO VESSEL BY COLLISION—LIABILITY.

Injury to a steamer in the night from collision with a crib under construction as an extension of the breakwater at Cleveland harbor *held* on the evidence, which showed that the contractors maintained a proper and sufficient light on the crib which was burning at the time, to have been due either to the failure of the vessel to keep an efficient lookout or to the fact that the smoke and fog were so thick that the light could not be seen from the vessel as she approached the entrance, for which in either case the contractors were not liable.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 133-166; Dec. Dig. § 26.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; Wm. L. Day, Judge.

Suits in admiralty by the Rutland Transit Company, by the President and Directors of the Insurance Company of North America, and by C. M. Holmes against the L. P. & J. A. Smith Company. Decree for respondents, and libelants appeal. Affirmed.

For opinion below, see 199 Fed. 640.

Charles E. Kremer, of Chicago, Ill., for appellants.

Harvey D. Goulder and Frank S. Masten, both of Cleveland, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. In the course of improvements to the harbor at Cleveland, the Smith Company, which had the construction contract with the United States, had erected a crib, the timbers of which projected above the water and the sloping stone substructure of which came nearly to the surface. This crib was about 1,000 feet out in the lake, approximately in line with one side of the opening in the existing breakwater, and it was a step in building a breakwater extension. The steamer Prince, which belonged to the Rutland Company, and whose cargo belonged to, or was insured by, the appellants in the other cases, suffered injury to herself and her cargo as she was endeavoring, in the nighttime, to go into the harbor. Three separate libels were brought against the Smith Company; the only fault alleged

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

being that the crib was not marked by a proper light. On final hearing the libels were dismissed, and the libelants bring these appeals.

In the shape which these records take, the questions involved are only questions of fact. If we assume, as for the purpose of this decision we may, that the injury was caused by the boat striking an integral part of the crib, the only vital further inquiry is whether a proper light was there maintained. The evidence shows without dispute that a lantern, of suitable size and shape and with a light burning therein, was upon the crib at the time of the accident. Libelants must stand, as they do, upon the theory that the light had become dim or the glass had become smoked to an extent which made the light an insufficient discharge of the Smith Company's duty in the premises. The testimony discloses that there was considerable fog and smoke settled down, which would lift and then close in again and would be different in different places, and at different times in the same place; and that this light was seen at about the time in question by many witnesses at varying distances and by several at a distance amply sufficient for due warning to the Prince, if she had seen it from the same distance. It comes to this: According to the weight of the evidence, it must be held that the light was sufficient, unless that conclusion is to be changed by the fact that the men on the Prince did not see it until after she struck. Under these circumstances, and regardless of original questions of burden of proof, it is clear that the burden rested on appellants to show that they did take all due care in the matter of a vigilant lookout for a considerable time before they reached the crib. A discussion of the evidence on this point would be unprofitable. It is enough to say that libelants do not successfully carry this burden, and our conclusion, from all the testimony, is either that the Prince would have actually received sufficient warning by the light, if a proper lookout had been kept, or that in that particular locality and at that time the smoke and fog were continuously so thick that a good and sufficient light could not have been seen. Either of these results is fatal to appellants' claims. Maintaining a vigilant lookout is essential (*The Ottawa*, 3 Wall. 268, 273, 18 L. Ed. 165; *The Ariadne*, 13 Wall. 475, 478, 20 L. Ed. 542); and the necessity of any warning, other than a light, is not alleged.

Libelants allege as a fault, in this same connection, that the contractor did not maintain, in connection with the light, a guard or watch, and rely upon the analogy of the decisions that it may be negligent not to maintain an anchor watch on a vessel at anchor. In *re Eastern Dredging Co.* (D. C.) 159 Fed. 541; s. c., 162 Fed. 860, 89 C. C. A. 550; *The Starin* (D. C.) 113 Fed. 419. If the light on the crib had gone out or was sufficiently proved to have become dim and inefficient, this question would be material; but the situation which we have recited does not establish any necessity for a watch or any harm from the lack of one.

Libelants further contend that from the direction in which the Prince was approaching, the light was obscured by some upright timbers on the crib. The construction indicates that there might be some such obscuration, probably temporary and trifling, but that the light was really

so hidden is only a surmise. It has no proof to support it, except the fact that the light was not seen from the Prince, and this fact loses any controlling significance when put in connection with the further fact that the Prince's lookout was, much of the time, engaged in other duties.

The decree in each of the three cases is affirmed, with costs.

CRISTIN et al. v. LEONARD.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 10.

1. CONTRACTS (§ 330*)—BREACH—NECESSARY PARTIES.

In an action for breach of a contract for the sale of corporate stock, the evidence showed that defendant agreed that on the incorporation of the company and delivery of its whole capital stock he would transfer certain mining property to it, and pay 5,000 shares into the treasury, and give 10,000 shares to plaintiffs and L. on their selling 10,000 other shares of defendant's stock so as to net defendant \$50,000 in cash. *Held*, that L. was an indispensable party to the suit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1589, 1591–1594, 1596, 1597, 1602–1604; Dec. Dig. § 330.*]

2. CONTRACTS (§ 346*)—BREACH—ALLEGATION AND PROOF.

In an action for breach of a contract, plaintiff must not only prove the contract alleged in the complaint, but show performance on his part.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718–1751; Dec. Dig. § 346.*]

In Error to the District Court of the United States for the Southern District of New York.

Action by Jules Ami Cristin and another against Charles R. Leonard. Judgment for defendant, and plaintiffs bring error. Affirmed.

F. L. Crocker, of New York City, for plaintiffs in error.

S. Robinson, of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an action at law. The complaint sets up three causes of action:

First, that the plaintiffs Cristin and Lockhart, at the defendant's request, organized a corporation with a capital of \$200,000 in 40,000 shares of \$5 each, which was delivered to the defendant in exchange for certain mining property, he agreeing to pay 5,000 shares of stock into the treasury; that in consideration of this service and further of the plaintiff's selling \$25,000 of the defendant's stock at par, the defendant agreed to give to them and his brother, Frank M. Leonard, 5,000 shares of his stock; that the plaintiffs did organize the company and sell the said stock, and have demanded two-thirds of the said 5,000 shares, which the defendant has refused to deliver.

Second, that in consideration of the aforementioned service and of a sale of another 5,000 shares of the defendant's stock at par, the defendant agreed to give other 5,000 shares of his stock to the plaintiffs

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 209 F.—4

and Frank M. Leonard; that the plaintiffs sold 1,000 shares of the said stock, but the defendant has refused to permit them to sell the balance, wherefore they claim two-thirds of the value of said 5,000 shares.

Third, that in consideration of the aforementioned service and the sale of 10,000 shares of the defendant's stock, netting him \$50,000, the defendant agreed to give to the plaintiffs and Frank M. Leonard 10,000 shares of his stock, 5,000 shares upon the receipt of the first \$25,000 and 5,000 shares upon the receipt of the second \$25,000; that the plaintiffs sold 6,000 shares, but the defendant refuses to let them sell the balance or to pay them anything at all for their services.

The complaint alleges that Frank M. Leonard's interest was not joint with theirs, but severable, and that he has received one-third of the said stock compensation mentioned or its equivalent from the defendant.

[1, 2] It appeared at the trial that the defendant had never had any personal communication; either oral or in writing, with the plaintiffs. He and his brother Frank were both examined as witnesses for the plaintiffs. Frank M. Leonard was not asked as to the extent of his authority to make a contract for the defendant. Upon that subject the defendant's was the only testimony, and was that he agreed that upon the incorporation of the company and the delivery to him of its whole capital stock, to transfer certain mining property to it and pay 5,000 shares into the treasury, and to give 10,000 shares to the plaintiffs and Frank M. Leonard upon their selling 10,000 shares of his own stock so as to net him \$50,000 in cash.

Upon this state of the testimony the trial judge directed a verdict for the defendant. He thought there was a defect in parties, Frank M. Leonard not being made either a plaintiff or a defendant, and that there was no proof of any contract alleged in the complaint, nor any proof of performance of the contract proved at the trial.

We see no error in this, and the judgment is affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. CRAIG.

(Circuit Court of Appeals, Sixth Circuit. December 2, 1913.)

No. 2,379.

RAILROADS (§ 400*)—LIABILITY FOR INJURY TO PERSONS ON TRACK—KEEPING LOOKOUT.

Evidence in an action to recover for the death of children killed by a train on defendant's railroad *held* to justify the court in refusing to direct a verdict for defendant on the ground that those in charge of the engine used every possible means to stop the train as soon as the children appeared as an obstruction on the track, and so brought defendant within the protection of Shannon's Code Tenn. § 1574, subd. 4, and to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*

Care required of railroads as to trespassers on or near track, see note to Louisville & N. R. Co. v. Womack, 97 C. C. A. 566.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action at law by J. B. Craig, administrator of Eva and May Craig, against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Horace M. Carr, of Harriman, Tenn., for plaintiff in error.

J. C. J. Williams, of Huntsville, Tenn., and Cassell & Harris, of Harriman, Tenn., for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

PER CURIAM. The intestate children of defendant in error were struck and killed by the locomotive engine of plaintiff in error, and recovery had under consolidated action. The meritorious question presented by the motion to direct verdict is whether it appears by substantially undisputed testimony that those in charge of the engine used every possible means to stop the train as soon as the children appeared as an obstruction on the track, and so brought the defendant within the protection of the Tennessee Precautions Act (Shannon's Code, § 1574, subd. 4).

Giving to the testimony a construction most favorable to plaintiff, we think it would tend to support a conclusion that the children should have been seen 400 to 500 feet ahead of the engine, but that they were not in fact seen, and therefore no attempt made to stop the engine, or to give the statutory warnings, until they were but 175 feet away.

The judgments are accordingly affirmed, with costs.

LAWSON v. METAL PRODUCTS CORPORATION.

(Circuit Court of Appeals, First Circuit. November 13, 1913.)

No. 1,022.

PATENTS (§ 328*)—INVENTION—GEM SETTING.

The Lawson patent, No. 983,295, for an improved gem setting, *held* void for lack of patentable invention in view of the prior art. Consolidated Electric Company v. Holtzer, 67 Fed. 907, 15 C. C. A. 63, applied.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Suit in equity by James W. Lawson against the Metal Products Corporation. Decree (203 Fed. 284) for defendant, and complainant appeals. Affirmed.

Howard A. Lamprey and Wilmarth H. Thurston, both of Providence, R. I., for appellant.

Alexander P. Browne, of Boston, Mass., for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. This is a suit brought for the infringement of Letters Patent No. 983,295, issued to James W. Lawson

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on February 7, 1911. There are three claims, but the only one brought to our attention is No. 3, as follows:

"(3) The improved gem-setting herein described consisting of a body portion having an internal seat adapted to receive a gem, an integral flange extending from the top outline of said seat, and ornamental structures extending integrally from the base of said body portion and from the outer surface thereof and in a plane substantially parallel to the plane passing through said seat, substantially as and for the purpose set forth."

The specification says as follows:

"My invention relates to an improvement in jewel-settings, and has for its object the making of various connections and ornaments integral with the box-setting or gem-setting now in common use."

So far as this common use is concerned, it is only necessary to refer to the patent issued to George William Dover, No. 795,109, of July 18, 1905, which contains everything claimed by the patentee here, except what is covered by the words in claim 3, as follows:

"And ornamental structures extending integrally from the base of said body portion and from the outer surface thereof, and in a plane substantially parallel to the plane passing through said seat."

The District Court dismissed the bill for want of patentability, without reference to the question of infringement, basing the want of patentability upon the Dover patent. In reply on this appeal the complainant says that the propositions on which the District Court dismissed the bill were not admissible because the answer failed to allege invalidity. It is true that the answer does not deny the validity of the patent in the usual terms; but the first paragraph thereof sufficiently denies patentability in view of the general state of the art, although not sufficiently with reference to the special defense of anticipation.

The learned judge of the District Court evidently thought that the Dover patent showed a construction which did not completely anticipate the patent in suit because it did not cover ornamental extensions which were integral with the box-settings. That was the way he described the addition made by the patent in suit to the prior art. If there was no such addition, then the Dover device was properly an anticipation. If he was in error about this, then we must apply the rule we will explain as follows: Walker on Patents (4th Ed. 1904) § 599, explained with reference to cases in which the court will take judicial notice of the matter of patentability. The propositions stated by Mr. Walker are very carefully guarded and properly limited. We think this case comes within those propositions with all their limitations. The alleged invention comes down to a mere matter of building solid what was formerly soldered together. In *Consolidated Electric Company v. Holtzer* (decided April 16, 1895) 67 Fed. 907, 908, 15 C. C. A. 63, 64, where the matter came directly in issue, we said:

"The right to improve on prior devices by making solid castings in lieu of constructions of attached parts is so universal in the arts as to have become a common one, so that the burden rests on any one who sets up this improvement, in any particular instance, as patentable, to show special reasons to support his claim."

This means that the right to improve in the way stated is a public right of which no patentee or judicial tribunal can justly deprive the public. This rule was applied by Judge Townsend in *Chatillon v. Forscher* (C. C.) on August 7, 1899, by an opinion published in 96 Fed. 342, 343, where it is evident that he was of the opinion that he might take judicial notice of this proposition; and he added that it was not material that the arts referred to were not analogous, provided the devices "were common to the general field of arts"; and he there-upon cited our own decision we have referred to. The case was re-affirmed by us in *Nutter v. Brown* (announced on January 2, 1900) 98 Fed. 892, 893, 39 C. C. A. 332, and in *United States Peg-wood Co. v. Sturtevant Co.* (announced on October 6, 1903) 125 Fed. 378, 381, 60 C. C. A. 244. The same rule was stated and applied with amplification in *Standard Co. v. Caster Co.* by the Circuit Court of Appeals in the Sixth Circuit, in a decision passed down on December 17, 1901, 113 Fed. 162, 165, 166, 51 C. C. A. 109, where the *Holtzer Case* was again cited and applied, and also some other decisions, including one of the Supreme Court. The *Holtzer Case* was again cited and applied as a general rule in *General Electric Co. v. Yost Co.* by the Circuit Court of Appeals in the Second Circuit, on May 24, 1905, 139 Fed. 568, 570, 71 C. C. A. 552, in a very important and thoroughly considered opinion. The same rule has been elsewhere several times applied and never doubted, so far as we can discover. In accordance with the recognized usage, where a specific rule of this kind has been several times accepted without question by courts of authority, it becomes a matter presumably of judicial cognizance and one, therefore, which may be applied to patents under the present circumstances.

Whether the making solid is by actual casting or by stamping is, of course, *prima facie* immaterial.

It is apparent that there is some question with reference to the tools and other mechanisms which were most available for completing, under all circumstances, some of the specimens of gem-setting which the complainant offered to the public; but the patent in this case is strictly limited to a product, some examples of which, moreover, could be produced by the older tools; and therefore we have no occasion to deal with the mechanism or mechanisms which various manufacturers might use in preparing this product for the market.

The decree of the District Court is affirmed; and the appellee recovers its costs of appeal.

DAVIES v. BOWES.

(District Court, S. D. New York. November 17, 1913.)

1. COPYRIGHTS (§ 47*)—INFRINGEMENT—ASSIGNMENT.

Where complainant wrote a short story which was published in a copyrighted newspaper, after which the publishers assigned their rights under the copyright to complainant, his rights were limited to those of his assignors.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 45; Dec. Dig. § 47.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COPYRIGHTS (§ 2*)—INFRINGEMENT—WHAT LAW GOVERNS.

Where a copyrighted newspaper published a short fiction story, its rights against an alleged infringer were measured by the statute in force at the time of publication.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 1; Dec. Dig. § 2.*]

3. COPYRIGHTS (§ 51*)—INFRINGEMENT—CAUSE OF ACTION—ELEMENTS.

Rev. St. § 4952, as amended in 1891 (U. S. Comp. St. 1901, p. 3406), provides that the author or proprietor of any book shall have the sole liberty of printing, copying, and vending the same, and that authors or their assigns shall have the exclusive right to dramatize their works for which copyrights have been obtained. *Held* that, in order to obtain relief for alleged infringement of a copyrighted publication, the burden is on complainant to show that the copyright exists and that copying has taken place.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 51.*]

4. COPYRIGHTS (§ 75*)—INFRINGEMENT—EXISTENCE OF COPYRIGHT TO FICTION PRINTED AS NEWS.

Where complainant, a newspaper reporter, wrote and had printed in a copyrighted newspaper an alleged report of an incident as news which was in fact pure fiction, it was not covered by the copyright of the newspaper so as to entitle complainant, after having obtained an assignment of the publisher's rights under the copyright, to restrain the subsequent use of the purported facts stated therein as part of the basis of a dramatization.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 65; Dec. Dig. § 75.*]

In Equity. Suit by Acton Davies against Edward J. Bowes for infringement of a copyright. On final hearing. Bill dismissed.

For purposes of argument, the following assumptions of fact are made: They are in accord with the contentions of complainant and are therefore most favorable to him. If, however, decision were put upon other points, some further investigation of the facts would be necessary.

In June, 1908, Davies was in the employment of a newspaper, the Evening Sun. It was his especial duty to provide theatrical news and criticism; he also wrote short stories. At the time mentioned, he wrote, and the Sun published under the caption "News of the Theaters," something which began as follows: "A Massachusetts real life drama which eclipses the plot of 'The Thief.'" The drama in question begins thus: "Two men who had missed their connection with a Boston train last Tuesday morning found themselves in a little interior Massachusetts town with four hours to be killed." Then is told how they observed the drama during the said four hours, and found the same by sitting in the courthouse of the village, where was put on trial a woman accused of theft, and who, it appeared, had actually stolen for the purpose of providing luxuries, and perhaps comforts, for the child to which she soon expected to give birth. She admitted the larceny, whereupon her husband asserted himself to be the thief, and she repudiated his assertion, dramatically exclaiming (in substance) that the father of her child was lying to save her. Before the result of this court episode could be known, the travelers first mentioned were obliged to leave and catch their train. The episode is related almost wholly in the third person, though the language of the woman in asserting her own guilt and her husband's innocence is put in the first.

The edition of the Evening Sun containing this publication was copyrighted, and in course of time, by a train of circumstances unnecessary to recite, attracted the attention of one Kenyon, who says that he supposed it to be a journalistic statement of an actual occurrence. Davies' name appeared at the foot of the column headed "News of the Theaters" in the New York Sun, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Davies himself says that the tale was not true; that he regarded it as a short story, which he had cast in the form of an actual occurrence because he thought it more striking. Kenyon testifies that out of this tale in the Sun and much other and more important material, plus his own imaginings, he constructed a play called "Kindling." Defendant is a producer of that play, and in this suit Davies considers himself aggrieved because, having received an assignment of the copyright privileges of the Evening Sun, he accuses Kenyon of unlawful use of the above referred to product of Davies' imagination. For the purposes of this decision (only) it is found as a fact that "Kindling" contains a substantial part of the plot of Davies' story, if it be regarded as a story in the sense of fiction.

Mr. Treadwell, for complainant.

Mr. Rosenheim, for defendant.

HOUGH, District Judge (after stating the facts as above). Complainant's contention is that this case is on all fours with *Dam v. Kirke La Shelle Co.*, 175 Fed. 902, 99 C. C. A. 392, 41 L. R. A. (N. S.) 1002, 20 Ann. Cas. 1173. This may be so if (and only if) the Evening Sun obtained the protection of copyright in the matter written by Davies.

[1] The rights of this complainant are, of course, to be measured by those of his assignor.

[2] The rights of the Sun must depend upon the language of the statute in force at the time of publication, viz., Rev. St. 4952, as amended in 1891 (U. S. Comp. St. 1901, p. 3406).

[3] Of the act referred to, the words applicable to this litigation are as follows:

"The author * * * or proprietor of any book * * * shall * * * have the sole liberty of printing * * * copying * * * and vending the same. * * * Authors or their assigns shall have the exclusive right to dramatize * * * their works for which copyright shall have been obtained."

It follows that there are two prerequisites to relief. One is that a copyright shall exist, and the other is that a copying shall have taken place.

[4] Decision in this case is put upon a single narrow ground—not because other grounds could not be found, but because the point to be stated depends upon a rule of morals.

There never was any copyright in this alleged episode of trial, because it was printed as news; it was presented to the public as matter of fact and not of fiction; the readers of the Sun were invited to believe it, and Davies substantially admits that he wrote it in the form he did in order to induce belief.

How much belief is to be accorded to newspaper stories is matter of opinion; but it is a matter of morals that he who puts forth a thing as verity shall not be heard to allege for profit that it is fiction.

The statute is infringed only by "copying" that which is "copyrighted." The essence of copying is *literary piracy*, viz., the appropriation of an author's intellectual labors.

The fact that something has been printed is not of primary importance, and neither is the embodiment of labor in what is commonly called a "book." The inquiry always is as to the literary form. Of course, a statement of fact may be protected by copyright against any

piracy of the form of statement, because such form may, and often does, display literary effort of merit. But there can be no piracy of the facts, because facts are public property.

Nor does it change the result that the facts are stated in dramatic form. It is conceivable that the actual dialogue of a courtroom would be attractive on the stage, but the reporter of said dialogue could never obtain copyright thereupon.

All that was ever copyrighted regarding this tale was the form of telling, the sequence and choice of words and arrangement of sentences coined by the plaintiff, who pretended to be a reporter and not a fiction writer. But the words of the actors in the alleged "Massachusetts real life drama" have not been appropriated or copied by Kenyon nor used by the defendant.

The point above made as to the impossibility of copyrighting news has been recognized in *Tribune Co. v. Associated Press* (C. C.) 116 Fed. 126, and cases cited, and a fair summary of the law on this head is, I think, contained in *Bowker on Copyright*, pp. 88, 89. If therefore the tale in question were admittedly news, there would be ample authority for this decision; since it only pretended to be news, the proposition is more novel. But in my judgment the reasoning of *Wright v. Tullis*, 1 C. B. 873, is applicable. There a publisher pretended that a copyrighted work was a translation from a well-known foreign writer. It was, on the contrary, an original product by a native. It was held, and I think rightly held, that such pretense vitiated the copyright. The pretense here was for the purpose of attracting attention and lending interest to an alleged occurrence which if told as fiction would have been tawdry and unconvincing. The man who used the episode swears that he thought it at least as true as most journalistic news items; and I may add that I remained under the same impression until the argument of counsel enlightened me.

The bill is dismissed, with costs.

Ex parte THAW.

(District Court, D. New Hampshire. September 16, 1913.)

No. 86, Law.

HABEAS CORPUS (§ 45*)—STATE PRISONER HELD FOR EXTRADITION—JURISDICTION AND POWER OF FEDERAL COURT.

Where it is alleged that a person arrested under state process for extradition to another state is restrained of his liberty in violation of the Constitution and laws of the United States, a federal court has full power to entertain habeas corpus proceedings for his release, and may in an extreme case proceed speedily and summarily, without regard to the pending extradition proceedings; but the court may in its discretion, and in recognition of the principle of comity, delay the hearing to await the action of the executive of the state without losing jurisdiction, and such course is especially proper when neither party insists on a speedy hearing.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 38-45; Dec. Dig. § 45.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Petition of Harry K. Thaw for writ of habeas corpus. Statement of reasons for delay in hearing.

In view of the novelty of the questions raised in this case, relating both to the law of extradition and to procedure, the following excerpt from the proceedings preceding and following the filing of the rescript herein is appended:

The petition of Harry Kendall Thaw respectfully shows to this court:

First. That said Harry Kendall Thaw is unlawfully imprisoned and deprived of his liberty without his consent and volition, by Holman A. Drew, sheriff of the county of Coös, state of New Hampshire, and some agent or subordinate of the said sheriff, or other person whom he designates by the fictitious name of John Doe; said captor's real name being unknown to the petitioner.

Second. That petitioner is unlawfully detained within the district of New Hampshire under color of the authority of the United States, in violation of the provisions of the United States Constitution, art. 4, § 2, subd. 2, and section 5278 of the Revised Statutes of the United States concerning the rendition of alleged fugitives from justice from any state in the United States, and contrary to the provisions of the fourteenth amendment of the Constitution of the United States forbidding any state to deprive any person of liberty without due process of law; that a copy of the warrant under which petitioner is detained is hereto annexed and made part hereof, being marked "Exhibit A," and petitioner verily believes that said warrant is the cause or pretense of his imprisonment or restraint; that the petitioner was arrested and taken into custody under and pursuant to said warrant on the 10th day of September, 1913, within the county of Coös and within the district of New Hampshire.

Third. That petitioner avers that said warrant under which petitioner is detained and imprisoned is illegal, null, and void, and was issued without jurisdiction; and he particularly refers to each and all of the following grounds upon which said averment is based, and avers the truth of the facts herein stated concerning said warrant:

1. That in the said warrant it is stated and alleged: "That one Harry K. Thaw, Richard J. Butler, a man about six feet tall, fairly light complexion, smooth shaven, and weighing about 185 or 190 pounds, and having a large nose, and Roger Thompson, a man about six feet tall and weighing about 160 or 165 pounds and clean shaven and square shoulders and well built and wearing a blue suit, fair complexion, Michael O'Keefe, Eugene Duffy, and Howard Barnum, and Thomas Flood, at the city of Beacon, county of Dutchess and state of New York, on the 17th day of August, 1913, did willfully, knowingly, corruptly, and falsely commit the crime of conspiracy against the people of the state of New York by conspiring among themselves to commit acts for the prevention and obstruction of justice, and the due administration of the laws, and to commit a crime by conspiring and arranging and planning to effect and procure the escape of one Harry K. Thaw, a prisoner duly committed to and confined in the Matteawan State Hospital, a criminal insane hospital of the state of New York, and by arranging, procuring, planning, and carrying out the escape of the said Harry K. Thaw, whereby on the 17th day of August, 1913, said Harry K. Thaw, with the aid and assistance of the said above-named parties and defendants, did escape from the said Matteawan State Hospital for the Criminal Insane at the city of Beacon, in the county of Dutchess and state of New York, contrary to the form of the Criminal Code of said state of New York, and against the peace and dignity of said state of New York. That the said Harry K. Thaw has fled from justice in said state of New York, and has made his escape to, and is now found within this state, and is liable, by the Constitution and laws of the United States, to be delivered over upon the demand of the executive of said state of New York, from which the said Harry K. Thaw has fled, to be removed to the state having jurisdiction of said crime. Wherefore the said Holman A. Drew prays that a warrant may issue to bring the said Harry K. Thaw before the police court for the dis-

trict of Colebrook, that the said Harry K. Thaw may be held to answer to this complaint, and that justice may be done in the premises."

2. That the said warrant fails to charge the petitioner, Harry K. Thaw, with having committed any crime, and that the magistrate signing the said warrant is without jurisdiction to hold the petitioner upon the same, in that the said warrant fails to charge petitioner with any crime.

3. Because the said warrant affirmatively and on its face shows that the said Harry K. Thaw, this petitioner, was duly committed and duly confined in the Matteawan State Hospital for the Criminal Insane, and is therefore unable to be guilty of any crime under the Constitution and laws of the state of New York.

4. Because your petitioner has been adjudged insane in proceedings had under and pursuant to the laws of the state of New York, and is therefore unable to and has not the capacity to commit a crime under the Constitution of the United States and laws of the United States or of the state of New York or of the state of New Hampshire.

5. Because under and pursuant to the laws of the state of New York, it is not criminal for an inmate of a state hospital for the insane to escape therefrom, there being no provision in the laws of the state of New York making it either a felony, misdemeanor, or other offense for one confined in a state hospital to escape therefrom.

6. Because your petitioner is not a fugitive from justice from the state of New York, not having committed any crime therein, nor having the capacity to commit any crime therein, and is therefore not a fugitive in the state or district of New Hampshire.

Fourth. That your petitioner is informed and believes that there are at present in the state and district of New Hampshire certain officers from the Matteawan Hospital for the Criminal Insane in the state of New York, and other officers of the state of New York, who intend unlawfully and forcibly to seize this petitioner and unlawfully and forcibly, under color and pretense of the said warrant and of the proceedings taken and had thereunder, to obtain possession of the body of this petitioner, and unlawfully and forcibly, in violation of his legal rights, and without due process of law and in contravention of article 4, § 2, of the Constitution of the United States, and of the fourteenth amendment to the Constitution of the United States, to convey this petitioner, against his will, from the state and district of New Hampshire to the state of New York.

Fifth. Your petitioner further avers that he has not at any time been confined in the said Matteawan State Hospital for the Criminal Insane as the result of or upon the finding of any verdict of conviction of any offense, whether felony, misdemeanor, or other offense against the state of New York or elsewhere, but has merely been confined therein as an insane person or as an alleged insane person; and your petitioner reserves the right to amend this petition and to supplement the same by any further facts which he may be advised by his counsel may be proper and material to the application herein made.

Sixth. That your petitioner has been advised by counsel from the bar of both said states of New York and New Hampshire that the alleged offense which he is claimed to have committed in the said state of New York, and for which said warrant is issued, is not an offense against the laws of the state of New York, and the facts upon which the said alleged crime is based do not constitute a proper charge of such felony, misdemeanor, or any other offense against the said state of New York.

Seventh. That the said warrant is not taken out in good faith, nor will this petitioner if returned to the state of New York be put upon trial upon any indictment charging him with the offense of conspiring, but that the said warrant and complaint are merely a pretext to return the petitioner to the state of New York and to confine him there, within the said Matteawan State Hospital for the Criminal Insane.

Wherefore your petitioner prays that a writ of habeas corpus, directed to the said Holman A. Drew, sheriff of the county of Coös, in the state of New Hampshire, and to the said John Doe, wherever they may be found within

the district of New Hampshire, having the petitioner in custody, and that your petitioner, pending such hearing, may be held to bail; and your petitioner will ever pray.

Dated September 11, 1913.

Harry Kendall Thaw, Petitioner.

Martin & Howe,
Drew, Shurtleff, Morris & Oakes,
Goss & James,
T. F. Johnson,
House, Grossman & Vorhaus,
Attorneys for Petitioner.

United States of America, District of New Hampshire.

Coös—ss.:

Harry Kendall Thaw on oath deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters, he believes them to be true.

Sworn to before me this 11th day of September, 1913.

Merrill Shurtleff, Justice of the Peace.

Rescript.

(September 13, 1913.)

ALDRICH, J. The petition of Harry K. Thaw for a writ of habeas corpus, under United States authority, invokes the fourteenth amendment to the Constitution of the United States, which, among other things, declares that no state shall deprive any person of life, liberty, or property without due process of law, as well as other federal laws with reference to the restraint of personal liberty. It is not necessary for present purposes to consider the allegations of the petition, other than that based upon the fourteenth amendment, because, under federal statutes, the writ upon such an allegation as that contained in the petition issues quite as a matter of course, if not as a matter of right. It is ordered that the writ issue and be made returnable before me at Littleton, N. H., September 16, 1913, at 11 a. m., at which time, unless this order be extended, the respondent will make proper answer.

While reserving to federal authority the exercise of all such ultimate power, and the discharge of all such duty, as the Constitution and laws of the United States contemplate, in a situation like this, and while according to federal and state interpretations, state authority in respect to extradition results primarily, if not altogether, from federal law, it is not intended that the issuance of the writ shall interfere at all for the present, at least, with such of the state authorities of the state of New Hampshire as may be called upon to deal with problems involved in the proposition of extradition.

All persons should be strictly enjoined from interference with the execution of the writ.

The United States marshal, proceeding under the writ of habeas corpus, should confer and co-operate with Holman A. Drew, or any other person claiming to hold said Harry K. Thaw in custody, and, in connection with him or them, employ and use such force as is necessary to hold the custody of Thaw safe and such as may be necessary to protect him from violence or indignity, if such shall be attempted.

Let an order be attached to the writ which shall cover these suggestions.

Writ of Habeas Corpus and Order of Court.

(Issued September 13, 1913.)

United States of America.

To Holman A. Drew, Sheriff of Coös County, State of New Hampshire, and "John Doe," the name "John Doe," being fictitious and being used to designate an agent, deputy, aid or assistant of the said Holman A. Drew, Sheriff of Coös County aforesaid, or other person, having in custody one

Harry Kendall Thaw, the real name of said persons being unknown to the petitioner. Greeting: We command you that you have the body of Harry Kendall Thaw by you imprisoned and detained, together with the time and cause of such imprisonment and detention, by whatever name said Harry Kendall Thaw shall be called or charged, before the Honorable Edgar Aldrich, United States District Judge for the District of New Hampshire, on the sixteenth day of September, A. D. 1913, at 11 o'clock in the forenoon of that day, in the United States courthouse at the town of Littleton, in the district of New Hampshire aforesaid, to do and receive what shall then and there be considered concerning said Harry Kendall Thaw, and have you then and there this writ.

Witness Honorable Edgar Aldrich, United States District Judge for the District of New Hampshire, at Concord in said District, this 13th day of September, 1913.

Burns P. Hodgman, Clerk U. S. District Court.

[Seal.]

To E. P. Nute, U. S. Marshal: In executing the precept to which this order is annexed, you will proceed to Colebrook, N. H., or such other place as you may find Holman A. Drew or such other person or persons covered by the writ as may have the said Harry K. Thaw in custody, and when found, co-operate with him or them, and in connection with him or them employ or use such force as is necessary to hold the custody of Thaw safe, and such as may become necessary to protect said Thaw from violence and indignity, if such shall be attempted. All persons are enjoined from interfering with the proper execution of the process to which this is annexed, and you will see that this injunction is executed.

By order of Edgar Aldrich, Judge of the District Court of the United States for the District of New Hampshire.

Burns P. Hodgman, Clerk U. S. District Court.

[Marshal's Returns.]

United States of America, District of New Hampshire—ss.:

Concord, N. H., September 13, 1913.

I certify that I have this day served on James P. Tuttle, Attorney General of the State of New Hampshire, a copy of the within writ of habeas corpus and order of court thereto attached, both attested by Burns P. Hodgman, Clerk of U. S. District Court.

F. S. Johnson, Deputy U. S. Marshal.

United States of America, District of New Hampshire—ss.:

Colebrook, N. H., September 15, 1913.

Pursuant herewith, I have this day served the within writ of habeas corpus upon Holman A. Drew, sheriff of Coös county, who had the custody of the within named Harry K. Thaw, and upon William T. Jerome, of counsel for the state of New York, by giving to each of them, in hand, a copy of said writ and order of court thereon, both attested by Burns P. Hodgman, clerk of U. S. District Court.

E. P. Nute, United States Marshal.

[Returns of Sheriff on Writ of Habeas Corpus.]

United States District Court, District of New Hampshire.

In the Matter of Harry Kendall Thaw.

To the Honorable Edgar Aldrich, United States District Judge of the United States for the District of New Hampshire: I, Holman A. Drew, hereby respectfully make return to the writ of habeas corpus heretofore issued in the above-entitled matter and served on me, as follows:

First. I am the sheriff of Coös county in the state of New Hampshire.

Second. I have in my custody the body of one Harry Kendall Thaw, and pursuant to said writ of habeas corpus I now here produce the body of said Harry Kendall Thaw.

Third. The cause of my detention and imprisonment of said Harry Kendall Thaw is as follows: The said Harry Kendall Thaw was imprisoned by

me upon the 10th day of September, 1913, and has been since that time imprisoned and detained by me by virtue of certain process directed to me by a justice of the peace for the county of Coös in the state of New Hampshire. A true copy of said process is hereunto annexed, is marked "Exhibit A" and is intended to be taken as a part of this my return to the said writ of habeas corpus.

Fourth. And in further compliance with the command of said writ of habeas corpus I have now here the copy of said writ heretofore served upon me.

Dated September 16, 1913, at Littleton, New Hampshire.

Holman A. Drew, Sheriff of Coös County, State of New Hampshire.

Exhibit A.

To Bernard Jacobs, a Justice of the Peace for the County of Coös: Holman A. Drew, of Berlin in said county, complains:

"That one Harry K. Thaw, Richard J. Butler, a man about six feet tall, fairly light complexion, smooth shaven and weighing about 185 or 190 pounds, and having a large nose, and Roger Thompson, a man about six feet tall and weighing about 160 or 165 pounds and clean shaven and square shoulders and well built and wearing a blue suit, fair complexion: Michael O'Keefe, Eugene Duffy, and Howard Barnum, and Thomas Flood, at the city of Beacon, county of Dutchess and state of New York, on the seventeenth day of August, 1913, did willfully, knowingly, corruptly, and falsely commit the crime of conspiracy against the people of the state of New York by conspiring among themselves to commit acts for the prevention and obstruction of justice, and the due administration of the laws, and to commit a crime by conspiring and arranging and planning to effect and procure the escape of one Harry K. Thaw, a prisoner duly committed to and confined in the Matteawan State Hospital, a criminal insane hospital of the state of New York, and by arranging, procuring, planning, and carrying out the escape of the said Harry K. Thaw, whereby on the 17th day of August, 1913, said Harry K. Thaw, with the aid and assistance of the said above-named parties and defendants, did escape from the said Matteawan State Hospital for the Criminal Insane at the city of Beacon, in the county of Dutchess and state of New York, contrary to the form of the Criminal Code of said state of New York, and against the peace and dignity of said state of New York.

"That the said Harry K. Thaw has fled from justice in said state of New York, and has made his escape to, and is now found within this state, and is liable, by the Constitution and laws of the United States, to be delivered over upon the demand of the executive of said state of New York, from which the said Harry K. Thaw has fled, to be removed to the state having jurisdiction of said crime.

"Wherefore the said Holman A. Drew prays that a warrant may issue to bring the said Harry K. Thaw before the police court for the district of Colebrook, that the said Harry K. Thaw may be held to answer to this complaint, and that justice may be done in the premises."

[Signed] Holman A. Drew.

Coös—ss.:

September 10, 1913.

Personally appeared Holman A. Drew, and made oath that the above complaint by him subscribed is, in his belief, true.

Before me, Bernard Jacobs, Justice of the Peace.

[L. S.]

State of New Hampshire.

Coös—ss.:

To the Sheriff of said County of Coös, or his deputy, or to any Constable or Police Officer of any Town in said County: Whereas Holman A. Drew of Berlin in the county of Coös has exhibited to me, Bernard Jacobs, justice of the peace for the county of Coös, his aforesaid and annexed complaint, upon oath, against Harry K. Thaw of Beacon in the county of Dutchess and state of New York,

We command you, therefore, to take the said Harry K. Thaw (if to be found in your precinct) and bring him before the police court for the district of Colebrook at the Colebrook police courtroom, in Colebrook, in said county,

And we further command you, to summon to appear, and testify what he may know relating to said complaint, when and where you may have said before said police court for trial.

Dated the 10th day of September, 1913.

[Signed] Bernard Jacobs, Justice of the Peace.

Coös—ss.:

Sept. 10, 1913.

I have arrested the body of the above-named Harry K. Thaw and now have him before the said police court as commanded, and I have summoned, as above commanded, the said

[Signed] Holman A. Drew, Sheriff.

(On the back of the writ of habeas corpus is the following:) Writ of habeas corpus and returns thereon. Returned in the United States District Court sitting at Littleton within and for the District of New Hampshire, on Sept. 16, 1913; and the body of Harry K. Thaw was produced in open court by Holman A. Drew, sheriff of Coös county, against whom, with others, the writ was directed.

Attest: Burns P. Hodgman, Clerk.

Record of Proceedings at Littleton, September 16, 1913.

Clerk: In the matter of the petition of Harry Kendall Thaw for writ of habeas corpus. This writ is directed to Holman A. Drew. Is Mr. Drew in court?

Mr. Drew: Yes, sir.

Clerk: Mr. Drew, have you the body of Harry K. Thaw in court?

Mr. Drew: I have.

Court: The petitioner being in court, the responsibility in respect to the custody is shifted, and for the time being and temporarily I appoint Mr. E. P. Nute, United States marshal, and Holman A. Drew keepers, who for the present will be charged with the responsibility of custody. Who appears for the petitioner?

Mr. Shurtleff: If the court please, Drew, Shurtleff, Morris & Oakes appear for the petitioner, and Nathaniel E. Martin, of Concord, House, Grossman & Vorhaus, of New York City, as I understand it, and former Governor William A. Stone of Pennsylvania.

Court: Who appears to resist the writ? Who appears for the state of New York?

Mr. Jerome: In behalf of the state of New York, Mr. Franklin Kennedy, William Travers Jerome, as deputy Attorney General, and Mr. Bernard Jacobs, of the New Hampshire bar.

Court: Well, what is to be said?

Mr. Shurtleff: If the court please, I suppose we are here at this time to fix a time for the hearing on the petition. And we are informed, although not officially, that requisition papers have been filed with the Governor of our state, and that he has consented to grant us a hearing on the requisition papers. We are also informed, although not officially, that that hearing will be held to-morrow at 10 o'clock. At any rate, it will probably be held in the immediate future. We ask at this time that this hearing be postponed until some time after the Governor may have heard the case on the requisition papers and has rendered his decision.

Mr. Jerome: In regard to that, if it pleases your honor, we desire to interpose an objection. We believe that an examination of the return to this writ of habeas corpus will show that the questions raised are entirely frivolous in character, and interposed only for the purpose of delay. There is no federal question involved here, as shown by the petition and the return, federal in the sense that the laws of the state of New York or the state of New Hampshire are challenged. The memorandum which your honor filed in granting the writ pointed out that the writ issued practically as of course,

in view of the formal allegation that the detention was in violation of the fourteenth amendment of the Constitution of the United States, in that the prisoner was detained without due process of law. A wide familiarity with extradition cases enables me to say with some degree of assurance that the papers in this case are exactly the same as papers ordinarily employed in interstate rendition, are precisely such as have been time and time again passed upon both by the state and federal courts, and without exception, as far as I am aware, the extradition has always been granted. I wish in no way to challenge the good faith of counsel, but I feel constrained to say that in my judgment this writ has been sought, not so much to enable the relator and his attorneys to present to this court a serious question deserving this court's attention, but they have pursued a course which it seems to me, if the facts of which I am apprised are so, that approaches very close to trifling with the process of this honorable court. I hold in my hand an affidavit sworn to by one Lindsey Dennison, which sets forth in substance that he was informed by Mr. Grossman, one of the counsel for the defendants, the substance of it is that the purpose of obtaining this writ was because they had found that under the laws of the state of New Hampshire there would be danger, if the Governor honored the requisition from the state of New York, that this prisoner would be removed to the state of New York before they could obtain from the courts of New Hampshire a writ of habeas corpus; and that therefore they had resorted to this process in the federal court as a safeguard—safeguard being the word used by counsel—not to present to this court apparently any question, but that they might use the process of this court should the Governor grant requisition to delay the removal of the prisoner until they would have time to apply to the courts of New Hampshire. I think, sir, we have been now in trying to secure the return of the body of this prisoner to the state of New York something over three weeks. If there was really presented here a serious question, one that would be even of professional interest to discuss and examine, I would be the last person to oppose any reasonable delay that counsel might be adequately prepared to submit it to your honor, and that your honor might give it the consideration that it is entitled to. But an examination of this return by your honor I think will convince you that every one of the features required by the Revised Statutes of the United States and by the Constitution of the United States have been complied with. It is so plain on the face of the papers that there is not even a scintilla of violation of any right here, but it is the ordinary due course of procedure, that I beg that your honor will not remand us to some future day and impose upon us the further delays that have already occurred in this case. The requisition of the Governor of the state of New York has been presented to the Governor of the state of New Hampshire. He had made an appointment for to-morrow to hear it, but I am informed by Mr. Jacobs that he has postponed the hearing on that requisition until Friday. I say here to your honor that should the Governor decide adversely to this prisoner, as I practically told counsel, there will be no unseemly haste in endeavoring to remove this prisoner from the jurisdiction of the courts of New Hampshire. It is more important, sir, to the interests of the state of New York, which I have the honor to represent, that we should proceed with dignity and decorum in a case already filled with scandal than that we should have the body of Harry Kendall Thaw or any other fugitive from its justice. Should the Governor of the state of New Hampshire decide to return this man under the requisition, there will be ample opportunity afforded by the representatives of the state of New York, and I have no doubt, if we were unwilling to do it, the Governor would be willing to see to it that ample time would be afforded for such review of his action in the courts of New Hampshire as might be fit and appropriate. While it is a distasteful task to suggest that this writ is not for the purpose of submitting to your honor serious questions, I feel constrained, in view of the affidavit that I have here and which I will file, and if it is traversed there are at least four witnesses in court who can testify to the same state of facts, I feel constrained to say, sir, that this writ is applied for rather for the purpose of delay, that this may get into

the courts of New Hampshire on a writ of habeas corpus, than for the purpose of presenting to your honor a serious question either of law or fact.

Court: Well, precisely what is your motion here? The return of the sheriff is attached to this writ?

Mr. Jerome: The sheriff has made his return, I believe, sir.

Court: And in that he states the process under which Thaw is held?

Mr. Jerome: He does sir. If your honor will allow me to state the process which he says, the return shows that he made complaint before a justice of the peace of the state of New Hampshire in the county of Coös that Harry Kendall Thaw was a fugitive from justice to the state of New York, setting forth that he was in the state of New York charged with the crime of conspiracy, and asked that he be held to await extradition. Upon that the mandate of the justice issued to the sheriff, and the sheriff is holding him under that mandate. Since the issuance of that, the requisition papers from the Governor of the state of New York upon the Governor of the state of New Hampshire have arrived and have been filed with the Secretary of State of New Hampshire, and are now before the Governor.

Court: Has the sheriff made the commitment process under which Thaw was held in the New York institution a part of his answer?

Mr. Jerome: No, sir.

Court: That may become material. How do you understand that he was held there?

Mr. Jerome: How he was held in New York?

Court: Yes.

Mr. Jerome: I have herè an exemplified copy of the warrant under which he was held there.

Court: Was he held as a criminal or as an insane person?

Mr. Jerome: In the first instance, under our law when a jury acquits a man of a charge of murder where the defense is insanity, they are required by our law to specify in their verdict the ground of their acquittal. It was specified in the verdict acquitting him of the charge of murder in the first degree that he was acquitted on the ground of insanity. A Supreme Court judge of the state of New York before whom the trial was held then, in accordance with the provisions of our law, committed him to the state asylum for the insane at Matteawan in pursuance of our provisions of law until discharged therefrom by due process of law. Thereafter, on three occasions, he sued out writs of habeas corpus, contending that he had become sane and was entitled to his discharge. The first writ was returnable before a judge of the Supreme Court, and the hearing, if my memory is correct, occupied I think four days. That was in 1908, almost immediately after his acquittal and commitment to this institution. In 1909 he sued another writ and it occupied about five weeks. In July, 1912—

Court: I don't think the history of the case is material, except—

Mr. Jerome: Well, it is under orders of those judges that he is held, sir.

Court: One moment. I do not think the history of the case is material except so far as it bears upon the question of process, if at all—upon the question whether the process under which he is now held here in New Hampshire is due process within the meaning of the federal Constitution. Now it may be—we shall find out about that later on—that the process under which he was held at Matteawan will become material upon the question whether he is restrained in New Hampshire upon process in accordance with the spirit of the Constitution in respect to due process. I don't say that you should act upon this suggestion, if at all, now, but later on it may become material to inquire whether the conditions under which he is held in New Hampshire do not require that the authority under which he was held in New York should become a part of the proceeding here in the sense of the pending inquiry as to whether he is now constitutionally held and restrained by the state of New Hampshire. The time was fixed in the writ for the return, and was shorter than was intended; that is, I acted upon the supposition that this writ was to be served Saturday. I supposed that that was to be done. It seems it was not served until yesterday, so you are entitled

to further time. The sheriff is entitled to further time to perfect his return if he wishes it. Now you understand that under the fourteenth amendment as construed, that a writ of this character issues as of course and as of right unless it appears from the papers that the restraint is clearly in accordance with law. Well now, that being so, there was no intimation to me that it was for the purpose of holding it over anybody or over any state authority but for the purpose of safeguarding the petitioner's rights in a proper way. Of course, if you seriously contend here that it was a fictitious proceeding, or that it was obtained for improper purposes, I should hear you on that question.

Mr. Jerome: With your honor's permission—

Court: I further perhaps ought to say that I informed Mr. Shurtleff that while I understood the decisions of the Supreme Court made it imperative upon me under the circumstances to issue a writ, that the writ once issued would present a situation in which the broadest discretion should be exercised with the view of not interfering with the ordinary course of extradition proceedings, and now they come here and say they are not pressing for an immediate hearing. Do you want one?

Mr. Jerome: Yes.

Court: On what question?

Mr. Jerome: We say that our return shows that he is lawfully held under the laws and Constitution of the United States in extradition proceedings, and we ask your honor to quash the writ and remand the prisoner to the custody from whence he came.

Court: What does the other side say to that?

Mr. Morris: Your honor, the question here is a question of whether or not there should be an immediate hearing or whether this matter should be continued to await the action of the Governor and Council. We have been charged with bad faith. Perhaps it is unnecessary for me to inform the court that we are not asking anything in bad faith. We honestly desire a full and fair hearing for our client in this court at some time. The way the matter rests in my mind is this: There are proceedings pending before the Governor for extradition or rendition of Mr. Thaw. We want to present all of the questions at the proper time in this court. Now under our liberal mode of procedure in this state and in this court it seems to me that all of these questions may be properly raised upon this single writ of habeas corpus now pending before this court. If this case to-day is continued to some such time as your honor may name pending the proceedings before the Governor and Council, it may be that the officer at a later date should and could—or could and should—make a further return that he is now holding the prisoner in case of the granting of an executive warrant upon an executive warrant from the Governor. It might be that we would have to answer that petition in this same proceeding or reply to that answer in this same proceeding, then all of the questions necessary for the final determination of this question now pending would be properly before this court. And it is here that we desire to carry this matter along. It is here that we desire to have a final determination, in the federal courts, of the question whether Harry K. Thaw is properly held, and whether this warrant and this proceeding which the state of New York has instituted is, in fact, a subterfuge to get Mr. Thaw and take him back for commitment to Matteawan, or whether they in good faith intend to try him upon the trivial complaint which has been made before your honor, and which we say does not in fact set out any offense against the laws of the state of New York. Now we have not been able, as I understand from my Brother Shurtleff—the requisition of the Governor of New York was not filed at Concord until yesterday, some time yesterday forenoon—we have not been able to obtain copies. We do not know whether it is in the form set forth in the writ upon which Mr. Thaw is held at the present time or whether they have charged some new offense; in fact, we are entirely in the dark as to the proceedings. They charge us with bad faith in coming before this court. I assure the court that there is absolutely no bad faith on our part. That it is an honest intention on our part to get

these questions properly before this court. We were not unmindful of the section of the statute of the state of New Hampshire which provided that the Governor might issue his executive warrant to be executed forthwith, or he might issue a warrant to be executed at some future date. In that instance we would have had time, of course, to have prepared a writ of habeas corpus and brought it before this court. But if that executive warrant had been to deport Harry K. Thaw forthwith, there would have been absolutely no opportunity on our part, and we could get no assurance from Brother Jerome that he would wait a moment in case such an order came from the Governor. Now, under those circumstances, it was no more than justice to our client and in furtherance of our desire that he should have a fair and impartial hearing before this court that we should proceed at once under a writ of habeas corpus from some court, and we went to the court where we desire to have this question tested, and it seems to us under our practice here that it can all be tested in this court.

Court: One moment, Brother Morris. I want to know whether Mr. Jerome intends to raise the issue of bad faith. If so, there must be some issue framed with reference to it, and that must be heard. But I think when we consider the full situation in a comprehensive sense that a proceeding of this kind should not be attacked as fictitious or in bad faith; because, if I read correctly the expressions of the Supreme Court, they enjoin upon the federal authorities the imperative duty, when any man in custody complains that he is restrained of his liberty, of issuing a writ unless it clearly appears upon the face of his petition that the process is in all respects legal. And Mr. Jerome can understand, as well as anybody, that it would be utterly impossible, and obviously unreasonable, for a judge to assume that a process, mixed as this is, should be accepted as due and legal without hearing the parties. Now I make these two general observations about this case: The writ having been issued, there would be no purpose on the part of the federal government or its officials to in any way interfere with a reasonable investigation in the state courts or before the state executive, and, if I understand the other view correctly, the same disposition of comity is manifested by the state authorities, both the courts and the executive, when they reach their part in respect to sharing duty. Executive orders are generally subject to the opportunity of presenting legal questions. It might be by habeas corpus. Might be upon broader proceedings raising issues of fact either in the state or federal courts with a view of determining rightfully and in a proper way whether the situation is such that a party who is proceeded against should be extradited. Now if under these suggestions you desire to raise the issue of bad faith, that would present a collateral issue of fact which I should feel bound to hear. But unless you have a pretty strong case it is probably not advisable to trouble yourself in doing it.

Mr. Jerome: The information that came to me—

Court: I don't mean disrespect, at all, to your position.

Mr. Jerome: I appreciate the position of your honor. Let me say right at the outset of what I am about to say, that I, myself, could see how the federal court could have no option on that petition to do other than issue a writ; it seemed to me plain that the court would have to do it. But the only basis that I had for the statement that I made was the remarks, direct statements, made by a loquacious attorney who perhaps by no means—

Court: Well, I wouldn't—

Mr. Jerome: Could bind himself to commit the others.

Court: I wouldn't characterize the attorney in that way, Mr. Jerome.

Mr. Jerome: I will withdraw the remark. But the remarks, whatever Mr. Morris or Mr. Shurtleff state in this case, and Mr. Shurtleff stated to me yesterday that it was his intention, I accept without any question at all, sir. I accept it so fully—Mr. Morris said that he wants these things submitted to the federal court. I am perfectly willing to withdraw any opposition to a continuance for any time that suits their convenience, and submit the question to this court.

Court: Well, so far as I would express any preference about the matter, it would be that such questions as can be raised and perhaps will be raised

could be better raised in the state courts, but I don't shrink any duty imposed upon myself as judge of the federal court. Now we may as well come to the point. Do you desire to raise that issue?

Mr. Jerome: Of bad faith?

Court: Yes.

Mr. Jerome: Not in view of what Mr. Morris has stated. I accept anything Mr. Morris will state as absolutely correct.

Court: Very well. There are some matters in respect to the custody, and some matters in respect to the answer which we will need to talk about a little later on. My impression is that in order to have the pleadings perfected that it will probably be useful to counsel on both sides to take further time and consider whether the New York process by which Thaw was held should not become in some way a matter of pleading here. I don't know how broadly—this writ of habeas corpus is rather limited in its scope. It doesn't warrant, at least it may not warrant, an investigation of all the questions which may be material to the rights of the petitioner and to the state of New York. After I have determined what shall be done here, we will talk about that a little more. Then you are not to press the issue of bad faith, Mr. Jerome.

Mr. Jerome: I am perfectly willing to oppose no motion. I understood that the application to your honor by Mr. Morris or Mr. Shurtleff was for a continuance here, adjournment to another date. I think, though, that it would be no more than fair, if this thing is to go over without opposition, that they should be willing to stipulate, to submit it to your honor at any day of your own selection that your honor will give them, and stipulate if not litigated at once before your honor not to go then into the courts of the state of New Hampshire to litigate it over again. That would seem to be a reasonable stipulation to ask.

Court: I don't think the court in a case like this would be controlled at all by any stipulation in that respect. The immediate question, as I understand it, is whether the hearing shall proceed here now. I understand Mr. Shurtleff and Mr. Morris to state that they want a suspension; not a continuance, as I understand it, but a suspension. You say you want a hearing?

Mr. Jerome: I should like it, yes.

Court: Well, I think if I proceed with a hearing with the extradition proceedings pending, I shall do precisely what the Supreme Court of the United States has repeatedly said should not be done. As I understand the rule, it is that a proceeding of this kind having been once instituted, that it should be suspended or held in abeyance out of deference and under the rule of comity which exists between the federal and state governments.

Mr. Jerome: I certainly would not press your honor in any direction where you thought it was against the judgment or decision of the Supreme Court of the United States; it would be probably useless and ridiculous to do so.

Court: There is perhaps nothing further to be said. I may as well dispose of it in a general way, in view of the complications, and there are complications, because here is one party insisting before the executive of the state upon an immediate or speedy extradition, while the other party stands upon a writ of habeas corpus in which he alleges that he is held in violation of the federal Constitution. That, of course, presents a situation which imposes upon the authorities the duty of proceeding in accordance with law, and to discharge the obligations upon them, and, saying nothing of the public interest in this question, in view of the fact that there are two proceedings, one before the state executive and another in the federal court, to which, if the text-books and the decisions are to be respected at all, might take precedence of everything else, still, it is with the qualification that it should temporarily yield, at least, to the proceeding under the state authorities. And in view of the fact that there is a pendency of extradition proceedings, I have thought it my duty to hand down a rescript at some time, when counsel have said all that should be said here, which will make it perfectly understood as to what relation this proceeding sustains to the one

which is pending before the executive of the state of New Hampshire. And if everything has been said that counsel desire to say, I may as well dispose of the case now, and then we will come to these questions as to the pleadings here and the question as to the custody of Thaw pending these investigations.

Mr. Jerome: We have nothing further to present to your honor.

Mr. Shurtleff: What was the suggestion, your honor, about the custody of Thaw?

Court: Well, later that will come up, as to the custody of Thaw; that is, as to how it shall be safeguarded and controlled pending the investigation.

(Following Reading of Rescript.)

Mr. Morris. Your honor, I would say that the custody suggested by the court is satisfactory to us.

Mr. Jerome: Entirely so to us, sir.

Court: The statute requires imperatively a return or an answer to the writ. But my view is that that is something to be treated in a practical sense, and I make the assumption, of course, that all counsel concerned in the interests involved here desire in all reasonable ways to have the issues properly framed, and that it may be as well to let this question of perfecting the pleadings go along with suspension and treat it as something open to amend if you desire it, enlarge it if you desire it, or stand upon it as you have framed it here. You are satisfied with the proposed custody, Mr. Jerome?

Mr. Jerome: Entirely so, sir.

Court: It is understood, of course, that these keepers are appointed under the authority of this writ. If counsel will examine this case against a sheriff to which I have referred, it will be seen that the responsibility of the sheriff as such is suspended altogether, and as keeper he stands here acting under federal authority. That seems to be the rule in order to protect one interest as well as the other. You understand that to be that way, Mr. Jerome?

Mr. Jerome: Perfectly.

Court: Now then, of course the keepers will employ such force as they deem necessary to safeguard the petitioner; they will give him all reasonable opportunities to confer with counsel; they will go to all reasonable places where the state authorities require his presence, in order that the proceedings there may go forward conveniently. Anything further to be said?

Mr. Jerome: Nothing, sir, on our part. I might ask this: As I understand the intimation of your honor—which would be entirely agreeable to us—it is that the framing of any further pleadings in this matter, or further amending the return, may be suspended until the question of the hearing comes up.

Court: My idea about this hearing is this: That it is not adjourned; it is still on.

Mr. Jerome: Just suspended.

Court: Merely suspended. The statute, as you are aware, requires the return to be made within so many days. But as I understand it you have made a return, and that being so, I think I am right in saying that it may be enlarged or may be perfected. Of course, there is something to be done by the petitioner by way of replying to this answer. I think, if no one objects, it may be as well understood that the matter of perfecting the pleadings is suspended until some one makes some motion about having them perfected. Unless you deem the statute imperative that you should do it within a given time. (Reading) "When a writ is returned a day shall be set for a hearing of the cause not exceeding five days thereafter." The person to whom such return is directed shall make return within three days thereafter, and so forth.

Well now he has made his return, as I understand it. I think it is perfectly open, especially upon consent of all parties interested, to give you further time if you want it.

Mr. Jerome: I took it, sir, that it would be proper procedure. You see as yet, from the intimations of your honor and the rescript that you have, that it would appear, naturally, that no hearing would proceed in the federal court until the decision of the Governor. And your honor's intimation, while not intimating what effect it has, stated as a legal proposition that questions of fact or law might arise before the Governor which would be taken as adjudications, so it might become important before a final hearing on this to put in an amended or further return setting forth the proceedings before the Governor.

Court: Yes.

Mr. Jerome: The return now in is strictly correct up to the time of making it. Subsequent proceedings may occur that would render it desirable for the sheriff to return that since—he makes further return to the writ, that since the return made in obedience to the writ following facts and circumstances have arisen which he begs to present in determination of the issues involved.

Court: Well, I have simply thrown out the suggestion as to the pleadings. You must examine the question and act on your own judgment about it. As far as the prisoner is concerned, I think the statute contemplates, at least the decisions do, that they shall make some reply; and that they may traverse certain of the allegations and so on. And if the matter of pleadings is to remain open it is by common consent, as I understand it. I wish to say in conclusion of the disposition of the matters here to-day that my object, as counsel will readily see, in making definitely known through a rescript what is done here, was to give the executive authorities of the state to understand the precise situation and precisely what is being done in this proceeding. It has been represented to me that the Governor had expressed some doubt as to whether he should proceed or not until he understood perfectly what the effect of the action was under this petition. I therefore felt it incumbent upon me to have it understood through a rescript. It is right that counsel for all interests should understand it, too.

Mr. Morris: One word, your honor, with reference to perfecting the pleadings. I suppose perhaps it may follow as a matter of practice, of course, that when Brother Jerome files any further answer or pleadings that we may have a copy of it and such time, reasonable time, to answer as may be necessary.

Court: That, of course, is true. I don't wish it to be understood that I have suggested the propriety or the necessity of your enlarging your answer at all, Mr. Jerome. I merely throw out the suggestion that you may consider it. And then it is probably open to counsel for the petitioner to raise questions whether this New York process under which Thaw was held as an insane person should become a part of the proceedings at issue, because it is a question under the limited scope of a habeas corpus proceeding whether that becomes something to be considered upon the question, whether the process under which he is held here is due process. The novelty of the situation, as everybody must see, results from the fact that he was held in an institution in New York under process against him as an insane person, and the offense or crime upon which it is sought to have him extradited consists, according to their own account of it, and their own description of it, in his escape from that institution. Now whether that is a crime, whether the state of New York, holding a person as an insane person, is in a position to set up his escape as a crime within the meaning of the federal Constitution and of the state authorities. If you have found anything in the books, Mr. Jerome, on that question, you have done better than I have. It seems to me that it involves a novel proposition.

Mr. Jerome: If I understand your honor right, the proposition would seem to look to the point of whether a person of unsound mind could be charged with criminal responsibility.

Court: Well, I am not making any—

Mr. Jerome: But since the rule in *Norton's Case*, which we have practically enacted into a statute, and which I understand to be the rule in in-

sane cases in federal jurisdiction, the rule laid down in Czolgosz Case and the Guiteau Case, that if a person knew the nature and quality of the act and that it was wrong, it did not matter whether he was sane or not.

Court: There results the novelty. The question comes whether it is not open to the petitioners here to raise that question of fact in the state courts of New Hampshire.

Mr. Jerome: Well, I submit—

Court: To raise issues of fact for the jury which present that question of mental responsibility. I don't intimate anything one way or the other about it, but you seemed to assume at the outset that the questions were entirely clear. I don't think they are.

Mr. Jerome: They are not clear if those questions are open, but I think on the argument I will be able to show to your honor decisions of the federal courts in extradition that the door is closed to your honor's investigation of those questions. That is what led me to say that in my opinion it was simple. If we had to go into those questions, it would be by no means simple, nor brief.

Court: I wish it to be understood that I am making no intimation as to what I think about the question when I say it is novel. But if you stand upon the position that extradition is justifiable provided Thaw was of sufficient mind to commit a criminal act at the time he escaped from Matteawan, you put a qualification upon your proposition at once. Now where is that question of mental condition within the meaning and scope of the extradition law to be determined, in New York or in New Hampshire?

Mr. Jerome: We shall probably—

Court: In New York or in New Hampshire, the state from which you are asking to forcibly extradite him?

Mr. Jerome: We shall probably contend before your honor this: That there are three questions, there being no contention that the statutes as I understand it either of New York or New Hampshire are unconstitutional, that the door is closed to your honor's investigation except on three questions.

Court: Well, is it closed?

Mr. Jerome: That is what we shall contend.

Court: Is it closed? When one sovereign state asks another sovereign state to forcibly seize a man and carry him across the line to another jurisdiction is any question closed?

Mr. Jerome: If we understand the decision, the unanimous decision of the Supreme Court of the United States in the Pease Case, in the 207th U. S. we think it is. We think that all that will be open for your honor's investigation will be, "Is he charged with crime?" "Was he in the state at the time of the commission of the crime and now found here, and is he the person mentioned?" The Supreme Court having gone so far as to say in that case, conceding that the indictment was demurrable and bad—

Court: I think you are perfectly correct in that proposition as a general one, but when the papers show that one is charged with a criminal act, and that that act is involved in and solely grounded in the escape from a warrant which holds him as an insane person, have you cases which hold that he would be extradited as a criminal?

Mr. Jerome: We have cases that hold as you have in the federal jurisdiction that an insane man is held to criminal responsibility. The most striking case in our state was where a man conceded by the district attorney to be insane was convicted of murder in the first degree and put to death because it is said that, while he killed under an insane delusion, the insane delusion was not one which, if true, would justify his acting.

Court: What was the process there?

Mr. Jerome: Indictment, trial, conviction, sentence, electrocution. You see, sir, our contention is, and we think we can show you authorities that will lead you to the same conclusion that we have, that all the federal court looks at is, "Is there a charge?" and that under the federal Constitution the word "charge," as was said in this Pease Case, is not whether it is

well founded or not. That it would be impossible for the federal courts to go into that question, because it would be in substance to give every man two trials when he was on an extraditable offense.

Court: I entirely agree that if there is a charge of crime, and there is no question about it, no fact appearing upon the record or in the papers which impinges on that allegation or charge of crime, that that is quite sufficient. But whether when, in describing the crime which is charged, the description of the crime necessarily involves the fact that he was held under insane process qualifies it at all, is the query.

Mr. Jerome: Except that the prisoner doesn't come before you alleging that he is insane.

Court: The petition shows that.

Mr. Jerome: Not that he was insane.

Court: No, but that he was held under insane process there.

Mr. Jerome: Until he was discharged by due process of law.

Court: Well, the papers somewhere show that he was held under insane process. I don't use the exact words, but that is the idea. It is in the record somewhere if it isn't (I think it is) in the petition. Now there is really no question for further discussion except as it may arise as to what further should be done. But I will say that counsel on both sides better examine cases which involve indictments and trials of issues of mental capacity and see how far they apply to similar questions involved in extradition proceedings where one state is asking another to exercise its authority for removal to another jurisdiction.

Mr. Morris: May it please the court, one further suggestion as to the perfecting of the pleadings. Of course, we cannot foresee just exactly what may be filed on the other side, and something might arise which would require us to amend our petition.

Court: Yes.

Mr. Morris: And we would want to reserve the right to do that.

Court: Well, I think Mr. Jerome should determine within, we will say, three days whether he will amend, or whether those interested for the state of New York will enlarge or amend their answer, and then you take how many, three days more?

Mr. Morris: Yes.

Court: Will that be enough? I will give you more time, Mr. Jerome, if you want it.

Mr. Jerome: Abundance of time, sir.

Court: Well, you may make it three days, Mr. Hodgman. And if you want more time, Mr. Jerome—

Mr. Jerome: I will apply for it.

Court: You ask for it and you will get it.

Mr. Morris: You mean three days after notice?

Court: Yes.

Mr. Jerome: Will your honor set any definite time, then, for a hearing, or have it brought up on notice?

Court: No, I can't say. The hearing is open under the circumstances which I have stated, and it is open to any party interested to ask for a hearing on any question that they may wish to have heard. Now if there is nothing further the keepers will take the prisoner in custody.

(Recess to 2 o'clock, p. m.)

Mr. Jacobs: May it please your honor, this morning you gave the state of New York three days in which to file an amendment or additional return on the writ. Now at that time it was thought that there might be a hearing before the Governor some time this week, possibly to-morrow or Friday. Now since then, since the adjournment this morning, the Governor has designated next Tuesday morning as the time for hearing, and therefore, if your honor pleases, we would like to have until a week from Thursday, something like that—that would be the 25th—in which to file an additional answer.

Court: Any objection to that?

Mr. Morris: No, your honor.

Court: Well, the time for amending the answer in the Thaw petition is enlarged by consent to September 25th.

Drew, Shurtleff, Morris & Oakes, of Lancaster, N. H., and N. E. Martin, of Concord, N. H., for petitioner.

William T. Jerome, of New York City, and Bernard Jacobs, of Lancaster, N. H., for State of New York.

ALDRICH, District Judge. Apparent uncertainty of counsel as to the effect of the pendency of this writ upon proposed extradition proceedings, and the possibility that the state authorities may be in doubt as to the reasons for not proceeding summarily to determine the question of discharge or no discharge, make it justifiable and advisable to file a rescript which shall explain the action taken here and the grounds for it.

It is understood that the state of New York is seeking to have the petitioner, Harry K. Thaw, returned to that state under the executive authority of the state of New Hampshire, and that he has been held in custody under New Hampshire state process to that end. The person so restrained institutes habeas corpus proceedings under federal law, in which he alleges that he is held in violation of the federal Constitution and laws, and particularly in violation of the fourteenth amendment in respect to due process and liberty.

This proceeding does not expressly involve the proposed extradition hearing before the state executive, yet it concerns it indirectly, in the sense that if this hearing should go forward, and if it should be determined here that the process under which the petitioner is held is not constitutionally due process, and that the restraint is therefore illegal, it would doubtless be contended that the result should be accepted as conclusive of the question of the right of extradition under the existing state process.

The rights of the state of New York are not of such urgency as to justify summary and precipitate action here in advance of the usual and proper course of interstate extradition proceedings, and the petitioner, having invoked federal protection for the purpose of saving his federal rights and of not waiving them, does not now insist upon his constitutional right of a speedy hearing and a speedy test of the question of the legality of the state restraint, and having thus safeguarded his rights, through his counsel, yields to the idea of a postponement of this hearing to the end that extradition proceedings may go forward before the state executive in the ordinary and usual way. This is a perfectly proper course for counsel to pursue. It is in perfect harmony with our system of federal and state interrelations. It involves no yielding of the idea of the paramount authority under the federal Constitution, and is strictly within the spirit and the reasoning of the Supreme Court in *Ex parte Royall*, 117 U. S. 247-253, 6 Sup. Ct. 734, 29 L. Ed. 868, and other Supreme Court cases.

What law and justice may require is often an embarrassing question for courts and other officers before whom persons are brought for such purposes as exist in this case; and in this particular case, whether the character of the custody in New York, prior to the alleged escape,

where, as is alleged, the petitioner was restrained in an institution because of insanity, or something like it, rather than for crime, where the offense for which he is sought to be extradited consists in his compassing his escape, whether the warrant of commitment under which the petitioner was held in New York, and whether, under the circumstances of this case, the question of extraditable crime, which is a mixed question of law and fact (*Ornelas v. Ruiz*, 161 U. S. 502, 16 Sup. Ct. 689, 40 L. Ed. 787), are involved, among other things, in the question of constitutional due process, at once present more than the usual novelties and difficulties, and their proper solution will require careful and painstaking consideration.

Under the colonial system there was no such thing as extradition of fugitives from one colony to another, except under imperfect compacts in the nature of treaties. Nor was there between the states until the Articles of Confederation, a source from which power of extradition was derived. Subsequently the federal Constitution, through the second section of article 4, defined and established a definite source of power with reference to extradition from one state to another, which section is as follows:

"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Following this there was congressional action, which imposed upon the states certain regulations and duties in respect to extradition, and, without much change, the regulations and duties are now defined by section 5278, page 3597, vol. 3, U. S. Comp. St. 1901, which corresponds to the same section of the Revised Statutes of the United States. Rev. St. p. 1022.

As repeatedly expressed by the Supreme Court and the highest courts of the various states, interstate extradition is now regulated by the federal Constitution and laws in pursuance thereof. Generally speaking, the states have recognized the power of extradition as emanating from federal source. This is particularly so in respect to New Hampshire, the state from which the person in question is sought to be extradited, because section 1 of chapter 263 of the Public Statutes of 1891 of New Hampshire (page 706), provides that:

"Whenever a person in this state is charged with an offense committed in another state, and is liable by the laws of the United States to be delivered over upon demand of the executive of such other state," etc.

It is thus seen that New Hampshire expressly recognizes the laws of the United States as the foundation for extradition, and this view is fully accepted by Judge Walker, who delivered the opinion of the Supreme Court in *State v. Clough*, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 46, which is popularly known as "Mrs. Munsey's Case."

While the Supreme Court decisions sustain the federal power, in the broadest sense, in a situation like this, where it is alleged that the party is restrained of his liberty in violation of the Constitution and the laws of the United States, as well as the view that hearing on habeas cor-

pus may in an extreme case proceed summarily and speedily, for the purpose of testing the legality of the restraint, still, if I understand the scope and theory of them, they also sustain the doctrine of a broad, practical discretion, when the party invoking the federal law is held under state authority, upon the question whether the interests of government and of the parties concerned require that federal courts shall proceed at once to determine ultimate rights, or whether, without relinquishing federal authority, considerations of usage and comity require suspension of a given proceeding for the purpose of allowing the state authorities to deal with questions of extradition; and the reasons for federal suspension are especially weighty where the person invoking the writ does not insist upon pressure of federal instrumentalities.

This is upon the theory that the state authorities, executive and judicial, are charged with the same duty as that of the federal authorities in sustaining the provisions of the laws of the United States, so far as they apply to given situations which involve questions of interstate extradition.

It is perfectly obvious, in respect to a proceeding involving proposed extradition, that some findings of the executive of a state might be accepted as conclusive and binding upon both state and federal courts, and it is equally obvious that questions might arise before the executive, where its action would not be binding upon either. Upon the question as to what findings would be conclusive and what not conclusive I make no intimation whatever.

The reasoning of federal and state decisions which sustain this view of suspension or delay of federal process, even where it is alleged that the restraint is in violation of the federal Constitution, is based upon the idea that, if investigation by the executive results in denying extradition, the aggrieved person would be set at liberty, and thus there would be no necessity for interposition of federal instrumentalities, while, if the result there were to be different, it would still be open to federal authority to afford such protection as the Constitution and laws of the United States require.

Holding pendency and control of this proceeding, under suspension, menaces neither the rights of the parties concerned, nor of state authorities. The proceeding is based upon a right which rests with every person restrained of liberty, and delaying the hearing, under the circumstances to which I have referred, is for the express purpose of allowing the state authorities, upon whom under our system equally with us rests the obligation to guard, enforce and protect every right guaranteed or secured by the Constitution of the United States and the laws made in pursuance thereof (117 U. S. 248; 6 Sup. Ct. 734, 29 L. Ed. 868), to go forward with attempts to legally solve the questions involved in the contest between the state of New York and the petitioner.

Under our system of federal and interstate relations, the fullest measure of comity exists in respect to extradition proceedings, and while there is no rule of comity which justifies extradition, unless the Constitution and the laws provide for it, the spirit of comity between

the federal and state governments is such that each assumes, with respect to the other, that proceedings will be in accordance with the supreme law of the land, and it is understood that this practical and wholesome view holds until some question is evolved which reasonably presents a situation which justifies a review under proper proceedings.

Such considerations make it justifiable, the custody of the party petitioning for the writ being properly safeguarded, that the hearing under the writ before us be suspended, to the end that the executive of the state shall have a free hand in respect to the extradition investigation contemplated by the Constitution and the laws.

Under such suspension as may be deemed advisable under these suggestions, it must be understood that it is open to the petitioner, at any time, to press his alleged constitutional right of an immediate hearing. It is likewise open to counsel representing the state of New York or the state of New Hampshire to move, at any time, for a hearing or for a dismissal of the writ.

The parties will consider whether the pleadings contemplated by the federal statutes should be perfected within the statutory period, or whether those are matters which go along with the suspension.

Under the decision of the Supreme Court in *Barth v. Clise*, Sheriff, 12 Wall. 400, 20 L. Ed. 393, as the body of the petitioner has been produced, the control of his person must be treated as within this proceeding, subject to recommitment to state authority, to be held to bail or placed in the custody of suitable keepers. My inclination is to appoint keepers, and to appoint Mr. Nute, the marshal, and Mr. Holman A. Drew, as such a custody will be most convenient for all, at least during these hearings.

Counsel will confer upon this question of custody.

CENTRAL OF GEORGIA R. CO. v. RAILROAD COMMISSION OF ALABAMA.

WESTERN RY. OF ALABAMA v. SAME.

(District Court, M. D. Alabama. December 4, 1913.)

1. CONSTITUTIONAL LAW (§ 298*)—DUE PROCESS—PASSENGER RATES—DETERMINATION BY RAILROAD COMMISSION—RIGHT TO HEARING.

Railroad companies were not deprived of due process of law because they were not accorded a hearing before the State Railroad Commission when it passed a preliminary order *ex parte* fixing an intrastate passenger rate.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.*]

2. CONSTITUTIONAL LAW (§ 298*) — DUE PROCESS — RATES — REGULATION BY COMMISSION—BIAS.

A preliminary order of the State Railroad Commission, reciting its belief that intrastate passenger rates were unreasonably high, did not indicate that the commission had prejudged the case before hearing it, since such "belief" only implied that the commission entertained what they considered reasonable grounds for investigation and did not warrant a final

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

order which could only be based on sworn evidence subsequently introduced.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.*]

3. JUDGMENT (§ 715*)—DETERMINATION—CONCLUSIVENESS—RES JUDICATA.

A final decree, in a proceeding to restrain the enforcement of statutory carriage rates, holding that the statutory system in its entirety resulted in confiscation, was not res judicata of a contention subsequently made that the statutory passenger rate when put in operation with no other part of the statutory system, but with restored voluntary and higher freight rates, and under changed traffic conditions, would be confiscatory.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244-1246; Dec. Dig. § 715.*]

4. CARRIERS (§ 18*)—REGULATIONS—PASSENGER RATES—CONFISCATION—ELEMENTS.

In order to show confiscation by a statutory intrastate passenger rate, the carrier must establish that the intrastate business under its freight rates in connection with the passenger rate objected to will not yield a fair return on the fair value of all its property devoted to intrastate business in the state, and that the passenger rate substantially contributed to such result.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

5. CARRIERS (§ 12*)—RATES—REGULATION—VALUATION OF PROPERTY.

The valuation of a carrier's intrastate property for the purpose of determining the reasonableness of rates on intrastate business may be obtained by taking the values fixed by the state for taxation purposes and raising them to 100 per cent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

6. CARRIERS (§ 12*)—INTRASTATE RATES—REASONABLENESS—DETERMINATION—APPORTIONMENT OF VALUES.

In determining the reasonableness of intrastate rates, values cannot be apportioned as between interstate and intrastate business, and freight and passenger business on a gross revenue basis, nor can a carrier be permitted to charge for more costly equipment, roadbed, track, and structures constituting a part of an interstate route than would be justified for the conduct of intrastate business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

7. CARRIERS (§ 12*)—RATES—VALUES OF ROAD AND EQUIPMENT—MAINTENANCE—APPORTIONMENT—INTRASTATE AND INTERSTATE BUSINESS.

Where railroads in a state constituted links in through routes built with the purpose and having its chief value to its owners in interstate traffic, the intrastate business being incidental only, the latter business should not be burdened, in determining the reasonableness of intrastate rates, by the same proportion of value, or of expense of equipment, as the interstate business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

8. CARRIERS (§ 12*)—RATES—REGULATION—INTRASTATE BUSINESS—CONFISCATION.

While the test of confiscation in the fixing of intrastate passenger rates is whether the carrier's entire intrastate business is unremunerative, yet the carrier has no absolute right to a passenger rate that will in every case be sufficient to raise its total intrastate revenue to the remunerative point;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the carrier being only entitled to demand that its entire intrastate revenue be not brought below the remunerative point by an unreasonably low passenger rate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

9. CARRIERS (§ 12*)—RATES—REASONABLENESS.

Where a reduced passenger rate in a typical year, on experiment, yields a revenue equal to that produced by a former higher rate in a year of exceptional prosperity, and voluntarily used by the carrier for many years, the reduced rate cannot be held unreasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

10. CARRIERS (§ 12*)—RATES—REASONABLENESS.

Where a carrier voluntarily maintained a 3-cent passenger rate for years, and, after the rate had been reduced to 2½ cents by order of the State Railroad Commission, it was found that the latter rate produced equal or greater revenue to the carrier, it was estopped to claim, in support of a contention that the 2½-cent rate was confiscatory, that the 3-cent rate did not yield sufficient revenue to make the carrier's entire intrastate business remunerative, and this whether the equal or increased revenue under the lower rate was due to stimulation of business caused by the carrier, or to increased density of traffic owing to development of the country served by it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

11. CARRIERS (§ 12*)—RATES—ESTABLISHMENT—REASONABLENESS.

Increased revenue under a lower freight rate, owing to development of the territory served, should be divided between the carrier and the public, while the latter should have the entire benefit of increased revenue due to increased traffic from the lowering of the rate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

12. CARRIERS (§ 18*)—RATES—DETERMINATION BY COMMISSION—REVIEW.

In a suit to restrain carriers' rates fixed by the State Railroad Commission on intrastate commerce, the court can only determine whether the rates fixed are confiscatory, and may not review the commission's determination of questions of business policy.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

In Equity. Suit by the Central of Georgia Railroad Company and by the Western Railway of Alabama against the Railroad Commission of Alabama to restrain the enforcement of a 2½-cent passenger rate for intrastate traffic. Application for temporary injunction. Denied.

See, also, 197 Fed. 954.

R. E. Steiner, of Montgomery, Ala., and T. M. Cunningham, Jr., of Savannah, Ga., for plaintiff Central of Georgia R. Co.

R. E. Steiner, of Montgomery, Ala., for plaintiff Western Ry. of Alabama.

S. D. Weakley, of Birmingham, Ala., and R. C. Brickell, Atty. Gen., of Alabama, for defendants, Charles Henderson, Leon McCord, and Frank N. Julian, composing the Railroad Commission of Alabama.

Before SHELBY, Circuit Judge, and SHEPPARD and GRUBB, District Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GRUBB, District Judge. These cases were submitted together upon motions for injunctions pendente lite against the enforcement of orders of the Railroad Commission of Alabama, fixing a 2½-cent rate for intrastate passenger traffic on the railroads of the two defendants. Some of the contested questions are the same in each case; all are similar; and the conclusions in each case can well be expressed together.

Due Process.

[1] It is claimed that plaintiffs were deprived of due process of law because the preliminary order of the commission, which determined that the investigation, upon which the order complained of was made, should be held, was made *ex parte*, and that it showed that the commission had prejudged the case. We think it clear the plaintiffs were not entitled to a hearing before the commission when it passed the preliminary order any more than a defendant would be entitled to a hearing before a grand jury. The function of each is to determine whether there should be a hearing, and it is only at that hearing, if ordered, that the plaintiffs are entitled to be present.

[2] It is contended that the order reciting the belief of the commission that the rate was unreasonably high shows that the commission had prejudged the case, before hearing it. The commission might well believe a rate was unreasonable without prejudging the case. Belief would not justify a final order. Such an order could be based only on a finding by the commission, based on sworn evidence. "Believing" amounts to little more than "having reason to believe," and only implies that the commission entertained what they considered reasonable grounds for entering upon an investigation. Plaintiff the Central of Georgia Railroad Company claims it was deprived of due process because it was not given an opportunity to argue the case after the evidence was closed. From the record, it would seem that the commission was authorized to infer that the plaintiff had waived its right to argue the case, before it acted on the case. The plaintiffs also claim that there was an absence of evidence before the commission to justify the order. The commission were authorized to act as well on the plaintiffs' evidence as on that introduced by the state, if from it inferences could be reasonably drawn to support its conclusions. The effect of the evidence would be different, depending upon the way in which such inferences were drawn by the commission. The adoption of certain methods of deduction would lead to the commission's conclusion and of certain others to that contended for by plaintiffs. The commission had jurisdiction to draw the inference, and it is not shown that it acted on anything but the evidence submitted to it in arriving at its conclusion.

Res Adjudicata.

[3] The final decree of the District Court on the first supplemental bill held that the statutory system of rates, in its entirety—one act taken in connection with all the others—resulted in confiscation. It did not hold that the passenger rate, when put in operation with no other part of the statutory system, but, on the contrary, with the restored voluntary and higher freight rates, and in connection with such

changed traffic conditions, as appear from traffic statistics for the years since the final decree, would produce confiscation. The issues presented by the first and second supplemental bills are therefore not the same. The reasons given in the opinion of the court in the Louisville & Nashville Railroad Company case apply to this case.

Confiscation.

[4] The plaintiffs, to show confiscation, must establish: (a) That the intrastate business under the restored voluntary freight rates, in connection with the statutory passenger rate of $2\frac{1}{2}$ cents, would not yield a fair return on the fair value of all property devoted to intrastate business in Alabama; and (b) that the $2\frac{1}{2}$ -cent statutory passenger rate substantially contributed to such result, if shown.

[5] (a) The values of plaintiffs' properties in Alabama, based on the values fixed by the state for taxation purposes, raised to 100 per cent., seem fair bases.

[6] The apportionment of values as between inter and intra and freight and passenger business, on the gross revenue basis, is subject to the criticism of the Supreme Court in the Minnesota rate case, as is the same method of apportionment when applied to expenses, as between inter and intra and freight and passenger business. The plaintiffs contend that the court can ignore such erroneous methods of apportionment, because confiscation so clearly appears that the erroneous methods of apportionment may be safely disregarded, as was done by the Supreme Court in the St. Louis & Minneapolis Railroad Company case. The claim in this respect is that neither road earned more than $2\frac{1}{2}$ per cent. on its total business in Alabama on the fair value of the property devoted to that business. In answer, the defendants contend that the plaintiffs' division of operating expenses between other states and Alabama is incorrect, and deny that the valuation of the property attributed to Alabama business is justly attributed to it. It is contended, especially with reference to the Western Railway, that the equipment, roadbed, track, and structures are much more costly than would be justified for the Alabama business conducted over and by means of them, and it seems to us that this is true as to both roads to some extent, and that it would not be fair to charge Alabama business with its proportion of the valuation of a road which was much more expensively built and equipped than was appropriate for the character of the business done over it within that state.

[7] Each of the two roads in Alabama seems to be a link in a through route, built with the purpose and having its chief value to its owners in that use; the intra or local business being incidental only. If this is true, it seems to us that the intra business should not be burdened by the same proportion of value or of expense of maintenance of road and equipment as the interstate business. If the owners get the benefit of the principal or interstate use, which makes higher class construction essential, they cannot expect to get the same measure of return on intrastate business, which requires for its conduct no such expensive roadbed or equipment. However, it seems to be unnecessary to determine whether plaintiffs employed correct methods to ap-

portion value and expense, or whether such methods, if erroneous were not such as to change the result, because, conceding that the entire intrastate business is shown to be unremunerative, it does not clearly appear that the reduced passenger rate contributes to this result.

(b) It is not enough to show that more revenue would be yielded to plaintiffs from a 3-cent fare. It must further appear that the 2½-cent rate was unreasonably low, otherwise the reduction in revenue from the reduced rate would not be a subject of complaint by the carrier.

[8] It is true that the test of confiscation is that the carrier's entire intrastate business is unremunerative. Yet it does not follow that the carrier has the absolute right to a passenger rate that will, in every case, be sufficient to raise its total intra revenue to the remunerative point. If it had such right, the passenger would frequently carry the burden of the freight to an undue and prohibitive extent. The freight revenue of a carrier is usually many times greater than its passenger revenue, and it is easy to see what result on passenger rates would follow the application of such a principle. All that the carrier can demand is that its entire intra revenue is not brought below the remunerative point by an unreasonably low passenger rate.

[9] Can it be said that a reduced rate which yields in a typical year, on experiment, a revenue equal to that produced by a former higher rate, in a year of exceptional prosperity, and voluntarily used by the carrier for many years, is unreasonably low?

[10] It may be said that the former voluntary rate did not yield enough revenue to raise the carrier's entire intra business to the remunerative point; but, having voluntarily maintained such a rate for years, can it be heard to say that the old rate is unreasonably low, and, if not, is it not equally true that it will not be heard to say that a lower rate, but one which produces an equal or greater revenue to the carrier, is too low? And is this not true whether the equal or increased revenue under the lower rate is due to stimulation of business caused by it, or to increased density of traffic due to development of the country served by it? It is clear that the carrier is not injured by the reduction, if the reduced rate so stimulates travel as to equal or increase the revenue obtained under the old rate.

[11] It seems that, if the increased revenue under the lower rate is due to the development of the territory served, the carrier and the public served by it should each share in the benefit. The pioneer carrier frequently operates its road through a sparsely settled territory at a loss, and for that reason should share in the advantages due to the subsequent higher development of the country. On the other hand, the community served should also profit by the increased population. It is universally true that passenger rates are lowered as traffic increases in density. The benefit of the increment due to stimulation of the lower rate should go entirely to the public, and that due to the growth of the tributary territory should be divided between the carrier and its patrons. Can it then be said that a reduced passenger rate, which when put into operation produces a revenue equal to or greater

than a higher rate of the carrier's own selection and adoption, is a confiscatory rate?

[12] It might be better policy for the commission to permit the carrier to reap the benefit of the country's growth and enable it thereby to give better and safer service, but this is a matter for the decision of the commission and not the courts, whose sole province is to preserve the carrier's property from confiscation, and not to review the commission's determination on questions of business or public policy. It seems to us that a passenger rate cannot be said to be confiscatory or unreasonably low when its effect, on experiment, is to yield the carrier as much or more revenue than was produced under its former higher rate.

It seems to us that the figures in the supplemental bill show that, in each case, the $2\frac{1}{2}$ -cent rate, whether due to stimulation or increased density of traffic in the territory served by the two carriers respectively, has proved as great a revenue producer as the 3-cent rate which preceded it.

Central of Georgia Railroad Company.

With reference to the Central (page 14, supplemental bill): Intra-state passenger earnings were \$500,311 for the most prosperous year of 1907 under the 3-cent rate. Owing to the panic of the fall of 1907, they declined for the years 1908 and 1909. The $2\frac{1}{2}$ -cent rate was in effect during the fiscal years 1910, 1911, and 1912. The intra passenger revenue increased progressively during the fiscal years 1910, 1911, and 1912. In 1911, under the $2\frac{1}{2}$ -cent rate, they exceeded those of 1907 by \$25,000. In 1912 they exceeded those of the year 1907 by \$55,000. In 1913 the 3-cent rate was in force. In that year the revenue from intra passenger business was \$99,000 more than 1907. For the year 1913, if the total intra passenger business be reduced to the $2\frac{1}{2}$ -cent basis, it would still have yielded an amount equal to that of 1907 which was earned on a 3-cent fare. All the travel for 1913 was not on a 3-cent basis. A substantial part of it was on a $2\frac{1}{2}$ or 2 cent basis. It is clear from this that if the $2\frac{1}{2}$ -cent fare had been in force during the fiscal year 1913, instead of the 3-cent fare, the revenue from 1913, on a $2\frac{1}{2}$ -cent basis, would have substantially exceeded that for 1907 on the 3-cent basis.

It is said that the year 1912 is not typical because one of unusual prosperity. This is true also of the year 1907 with which it is being compared. However, the year 1913 is conceded to be a year of only average prosperity because of a short cotton crop. Yet the plaintiff's figures of intrastate passenger returns for that year, reduced to the $2\frac{1}{2}$ -cent basis, will show an increase over the earnings of the banner year of 1907. These figures are the plaintiff's own and are not arrived at by doubtful methods of apportionment.

It is said that the carriers have lean and prosperous years, and that the prosperous years must be looked to to help out the lean years, and this is clearly true. However, the year 1913 is stated by plaintiff's counsel to have been only a normal year, if even that. There is also shown to have been an unusual increase in plaintiff's passenger earnings for its system during each year, except for the panic years of 1908 and 1909, from 1900 to 1912, aggregating in that period the dif-

ference between \$1,373,433 in 1900 and \$3,777,488 in 1912, the former under the 3-cent fare and the latter under the 2½-cent fare (page 19, supplemental bill). This shows a continued general increase in passenger earnings through the whole period, with, however, smaller eras of depression during years of adversity. The history of the system fairly reflects the history of the Alabama portion of it in this respect. Again, for the last three years of the 3-cent fare (1907, 1908, and 1909) the earnings, as compared with the three first years of the 2½-cent fare (1910, 1911, and 1912), are shown by the bill to have averaged less annually by an amount of approximately \$35,000. The supplemental bill (page 14) also shows that in 1912 the plaintiff carried approximately 39 per cent. more passengers in Alabama than it did in 1907; and that it carried more than 30 per cent. more intrastate passengers in Alabama in 1912 than it did in 1908. (No separation of inter and intra passengers is given in the bill for 1907.) These facts are persuasive that the plaintiff the Central of Georgia Railroad Company is now on a different basis as to passenger earning capacity in Alabama than it was in the years prior to and including 1907—so much so that a 2½-cent passenger fare, owing to stimulation of travel and increased density of traffic, will yield substantially more revenue now in a normal year than a 3-cent fare formerly yielded in a year of abnormal prosperity. This being so, we do not think confiscation can be predicated upon a rate producing such results.

Western Railway of Alabama.

Applied to the Western Railway: On page 34 of the Western's supplemental bill is a table of passenger earnings for the years from 1907 to 1913, inclusive, including mail and express earnings. The earnings for intra business for 1907 are \$207,175. For 1908 they are \$206,264. From thence on to and including 1913, they progressively increase each succeeding year in substantial amounts. In 1913, under the 3-cent fare, they were \$313,835. Reduced to the 2½-cent basis, assuming that all travel was on the 3-cent basis, their amount for 1913 would be \$260,833, which is substantially less than the true amount, since some of the travel was on the basis of 2½ cents instead of 3 cents. Yet it exceeds the intra earnings for 1907 on the 3-cent basis by more than \$50,000, an increase of 25 per cent. Between the years 1910 and 1913, as shown by the table on page 33 of the supplemental bill, there was a substantial increase of each year over the others in the number of passengers carried, and in the period a total increase of more than 103,000 passengers carried annually, an increase of 40 per cent. In passenger miles during the same period, there was an increase of 2,178,347, an increase of 28 per cent., and a greater increase for 1912 over 1910 than for 1913 over 1910. The revenue from intrastate passengers only during the same period increased in a substantial amount, even after reducing the revenue of 1913 to a 2½-cent basis in its entirety. This tends to show not only that the Western prospered during the period the 2½-cent rate was in force, but, when comparison is made with the year 1907, it is fair to assume that an era of improvement permanent in its character in the passenger traffic of the West-

ern has come, and that a $2\frac{1}{2}$ -cent rate, under it, produces substantially more revenue than did a 3-cent rate during the year 1907 and those preceding it. Whether this is attributed to stimulation of travel from the lower rate or the permanent settling up of the country and increased density of traffic, or both, it tends to show that the Western has reached a state where it can now endure a $2\frac{1}{2}$ -cent rate without confiscation, though formerly it may not have been able to have done so. It put in force and continued voluntarily for years a 3-cent rate, which yielded less revenue than the statutory $2\frac{1}{2}$ -cent rate yielded while in force, or would now yield, if restored. This is persuasive that the $2\frac{1}{2}$ -cent rate is not confiscatory in its operation, since the 3-cent rate, though producing less revenue when formerly in force, was not so considered by the carrier.

In both the Western and Central cases, the bill shows that the interstate passenger earnings during the period of the $2\frac{1}{2}$ -cent rate increased along with the intrastate over those of the year 1907. The increase in intra is therefore not shown to have been at the expense of the inter state passenger earnings. As we recall, the increase in the case of the Western was not accompanied by the putting on of any additional trains or added expense to accommodate the additional travel. In the case of the Central, one additional train, the Seminole Limited, was put on during the period of the $2\frac{1}{2}$ -cent rate, but it was clearly put on to accommodate interstate travel, since the record shows that it competed with the Central's trains numbered 3 and 4, between Birmingham and Macon, for Alabama local business, both passing from Columbus to Birmingham and the reverse, close together in point of time. It is clear the existing trains (3 and 4), therefore, sufficiently accommodated the local business.

The other additional operating expense claimed comes from the higher wages and prices for material and increasing taxes, which we know to exist. Neither the bill nor affidavits show the amount of this increase with certainty. It is true, adopting the methods of apportionment of the plaintiffs, the net earnings from intrastate passenger business in Alabama are shown to yield an inadequate return on the value of the property attributed to intrastate passenger business by plaintiffs' method of apportionment; plaintiffs' method of apportionment being faulty, the conclusion reached cannot be taken. If increased operating expenses, caused by the necessity of paying higher wages, higher prices for material and increased taxes, when properly apportioned to plaintiffs' intrastate business in Alabama, reduced a gross revenue from that business which would be otherwise adequate, so as to be unremunerative, a showing that the passenger rate of $2\frac{1}{2}$ cents was confiscatory would be presented. Plaintiffs' conclusions as to net return from intrastate passenger business in Alabama are based on the gross revenue method of apportionment of the value of the property devoted to that business and its share of operating expenses. These methods are condemned by the Supreme Court, and the results arrived at by them cannot be accepted by us. The effect of increased wages, etc., are not so apparent on the question of confiscation as to make erroneous methods of apportionment of no consequence. The effect of such

increases does not otherwise appear in the record. In any proper apportionment of value, it seems also to us that the value of a road and equipment reasonably suitable for the conduct of an intrastate business should be the basis, rather than the value of a higher class road with like equipment reasonably adapted for interstate business alone, and too costly for intrastate traffic.

On the present showing we are not prepared to find that confiscation exists as a result of the 2½-cent passenger rate, as to either of the plaintiffs; and the motion for an injunction pendente lite, in each case, is denied.

In re WENATCHEE HEIGHTS ORCHARD CO.

(District Court, W. D. Washington, N. D. December 3, 1913.)

BANKRUPTCY (§ 345*)—PROVABLE CLAIMS—FRAUDULENT ACTS OF CREDITORS.

Claimants, who organized and were the only stockholders and officers of bankrupt corporation, also held its notes to themselves. After it had become indebted to others, they fraudulently caused substantially all of its property to be transferred to a second corporation, making it appear by means of false recitals in the minutes of stockholders' and trustees' meetings that the transfer was in payment of their own notes, when in fact it was without consideration and they had not parted with the notes. Other creditors having brought suit against the bankrupt, claimants, and the second corporation and obtained a receivership, as the result of a settlement the property was transferred back. After the bankruptcy claimants sought to prove their notes against the estate. *Held* that, while there was not such evidence of their being fraudulent in their origin as to warrant their disallowance entirely in view of the fraudulent action of claimants in so transferring the property that neither they nor the bankrupt could have recovered it, their claims would be postponed to those of all other creditors, in so far as the property transferred and its proceeds are concerned.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. § 345.*]

In the matter of the Wenatchee Heights Orchard Company, bankrupt. On review of orders of referee. Modified.

See, also, 204 Fed. 674; 205 Fed. 964.

Walter Schaffner and Raymond D. Ogden, both of Seattle, Wash., for trustee.

Corwin S. Shank and H. C. Belt, both of Seattle, Wash., for claimants, Wells and McPherson.

CUSHMAN, District Judge. Hearings were had before the referee upon objections to the claims of L. V. Wells and E. H. McPherson, and the petition of the trustee for leave to use the funds belonging to the estate of the bankrupt, for the purpose of complying with an order of the Public Service Commission of the state of Washington, made against said corporation before it was adjudicated a bankrupt, which order required the corporation to increase the supply of water for irrigation of the lands sold by it. The referee allowed the claims in part, disallowed a part, and denied the petition of the trustee. Both

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the claimants and trustee pray a review of the referee's decision. For the reasons given by the referee in his opinion, his order is affirmed and approved, except as stated herein.

The claimants, L. V. Wells and E. H. McPherson, organized the Wenatchee Heights Orchard Company in 1906. They have since continued to be the sole stockholders and controlling officers of that company. That corporation, for the stock issued, acquired some 1,200 acres of land near Wenatchee, a large part of which was suitable for orchards and capable of irrigation, together with certain shares of stock in an irrigation company. The lands were, when acquired by the company, subject to a \$50,000 mortgage, which was assumed by the company. In addition to the stock, the company agreed to pay, as part of the purchase price of the land, claimant Wells \$40,000 and claimant McPherson \$5,850. It is the allowance by the referee of the residue of these amounts and interest of which the trustee complains.

A brief statement of the transactions prior to bankruptcy is necessary. The lands of the company were platted, for sale, into five and ten acre tracts. To irrigate them it was necessary to obtain water of the company in which the Wenatchee Heights Orchard Company held stock. By the end of 1911 all but a few acres of the irrigable lands had been sold. The contracts under which the lands were sold provided for a—

"perpetual right, appurtenant to the said land, of the use of water. * * *

"(4) The grantor agrees to furnish water for irrigation purposes for the said premises to the amount of two (2) acre-feet of water per acre * * * during the irrigation season. * * *

"(5) Said land and water right to be conveyed by a warranty deed to said grantee when said purchase price shall have been fully made. * * *"

The grantor was to plow the ground, plant the orchards, cultivate, irrigate, and care for them, and pay the taxes until the purchase price was fully paid.

In 1911 the Wenatchee Heights Orchard Company began trading its contracts with the purchasers of these tracts for real estate in and near Seattle, Wash. All of the contracts were in a short time exchanged. In 1911 the company moved its office from Seattle to Wenatchee. In the same year suit was brought against the company by one of its contract holders for damages on account of a failure to furnish the agreed amount of water for irrigation. A judgment for \$1,200 was obtained in the course of the year and paid by the bankrupt. In 1912 a similar suit was brought by another contract holder, who obtained a judgment for \$2,000. This suit was appealed. In the same year, upon complaint of other contract holders, after a hearing, the Public Service Commission of the state of Washington found the water supply insufficient to furnish the water provided for in the deeds and contracts of the company and ordered the corporation to so increase the water supply as to furnish it. This was not done.

Some time prior to December 5, 1911, the Summit Investment Company was incorporated. The claimant L. V. Wells caused all of its stock, save one share, to be issued or transferred to one B. E. Gates, who had theretofore, as agent, assisted in selling some of the orchard

tracts of the Wenatchee Heights Orchard Company; the one remaining share being issued to the wife of Gates.

While Gates had theretofore been engaged as stated, and there may have been a small balance due him upon some of his transactions with the Wenatchee Heights Orchard Company, it is clear from the testimony that the stock in the Summit Investment Company was given to him without consideration. Gates became president and his wife secretary and treasurer of that company. The only property ever held by it was transferred to it by the Wenatchee Heights Orchard Company.

New 90 days notes were made out by the Wenatchee Heights Orchard Company to claimants, L. V. Wells and E. H. McPherson, dated September 21, 1911, which notes included the residue of the original indebtedness, which has been allowed by the referee.

Under date of October 10, 1911, the minutes of a stockholders' meeting of the Wenatchee Heights Orchard Company, signed by the claimants, L. V. Wells and E. H. McPherson, embody the following letter addressed to that company on the letter head of B. E. Gates and signed by him:

"Having purchased the following promissory notes made by your company, viz., one dated Sept. 21, 1911, to L. V. Wells for \$57,000, due ninety days from date, and one dated Sept. 21, 1911, to E. H. McPherson for \$18,000, due ninety days from date, and being desirous of collecting the same, I propose to take the following described property in full satisfaction of the said notes and accumulated interest: * * * I agree to assume the mortgages against the above property, amounting to \$33,500."

The minutes then continue:

"After careful consideration of the proposal, on motion duly made by a stockholder, seconded and unanimously carried, all stock voting in favor, it was decided to accept the said proposal. * * *

L. V. Wells.
"E. H. McPherson."

The minutes of a special meeting of the trustees of the Wenatchee Heights Orchard Company, held the same date, read:

"Whereas, the proposal of B. E. Gates to accept certain property of the company in payment of notes given by the company to L. V. Wells and E. H. McPherson and held by him, having been accepted by the stockholders, therefore: Resolved, that the president and secretary be and are hereby authorized to complete the transfer in accordance with said proposal. * * *

"L. V. Wells, President.

E. H. McPherson, Secretary."

The minutes of a special meeting of the board of trustees, under date of December 7, 1911, read:

"Upon motion duly made by a trustee, and seconded, the following resolution was unanimously adopted: 'Whereas, the trustees and stockholders of the company have heretofore accepted a proposition made by B. E. Gates to exchange certain property for notes given by the company to L. V. Wells and E. H. McPherson, and whereas, a request has been received from the said B. E. Gates, that the above property be deeded to the Summit Investment Company: Resolved, that the president and secretary be and are hereby authorized to execute the necessary deeds as referred to in a resolution adopted by the trustees on Oct. 10, 1911, to the Summit Investment Company, instead of to B. E. Gates.' * * *

"L. V. Wells, President.

E. H. McPherson, Secretary."

In accordance with these resolutions, transfers were made to the Summit Investment Company.

Claimants, Wells and McPherson, both testified that they never parted with the notes mentioned in these minutes; that they were not purchased by, or assigned to, Gates and were never surrendered by claimants or canceled at the time of the transfer of the real property to the Summit Investment Company or at all. E. H. McPherson testifies:

"Q. Now, at the time of these transactions, who held those notes? A. Well, to explain the whole situation, of course we still held the notes. It was simply a means of transferring this property out of the hands of the Wenatchee Heights Orchard Company to the Summit Investment Company. Q. Was there any change in the physical possession of that property? A. Not at all. Q. Did you ever hand the notes over to Mr. Gates? A. No. Q. Mr. Gates never had them at all? A. Never had them. Q. And they weren't canceled and new notes issued? A. No, they were not canceled. Q. The whole transaction was merely a fiction except so far as the property was transferred? A. The property was transferred to get it out of the hands of the Wenatchee Heights Orchard Company. Q. But the notes being transferred to Mr. Gates, that part was all a fiction? A. He never really held them. Q. Never had any interest in them? A. No."

No acknowledgment of trust by either Gates or the Summit Investment Company, admitting the interest of either Wells, McPherson, or the Wenatchee Heights Orchard Company, was made; nor was any record preserved of any such interest.

The testimony on behalf of claimants is to the further effect that the property, after the transfer to the Summit Investment Company, continued in the control of the Wenatchee Heights Orchard Company.

In December, 1912, suit was brought in the superior court of King county by certain contract holders of the Wenatchee Heights Orchard Company against it, the Summit Investment Company, Wells, McPherson, Gates, and his wife for the appointment of a receiver for the Wenatchee Heights Orchard Company and to have the property transferred to the Summit Investment Company adjudged to belong to the Wenatchee Heights Orchard Company. Subsequent to the appointment of a receiver for the Wenatchee Heights Orchard Company, it was adjudicated a bankrupt.

In the suit in the superior court, an agreement was eventually reached between the plaintiffs, the receiver, and the defendants, Wells and McPherson, which recited that all the property of the Summit Investment Company was in effect the property of the Wenatchee Heights Orchard Company. It provided for new directors for each of these companies. It further provided that the Summit Investment Company should supply the funds required to perform the obligations of the Wenatchee Heights Orchard Company, so far as the same could be supplied from that company's assets. Further provision was made for the transfer of all of the stock of the Summit Investment Company to a trustee, except sufficient shares to qualify the directors to hold office.

"And the said Wenatchee Heights Orchard Company shall in particular, as soon as may be, proceed to carry out the order of the Public Service Commission of the state of Washington made and entered in cause No. 706 before said Public Service Commission September 28, 1912. * * *

Further provision was made for the dismissal of the suit. Subsequently, and after the adjudication in bankruptcy, the Summit Investment Company deeded the property back to the Wenatchee Heights Orchard Company. Claimants now contend that the transfer of the property to the Summit Investment Company was merely an effort on their part to obtain a preference, and that, it having been voluntarily abandoned and undone by them, their claims should be unaffected by reason of anything they may have done. The trustee contends that the transfer was a fraud upon the creditors of the company and for the purpose of hindering and delaying its creditors. The referee rules:

"The referee has not overlooked the claim of the trustee that certain transactions between the bankrupt corporation and the Summit Investment Company, in which the note held by L. V. Wells was used as the apparent consideration for the transfer of the property of the bankrupt corporation to said Summit Investment Company, amounted to a payment of the note, but, in his opinion the property for which the note is claimed to have been surrendered having been recovered by the trustee of the bankrupt estate, he cannot receive the benefit thereof and at the same time have the right to claim that the note has been paid. While it is possible that neither party to these transactions between the bankrupt corporation and the Summit Investment Company would have been entitled to relief as against the other, yet, relief having been obtained, the consideration, though fraudulent, must be returned."

If it be true that both the purpose and effect of this transfer was merely to give L. V. Wells and E. H. McPherson preference over the other creditors, as concluded, the ruling is doubtless correct. 20 Cyc. 472b et seq., 572, 624k11, 636; *White v. Cotzhausen*, 129 U. S. 329, at pages 344, 345, 9 Sup. Ct. 309, 32 L. Ed. 677; *U. S. Rubber Co. v. American Oak Lea. Co.*, 181 U. S. 434, at pages 446, 447, 21 Sup. Ct. 670, 45 L. Ed. 938; *Hutchinson v. Otis*, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179.

The creditors of the bankrupt were, in the main, those with small holdings under the sale contracts, with unliquidated claims against the corporation, and its books were in the sole control of the claimants.

According to claimants' own testimony, the property recovered from the Summit Investment Company was transferred without consideration to that company. The new notes given Wells and McPherson were at the time of that transfer not yet due and might have been transferred to innocent purchasers. As pointed out, no record of the interest of the Wenatchee Heights Orchard Company was preserved, and no acknowledgment of trust by either Gates or the Summit Investment Company was given or required. A false record was made by claimants in the minute book of the Wenatchee Heights Orchard Company to the effect that Gates had purchased claimants' notes against the Wenatchee Heights Orchard Company and that for them he received the company's property. Claimants must be held to have contemplated the probable result of their acts.

On its face the Summit Investment Company had become the owner of the principal assets of the Wenatchee Heights Orchard Company, freed from any claim by any one connected with that company. If by any chance this false record, in the control of claimants, was brought to light, still by it it had been made to appear that Gates was an innocent holder of the notes before maturity, without notice of any equi-

ties on the part of the contract holders, and the Summit Investment Company would be in a like advantageous position.

If the true relation between the Wenatchee Heights Orchard Company, the Summit Investment Company, and L. V. Wells and E. H. McPherson was brought to light, under the circumstances it would probably require more than four months' time after the transfer to do so and a preference thereby be established, especially as the creditors, other than claimants, had principally unliquidated claims, and the company defending against their liquidation would be in the sole control of claimants, Wells and McPherson, and finally if discovered, and bankruptcy intervened short of four months, the stand might further be taken that, while the preference had not been gained, yet these claims were unsmirched by reason of these transactions.

The discouragement of creditors, naturally resulting from the apparently hopeless condition of the company, would be likely to result in advantage to claimants, both as creditors and as sole stockholders of the corporation.

Claimant Wells, having testified that the Summit Investment Company was organized to facilitate the transaction of the business of the Wenatchee Heights Orchard Company, when repeatedly pressed to state how the transactions with the Summit Investment Company would facilitate the business of the Wenatchee Heights Orchard Company, gave the following explanation:

"A. We proposed to carry out the Wenatchee Heights Orchard Company project to take care of the land and the orchards and to perfect the water system, so that the Wenatchee Heights Orchard Company would be able to fulfill all of its contracts to the purchasers of its land. Early in that year we had—that would be 1911—we had been sued and a judgment had been recovered against us, which we regarded to be entirely unjust. We thought that no person should have any right to recover a judgment against the Wenatchee Heights Orchard Company on the grounds that those people had, and we were afraid, since they had recovered a judgment, we were afraid that others might possibly follow their course, and it was my idea to conserve the resources of the Wenatchee Heights Orchard Company in such a manner as to prevent the possibility of a repetition of what he had experienced in the matter of this judgment. Q. In other words— A. Just a minute, until I get through. That was my idea. We were afraid that possibly there might have been—might be others who would be encouraged by that fact that Mr. Hotchkin had obtained a judgment and would enter suits and thus dissipate the resources of the Wenatchee Heights Orchard Company in a way that we thought was not just. It was our idea to accomplish what we had started out to do, to furnish a water right which would be unquestioned in every particular and to carry out our contracts with our land purchasers perfectly; but if others who had not proper claims against the company were able to recover on judgments, necessarily the assets of the Wenatchee Heights Orchard Company would have been dissipated before we could carry out our contracts; and it was my idea to surround these resources by such safeguards as would prevent their being dissipated in that manner, and to use them for the purpose of carrying out the contracts of the company in regard to their water rights and cultivation of the land. Q. In other words, you were seeking a method by which you could prevent any person who secured a judgment against your company from levying upon this property and selling it? A. It was not my idea to prevent any person having a judgment, a just judgment, against the company— Q. You were to be the judge of whether it was a just judgment or not? A. Well, now, I am not saying that. Q. And you were trying to put those assets in such shape so that anybody who secured a judgment for the reasons that Hotchkin did would be unable to touch that

property, isn't that true? A. No, that was not my idea exactly. My idea was to put the matter in such shape as to discourage persons who thought of entering suits for causes of that kind."

It therefore appears that the scheme was stripped of its euphony to hinder and delay creditors.

The referee did not find such clear and convincing proof of gross overvaluation of the property acquired by the company on its organization as to warrant a finding of fraud, avoiding the indebtedness to the claimants, then assumed by the company. This conclusion is approved, and, as the notes are shown by claimants' testimony to have been at all times in their possession, never acquired by Gates, and therefore never surrendered to the Wenatchee Heights Orchard Company, they will not be treated as paid; but it does not follow that the only disadvantage suffered, on account of the transaction, by Wells and McPherson is the loss of their now claimed preference. By their acts, both as creditors and for the corporation, said company's property was transferred in such a way, as found by the referee, that neither they nor the corporation could recover it. The other creditors alone could compel its return to the corporation. They did so. To now hold that the claimants, who were parties to such transfer, may resort to the property they helped put out of the reach of the corporation and themselves, the same as the other creditors, would neither tend to encourage innocent creditors to diligence nor discourage those dishonestly inclined from scheming for an unfair advantage.

The claims of Wells and McPherson have not been shown to be fraudulent and will therefore be treated as legitimate. But, while there is a wide range between one with a purely fabricated claim and one who seeks to secure a preference for a valid claim, yet the holder of a valid claim may lend it and himself to the accomplishment of a fraud and both be affected thereby. 20 Cyc. 487c, 638.

Claimants might be diligent in securing the advantage of a preference, without prejudicing their claims. They might even be secret in so doing, if there was no duty on their part to speak. *U. S. Rubber Co. v. Am. Oak Lea. Co.*, 181 U. S. 434, at page 447, 21 Sup. Ct. 670, 45 L. Ed. 958, *supra*. But, if the creditor and the corporation do undertake to speak, they are bound to speak truly, and, if in these corporation minutes they spoke falsely in a matter naturally tending to their advantage and the deception and disadvantage of other creditors, no element of actual fraud appears lacking, even though the claim evidenced by the notes be not fabricated but a genuine debt.

It is not necessary to determine the effect of a confessed valuation now of the transferred property not exceeding the creditor's established claims. Such transactions as these should be tested by the situation, action, and intention of the parties at the time they acted, and the then probable effect of such action. Though the court has not found such clearly established fraud in these notes, at the inception of the claim, in the evidence, as to void them, yet they were not free from question, and city property of the nature of that transferred is liable to sudden fluctuations in value.

At the time of the transfers to the Summit Investment Company,

it was not unreasonable to calculate that the property had a present value, tested by its potential value, in excess of the established claims. The same rule that saved claimants from condemnation for overvaluation of the property amounting to fraud at the organization of the corporation, will obtain in testing their conduct in the matter of the transfer of this property. Their conduct shows that they considered it of greater value than their claims. Arriving at that not then unreasonable conclusion, the effect of their conduct will be tested as though their conclusion was a verity in establishing actual fraud upon their part.

The fact that, after other creditors brought a suit against Gates, the Summit Investment Company, Wells and McPherson, to recover the property transferred, for the Wenatchee Heights Orchard Company, claimants, before judgment, consented to return the property does not purge the transaction of fraud. It cannot be considered a voluntary surrender. These claimants are denied the right to have any of the proceeds of the property recovered applied to the satisfaction of their claims until the claims of other creditors are satisfied.

The conclusion of the referee that, upon the present evidence, the trustee should not be directed to comply with the Public Service Commission's order for the increase of the water supply to the present contract holders is affirmed. The penalty imposed by the state law for a failure to comply with the Commission's order cannot be made the basis of a claim in this bankruptcy proceeding. Section 57j of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444). If such an order were made, and the expense incurred of increasing the water supply, the claims of the contract holders for damages for a shortage of water would still exist. A different question would be presented if the petition was for authority to compromise the unliquidated claims of the contract holders for such damage by complying with the order and increasing the water supply.

The referee's order is modified as indicated above.

In re SMITH.

(District Court, N. D. California, First Division. November, 1913.)

No. 8,198.

BANKRUPTCY (§ 89*)—INVOLUNTARY PETITION—NATURE OF CLAIMS—LIQUIDATION BEFORE ANSWER.

Where claims of creditors signing an involuntary bankruptcy petition were based on the alleged bankrupt's statutory liability as a stockholder for debts of the corporation, and also supposed liability as a stockholder for debts of another corporation of which his corporation was a stockholder, all of which were unliquidated, and the claims of signing creditors constituting a primary liability did not amount to \$500 in the aggregate, the alleged bankrupt was entitled to a liquidation of the claims, before answer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 120-122; Dec. Dig. § 89.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Bankruptcy. In the matter of involuntary bankruptcy proceedings against F. M. Smith. Application by the bankrupt for liquidation of the claims of petitioning creditors before answer. Granted.

Green, Humphreys & Green, of San Francisco, Cal., for petitioners. Morrison, Dunne & Brobeck and Mansfield & Newmark, all of San Francisco, Cal., for respondent.

Pillsbury, Madison & Sutro, of San Francisco, Cal., for certain creditors.

DOOLING, District Judge. On July 24, 1913, a petition was filed in this court by Leo R. Dickey, E. E. Gilman, Albert Hanford, and Union Land Company, alleging that the petitioners are creditors of F. M. Smith, having provable claims against him amounting to the sum of \$500 in excess of the value of securities, alleging, further, that said F. M. Smith owes debts in excess of \$1,000 and is insolvent, and alleging, also, the commission of certain acts of bankruptcy by said F. M. Smith within four months prior to the filing of the said petition. The character of the claims of said petitioners against the alleged bankrupt is also fully set out in the said petition. Thereafter, and on August 21, 1913, J. M. Kane was allowed to intervene in said proceedings, and filed his petition as a creditor herein, and on the same date another petition was permitted to be filed by L. A. Goetz, Peter Hartwigsen, Frank Guittard, W. N. Hunt, R. B. Mott, John Lundholm, Edgar Mizner, and M. O'Connell, also intervening as creditors and joining in the original petition. In each of these petitions by intervening creditors the character of the claims against the alleged bankrupt is fully set forth.

These claims fall into four general classes. Claims of the first class, averred in the petitions to amount to \$177,786.50, are based upon the following facts:

The claim of Dickey is typical of all the claims of this class. It is averred that the United Properties Company is a corporation, and that F. M. Smith is a stockholder therein; that on January 6, 1912, said corporation issued its bond certificate, wherein it agreed to deliver to the holder of such certificate, upon surrender thereof, 26 of its bonds, of the denomination of \$1,000 each, and that said Dickey is the owner and holder of said certificate; that said corporation has failed and neglected to deliver the bonds as provided in the certificate; that by reason of such failure the said corporation became and is indebted to said Dickey in the sum of \$26,000, and said F. M. Smith as a stockholder (the total number of shares issued being set out, and the number owned by Smith) became and is indebted to said Dickey in the sum of \$10,979 as his proportionate liability for such debt of said corporation. There are five claims of this class, aggregating, as has been stated, \$177,786.50.

The second class may be typified by the claim of Albert Hanford, which avers that the Union Water Company is a corporation with a capital stock of 500,000 shares, of which the United Properties Company owns 499,980 shares; that on February 15, 1912, the said the Union Water Company issued and delivered to said Hanford 15 bonds,

of the par value of \$1,000, each, bearing interest at 6 per cent. per annum, payable semi-annually on the 1st days of January and July of each year; that the United Properties Company guaranteed in writing the payment of the principal and interest to accrue on said bonds; that on July 1, 1913, there became due to said Hanford for interest on said bonds the sum of \$450; that by reason of said guaranty the United Properties Company became indebted to said Hanford in said sum of \$450, and that the proportionate liability of said F. M. Smith as a stockholder of said the United Properties Company was and is the sum of \$190—the whole number of shares issued being set out, as well as the number owned by said Smith. Of this class of claims there are seven, aggregating \$429.64.

The third class embraces two claims, aggregating \$4,909, and may be illustrated by taking one of them, the claim of C. E. Gilman, which sets out that the Union Water Company is a corporation with a capital stock of 500,000 shares, of which the United Properties Company owns 499,980 shares; that the Union Water Company owes said Gilman \$1,615.19, evidenced by the promissory note of said Union Water Company payable upon demand; that as a stockholder of said Union Water Company the proportionate liability of the United Properties Company for said indebtedness is \$1,614.93, and that as a stockholder of said the United Properties Company the proportionate liability of said F. M. Smith for said stockholder's liability of said the United Properties Company is \$681—the total issue of the capital stock of said United Properties Company being set out, as also the number of shares thereof owned by said F. M. Smith.

The fourth class embraces a single claim, that of J. M. Kane, which is for the sum of \$5,000 for money loaned by said Kane to said alleged bankrupt and secured by 50 shares of the capital stock of the International Mercantile & Bond Company and 50 shares of Realty Syndicate; the value of such securities being averred to be \$1,000, leaving \$4,000 unsecured.

There are therefore five claims, aggregating \$177,786.50, based upon bond certificates, seven claims, aggregating \$429.64, for guaranteed interest, two claims, aggregating \$4,409, based upon the liability of a stockholder of a stockholder, and one claim, for \$4,000, the excess of the claim for \$5,000 over the value of the security.

All of the claims, except the last, are based upon the liability of said Smith as a stockholder of the United Properties Company, and two of them are based upon his liability as a stockholder of said corporation for an indebtedness of said corporation, due to its being a stockholder of the Union Water Company, which company borrowed the money. Upon this state of facts the alleged bankrupt has moved the court for an order directing the liquidation of all the said claims based upon his liability as a stockholder, and directing the determination of the value of the securities of said J. M. Kane, and this order is sought on the ground that the value of the securities held by said Kane is undetermined, and that the claims of all the others are unliquidated, and on the further ground that respondent is entitled, before further proceeding herein, to have determined the question as to whether or

not said petitions have been rightly filed by creditors of respondent having provable debts.

In support of this motion respondent has filed an affidavit setting forth that the value of the securities held by said Kane is greatly in excess of the amount of his claim; that there are extensive and valuable properties involved in this proceeding; that in the trial of the issues presented by said petitions much time will be consumed and enormous expense incurred, and that it will be for the best interest of all concerned to have determined preliminarily the question as to whether or not, upon liquidation of the said claims, it will be found that respondent is in fact indebted to said petitioners at all, or in such sum as would make their petitions valid, or, as stated by him, "rightly filed." The petitioners strongly object to such proceeding, on the ground, among others, that the court has no jurisdiction to make such order, at least in advance of the filing of an answer to the petitions, and that to countenance such procedure would be to introduce new and unheard-of pleadings and practice into the bankruptcy proceedings.

The relief sought by respondent does not seem to have been sought or granted heretofore in any bankruptcy court; but that fact alone is not sufficient to stamp it as unwarranted, and in a proper case it would seem to be authorized by the language of the Supreme Court of the United States in the case of *Grant Shoe Co. v. Laird*, 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591, the syllabus of which declares that:

"A liquidation may be ordered on the filing of the petition to ascertain whether the petition is based on a provable claim."

The body of the decision, speaking of what is meant by provable claims, supports the syllabus in the following terms:

"The whole argument from the letter of the statute depends on reading 'provable claims' in section 59b as meaning claims that may be proved then and there when the petition is filed. But if it can be seen then and there that the claims are of a kind that can be proved in the proceedings the words are satisfied; and, further, no reason appears why a liquidation may not be ordered on the filing of the petition to ascertain whether it is rightly filed or not."

It is not at all clear, under the first class of claims above mentioned, what the extent of the liability of respondent actually is. It does not follow that, because the bonds secured by the certificate were not delivered, the owner of the certificate has been damaged to the full extent of the face value of the bonds, nor, indeed, that he has been damaged at all. The claims of the second class are different, but they do not amount to \$500 in the aggregate. The claims of the third class are based upon the supposed liability of a stockholder of a stockholder. That such a liability exists does not seem ever to have been judicially determined. Of course, if this were the only class of claims presented here, the question might be determined upon a demurrer to the petition. But a demurrer could not reach the question as to the amount due under claims of the first and fourth classes, and if it be determined that without these claims arising upon the liability of a stockholder of a stockholder there are still debts sufficient in number and amount to

support this proceeding, then the validity or invalidity of such claims becomes immaterial.

The amount due over and above the value of the securities of petitioner Kane must also be determined at some stage of the proceedings. It is quite true that all of these questions could be disposed of upon a trial of the issues after answer; but, in the language of the Supreme Court above quoted, no reason appears why a liquidation may not be ordered at this time to ascertain whether the petitions are rightly filed or not. On the contrary, the magnitude of the interests here involved, and the character of the liabilities upon which it is sought to have respondent adjudicated a bankrupt, strongly incline me to the belief that this preliminary question should be first disposed of. Many things have been suggested that are false quantities herein. If the petitioning creditors have claims sufficient in number and amount to support the proceedings against respondent, they are entitled to proceed, even though it be against the wish of a much larger number of creditors representing a vastly greater amount of indebtedness. The desires of other creditors of respondent may not be considered.

The only questions presented at this time are: (1) Have a sufficient number of creditors joined in the petition? (2) Do they hold claims against respondent to the amount required by the statute? (3) Should these matters be now determined in the manner suggested?

I am of the opinion that they should, and respondent's motion will therefore be granted.

BARRETT v. GRAYS HARBOR COMMERCIAL CO.

(District Court W. D. Washington, S. D. December 3, 1913.)

No. 1,380.

MASTER AND SERVANT (§ 250¾ New, vol. 16 Key-No. Series)—WASHINGTON WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

Washington Workmen's Compensation Act, Laws Wash. 1911, c. 74, § 4, requires employers to pay to the state, to create an accident fund, a percentage of wages paid, such payments to be made in advance, based on past pay rolls, and to be adjusted at the end of each year on the basis of the actual pay roll for that year. It further provides that any shortage on such an adjustment shall be made good before February 1st following, and, by section 8, that if any workman shall be injured while the employer is in default for any payment and after demand for the same, the employer shall not be entitled to the benefits of the act, but the workman shall have a right of action. The commission created is empowered to make regulations for the administration of the act. An employer was notified on February 28th of a shortage due on its adjustment, with a demand for payment within 30 days. A workman was injured during that time, and before the payment had been made, but it was afterward made during the time. *Held*, that the demand was presumably in accordance with the regulations of the commission, and did not become effective until the expiration of the 30 days, and that on payment within that time the employer was entitled to the benefit of the act, and the injured workman could not maintain an action in the courts.

At Law. Action by J. H. Barrett against the Grays Harbor Commercial Company. On demurrer to amended complaint. Demurrer sustained.

Hugo Metzler, of Tacoma, Wash., for plaintiff.
 Bridges & Bruener, of Aberdeen, Wash., for defendant.

CUSHMAN, District Judge. This matter is for decision upon defendant's demurrer to the amended complaint. Plaintiff alleges that he was injured while in defendant's employ through the latter's negligence in failing to provide reasonably safe machinery in its sawmill where plaintiff was employed. Such employment is classified as "extrahazardous" by the Washington Workmen's Compensation Act. Section 2, c. 74, Sess. Laws 1911, p. 346. By this act such an employer is required to pay to the state $2\frac{1}{2}$ per cent. of his total pay roll each year, to create an industrial insurance fund. To justify his right to recover, in spite of the Compensation Law, plaintiff alleges that the defendant has not paid to the State Industrial Insurance Commission the percentage of its pay roll due from it for the year 1913, so as to exempt it from this action under that law.

Under date of February 28, 1913, the chairman of the commission served the following notice of demand upon the defendant:

Demand is hereby made for the contribution on your pay roll as required by section 4 for the payment of \$2,378.16 into the "accident fund" created by the Workmen's Compensation Act (chapter 74, Session Laws of 1911), and is based upon data and pay rolls on file in this office for the months of ————, [See other side.]

Amount to be forwarded..... \$2,378.16

This sum of \$2,378.16 now demanded must be received at Olympia 30 days from the date above noted; otherwise you will be in default and subject to the penalties of the act.

Remittance may be made by check, draft, or money order, payable to Industrial Insurance Commission, and forwarded to Olympia, Washington.

This notice to you is a "demand for payment" as prescribed in section 8 of said law.

Indorsed on back:

Class 10—Adjustment 1912:			
8/12 of pay roll for 1912,.....	\$146,281 04— $2\frac{1}{2}$ %		\$3,657 03
Credits:			
Adjustment for 1911.....		\$207 11	
July 1st, by cash.....		651 95	
9/25, by cash.....		859 66	1,719 32
			<hr/>
			\$1,937 71
Class 20—Adjustment 1912:			
5/12 of pay roll for 1912.....	\$ 27,044 62— $2\frac{1}{2}$ %	\$676 12	
Less by cash August 16th, 1912.....		235 67	440 45
			<hr/>
Balance due.....			\$2,378 16

On the 24th day of March, plaintiff was injured. Defendant did not make payment to the commission until March 28, 1913.

The Compensation Act provides:

"The application of this act as between employers and workmen shall date from and include the first day of October, 1911. The payment for 1911 shall be made prior to the day last named, and shall be preliminarily collected upon the pay roll of the last preceding three months of operation. At the end of each year an adjustment of accounts shall be made upon the basis of the

actual pay roll. Any shortage shall be made good on or before February 1st, following. Every employer who shall enter into business at any intermediate day shall make his payment for the initial year or portion thereof before commencing operation; its amount shall be calculated upon his estimated pay roll, an adjustment shall be made on or before February 1st of the following year in the manner above provided.

"For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one-fourth of the premium of the next succeeding year, and one-twelfth thereof at the close of each month after December, 1911: Provided, any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund.

"The fund thereby created shall be termed the 'accident fund' which shall be devoted exclusively to the purpose specified for it in this act.

"In that the intent is that the fund created under this section shall ultimately become neither more or less than self-supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to rearrangement following any relative increase or decrease of hazard shown by experience.

"It shall be unlawful for the employer to deduct or obtain any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deduction shall be a gross misdemeanor. If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance with the same principle, any such increase in classification or premium rate, shall be subject to restoration to the schedule rate. Any such change in classification of risks or premium rates, or any change caused by change in the class of work, occurring during the year shall, at the time of the annual adjustment, be adjusted by the department in proportion to its duration in accordance with the schedule of this section. If, at the end of any year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the 1st day of February of the following year by the employers of that class in proportion to their respective payments for the past year. (Sec. 4, pp. 351, 352, 353).

* * * * *

"If any employer shall default in any payment to the accident fund hereinbefore in this act required, the sum due shall be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under section 4, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman. * * * (Sec. 8, p. 362.)

* * * * *

"Any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interests under this act may have the

same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence. * * * (Sec. 20, p. 368).

* * * * *

"The commission shall, in accordance with the provisions of this act:

"1. Establish and promulgate rules governing the administration of this act.

"2. Ascertain and establish the amounts to be paid into and out of the accident fund.

* * * * *

"7. Compile and preserve statistics showing the number of accidents occurring in the establishment or works of each employer, the liabilities and expenditures of the accident fund on account of, and the premium collected from the same, and hospital charges and expenses." (Sec. 24, pp. 370, 371).

It is clear from the foregoing that the provisions of section 4 concern matters of administration, primarily, between the commission and the employer. Section 4, in part, provides:

"At the end of each year an adjustment of accounts shall be made upon the basis of the actual pay roll. Any shortage shall be made good on or before February 1st, following."

The effect of this provision is that, if adjustment is made prior to February 1st and the employer fails to pay, the state may sue to recover. So far as an employ  who is injured is concerned, a separate provision is made, in section 8:

"In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under section 4, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman. * * *"

The notice set out above, served upon the defendant, though dated February 28th, was not, in effect, a demand before the end of the 30 days allowed by its terms. Section 4 provides that "at the end of each year an adjustment shall be made." This necessarily contemplates the allowance of a reasonable time after the end of the year for the examination of the pay rolls and proofs, in order to make the adjustment. So far as the complaint discloses, no adjustment was made before the date of the notice of demand; i. e., February 28th. It would not appear, therefore, that an unreasonable length of time had elapsed since the end of 1912 for the purpose of making an adjustment.

The power given to make demand necessarily contemplates the power, in the absence of statutory prohibition, to allow a reasonable time after notice of demand for compliance. The 30 days allowed by the notice in this case would not appear unreasonably long. The act itself expressly reposes a considerable discretion in the commission in such matters of administration, and expressly empowers the commission to make rules governing the administration of the act. In the absence of the promulgation of formal rules, the practice of the commission would have the same effect. No departure from the regular practice on the part of the commission is disclosed in this case.

Demurrer sustained.

DARNELL v. EDWARDS et al.

(District Court, S. D. Mississippi. November, 1913.)

No. 9.

1. CARRIERS (§ 12*)—STATE REGULATION OF RATES—CONFISCATORY RATES.

In determining whether a freight rate established for a railroad by a state commission is unconstitutional as confiscatory, the only question is whether it will yield a fair return on the value of the property employed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

2. CARRIERS (§ 18*)—STATE REGULATION OF RATES—SUIT TO ENJOIN ENFORCEMENT.

A preliminary injunction to restrain the putting in force by a state commission of a rate on logs to be charged by a railroad doing principally a logging business, on the ground that such rate is confiscatory, denied on the showing made, and where it appeared that the lumber company shipping most of the logs was under practically the same ownership as the railroad.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

In Equity. Suit by R. J. Darnell against George R. Edwards and others, composing the Railroad Commission of Mississippi. On motion for preliminary injunction. Denied.

Montgomery & Montgomery, of Tunica, Miss., for complainant.

George H. Etheridge, Asst. Atty. Gen., and Woods & Kuykendall, of Charleston, Miss. (James Stone, of Oxford, Miss., on the brief), for defendants.

Before SHELBY, Circuit Judge, and NILES and GRUBB, District Judges.

PER CURIAM. This is an application by the complainant for an injunction pendente lite to restrain the Railroad Commission of Mississippi from putting into effect a rate on logs over a railroad leased to and operated by the complainant, and which ran from Batesville, a station upon the railroad of the Illinois Central Railroad Company, in the state of Mississippi, southwesterly, a distance of about 17 miles. The complainant assails the rate made by the commission as being confiscatory and in violation of the fourteenth amendment to the Constitution of the United States. The question for determination is whether Darnell, lessee and operator of the Batesville & Southwestern Railroad, will receive a fair return on the reasonable value of the property devoted to public use, if the Railroad Commission's rates on logs are made effective.

The bill shows that the railroad earned for the fiscal year, ending June 30, 1913, \$15,553.01, and that the operating expense for the same year was \$4,296.20, leaving net earnings of \$11,256.81. Against these the plaintiff charges one-twentieth of the amount alleged to have been expended by him in construction, \$163,467.67, as annual rent, upon the erroneous idea that it was a proper rental charge and operating expense. After deducting this rental charge, there is left the sum of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

\$3,123.42, which is 1.92 per cent. on the sum so expended by the complainant, instead of 6 per cent. on that sum, or \$9,760.06, which complainant contends he should have. These figures are based on the plaintiff's own rates.

[1] As we see it, the question should be solved without reference to the question of interest plaintiff has in the railroad or the reimbursement to him of the amount expended by him in construction. The bill shows a net operating income of \$11,256.81, and the remaining inquiry is, "Is this a fair return on the property (i. e., railroad and equipment) employed in the earning of it?" This depends upon what the property, so employed, consists of and the value of it.

The railroad was built at the joint expense of the Illinois Central Railroad Company and the plaintiff. The affidavit of Elliott Lang shows that plaintiff expended \$163,467.67 for construction and equipment. There is nothing to show how much was expended by the Illinois Central for the part it did, viz., furnishing track material, driving piles, etc. The record shows that the Illinois Central, under its contract with plaintiff, has repaid to plaintiff the sum of \$69,500 of the sum expended by him. This is all the evidence contained in the record relating to the original cost or the present value of the property devoted to the public use. The amount of plaintiff's expenditure, as stated, is disputed by defendants. In any event, the item of \$12,687.04, designated "other expenditures," should be eliminated until the nature of this expenditure is made to appear. This would leave the amount claimed to have been so expended approximately \$150,000, or about \$10,000 a mile, for the cost of preparing the roadbed and laying track, not including the cost of pile driving and of track material and equipping the road. In view of the character of the road and its territory, as developed by the evidence, this would seem ample for the whole work of construction. In any event, the plaintiff is not in a position to contend for more, since the record fails to show any other or greater expenditure by any one. The net earnings for 1912, eliminating the improper rental charge, would yield approximately 7½ per cent. upon the plaintiff's corrected valuation of \$150,000. These earnings are the result of plaintiff's own rate on logs. If the commission's rates were substituted for the plaintiff's for the year 1912, and if no more business had been done for that year than was done under those rates, and if all business done for that year was the handling of logs (and this seems to have substantially been the case), the gross earnings would be reduced from \$15,553.01 to approximately \$8,000, and, deducting operating expenses (\$4,298.20), the net operating income would be approximately \$3,700. No showing is made on the record for taxes. This would be about 2½ per cent. on the assumed valuation of \$150,000. The affidavits, however, tend to show that the voluntary rates of the plaintiff are prohibitive on all shippers, upon the shipment of all classes of logs, except only hickory and white oak, and practically forbid the transportation of all classes of logs, except when cut from the lands of the plaintiff and shipped by his lumber company. The contention of the commission is that plaintiff can afford to pay any rate, since there is a practical identity of interest be-

tween plaintiff, as lessee of the railroad, and plaintiff's incorporation as owner and shipper of the logs, so that the freight money would be taken by him from one pocket and put by him into the other.

The record shows that the Illinois Central Railroad Company voluntarily maintains rates on logs from Walls and Arden, stations on its line, to Memphis, for like distance of 15 miles, substantially the same in amount as those fixed by the Railroad Commission for plaintiff's railroad. The comparative rates on logs on other railroads in various sections of the United States, as shown by Exhibit I to the bill, are higher, but conditions on those roads are not shown to be similar. No inference unfavorable to the commission rates can therefore be drawn from the comparison.

If the commission rates, when enforced, will yield the plaintiff no more than 2½ per cent. on his investment, it would seem that they are too low. The fact that they would have yielded only that amount on the amount of business actually handled in 1912 under plaintiff's voluntary rates is, however, not conclusive. The defendant's contention that these rates were prohibitive as against all shippers except plaintiff or his incorporation, and that other timber landowners would cut and ship logs under the Railroad Commission's rates, if they had a chance under reduced rates, and would so greatly increase the volume of business transported as to make it remunerative under the lower rates, seems plausible. At least, it cannot be said in advance of a period of experiment under the lower rates that such would not be the case. If no business was developed by the lower rates, then, if the plaintiff is, as alleged, the party most interested in the incorporation that has heretofore cut and shipped the logs, no harm would be done plaintiff, since what he lost in operating the railroad he would regain in the additional profit on the logging business, due to reduced rates. The interest of the plaintiff in both the logging business and the railroad also impairs the value of the usual inference that the operator of the railroad would so operate it as to develop all the business that could be developed, and would make the greatest profit possible. It is clear that the interest of the plaintiff in the railroad may be counterbalanced by his interest in the timber, if it was built to develop the timber that he already owned, and that which he may yet desire to acquire at lower figures, obtainable because of its inaccessibility to proper railroad facilities and rates. So it is true that the amount actually expended by plaintiff to build the railroad in this instance may be no true index of its fair value, since his timber interests may have induced him to build a railroad that could not be expected to be operated profitably as a purely transportation proposition.

[2] It at least seems to us that it would be better not to interfere with the commission-made rates until final hearing, as this would afford a period for experiment as to their power to develop new business in volume sufficient to make the commission rates remunerative, and in view of the fact, if they fail to develop any new business, the loss of revenue to plaintiff from the enforcement of the reduced rates will be partly reimbursed to him in the additional profit, due to the reduced rates the incorporation, which does the logging and shipping,

and in which he seems to be largely interested, will make on its product. *Railroad Commission of Alabama v. Central of Georgia Railway Co.*, 170 Fed. 225, 95 C. C. A. 117.

Additional gross earnings of about \$5,000, with the same operating expense, would produce a net return of 6 per cent. upon the present showing upon the valuation of \$150,000 for the equipped railroad. The un rebutted affidavits tend to show that the additional business could be transported without any additional train crews than those heretofore employed, and at small additional operating expense.

We think there is no such showing of confiscation as is required by the rate case of *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, and the other rate cases recently decided by the Supreme Court, to justify the court's interference with the state-made rates, at least upon the motion for a temporary injunction; and the application for the injunction pendente lite is denied.

MOSS v. GOODHART.

(District Court, D. Montana. November 14, 1913.)

1. BANKS AND BANKING (§ 287*)—NATIONAL BANKS—RECEIVERS—IMPROVIDENT ACTS—STOCKHOLDERS—RIGHT TO SUE.

Where a receiver of a national bank, 90 per cent. of the stock of which was owned by plaintiff, wrongfully, willfully, and negligently sold assets of the bank for less than 50 per cent. of their value, a right of action against such receiver was in the bank, and could not be enforced by plaintiff without alleging a demand on the receiver's successor, the Comptroller, and the bank in turn, and the refusal of each to institute suit.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. § 287.*]

2. BANKS AND BANKING (§ 285*)—NATIONAL BANKS—INSOLVENCY—APPOINTMENT OF RECEIVER—AUTHORITY TO SUE AND BE SUED.

A national bank continues to exist and has capacity to sue and be sued, notwithstanding the appointment of a receiver of its assets by the Comptroller of the Currency.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 1088; Dec. Dig. § 285.*]

3. BANKS AND BANKING (§ 287*)—NATIONAL BANKS—INSOLVENCY—RECEIVERS—MISCONDUCT—ACTIONS—PARTIES.

Where a receiver of a national bank willfully sold certain of its assets for less than 50 per cent. of their value, and the receiver's successor, the Comptroller, and the bank successively and in turn refused to bring suit to set aside the sale or for an accounting, the receiver's successor should be made a party defendant to a suit by a stockholder to obtain such relief, that the bank might be bound by the result of the litigation.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. § 287.*]

In Equity. Suit by P. B. Moss against Richard W. Goodhart. On motion to dismiss for want of facts. Granted.

Goddard & Clark, of Billings, Mont., for plaintiff.

Johnston & Coleman, of Billings, Mont., for defendant.

BOURQUIN, District Judge. A national bank, of which plaintiff owns 90 per cent. of the stock, was closed by the Comptroller of the Currency, who appointed defendant receiver thereof. A second successor of defendant is yet administering the bank's affairs. This action was commenced in a state court, appealed to the state Supreme Court, by it remanded, and it was then removed hither. See 131 Pac. 1071.

[1] Plaintiff sues "on behalf of himself as well as of all stockholders" and "in the interests of all of the creditors." The allegations are that defendant as such receiver wrongfully, willfully, and neglectfully sold certain assets of the bank for less than 50 per cent. of their value; that plaintiff made demand upon defendant's immediate successor to bring suit against defendant to set aside the sale "or for an accounting to the said trust for the value thereof," which demand was refused, and that the Comptroller has levied an assessment of 100 per cent. upon plaintiff's stock. The prayer is that the sale be declared void, that defendant be required to pay to the present receiver, appointed after suit commenced, the amount of the loss from said sale, and for general relief.

Defendant moves to dismiss, for that the facts alleged are insufficient to constitute a cause of action in equity, in that no demand is alleged upon the bank, the Comptroller, and the present receiver. Plaintiff contends that by reason of owning 90 per cent. of the bank's stock and the assessment thereon he is directly injured by defendant's conduct, has an individual right of action therefor, and that in any event the demand alleged is sufficient. The court is of the opinion that the motion to dismiss should be granted. The property involved was the bank's. The alleged wrong by defendant was against the bank. The cause of action therefrom arising is the bank's. The recovery thereon will be the bank's.

Every trespass upon corporate property is a direct injury to the corporation and merely an incidental injury to stockholders. The right of action to which it gives rise is the corporation's. For their incidental injury stockholders have no right of action. Their only redress is the incidental benefit they may receive from the corporation's exercise of its right of action. Though plaintiff in this case owns nearly all the stock of the association, legal relations are not changed thereby, and the rule is the same. His equitable interest in the property involved is greater in quantity, but the same in quality, as that of the owner of a single share. If the assessment levied upon his stock is wholly due to the trespass, it is but part of his incidental injury. He has no individual cause of action. It is apparent the complaint is on the theory of a stockholder's suit in the right of the corporation. A prerequisite to a stockholder's suit in equity to redress corporate wrongs is a demand upon those then in control, management, and administration of the corporate affairs to bring suit, and their unreasonable refusal. This demand takes the form of earnest and honest efforts in good faith to secure action by those aforesaid whose duty is action. The stockholder must exhaust all means within reach to that end.

The reasons are obvious. A stockholder cannot interfere with this control, management, and administration, nor with the management's possession of the corporate assets, nor with its right to its own discretion, judgment, and procedure therein, and substitute his judgment for the management's, save in extreme necessity and as a last resort to preserve corporate property from willful or neglectful loss or injury. Then only can a stockholder intrude and assume such measure of the duty aforesaid as is necessary to maintain a stockholder's suit for the corporation's benefit. If the corporation is a going concern, these efforts must extend to the directors, and also, in case of failure with them, to the body of the stockholders, who may exercise influence upon the directors—change the personnel of the board, if necessary. *Corbus v. Mining Co.*, 187 U. S. 461, 23 Sup. Ct. 157, 47 L. Ed. 256.

If the corporation is in the hands of a receiver appointed by a court, the demand must be made upon the receiver; and it has been held that, failing there, the court should be requested to compel him to bring an action. *Swope v. Villard* (C. C.) 61 Fed. 419. The same end is generally attained, however, by the stockholder petitioning the court for leave to sue upon the corporation's cause of action and in its behalf, making the receiver a party defendant; the court having discretion to grant, or to refuse, and to direct the receiver to bring the action.

In the matter of a national banking association in charge of the Comptroller for liquidation, it is believed that, before a stockholder's suit can be maintained, demand as aforesaid must have been made upon the receiver, the Comptroller, and the association in turn. *Ex parte Chetwood*, 165 U. S. 456, 17 Sup. Ct. 385, 41 L. Ed. 782, seems to indicate that such demand is necessary. Then and then only all means within the stockholder's reach to procure action by those having capacity to sue or to compel suit have been exhausted. The Comptroller is in the management and administration of the bank's affairs, mainly through his receiver, his instrument, whom he appoints, directs, and controls.

[2] The receiver ordinarily can act without special instructions, but in some contingencies must have express authority from the Comptroller to bring suit. See Rev. St. U. S. § 5234 et seq. (U. S. Comp. St. 1901, p. 3507); *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476. The association continues to exist, and yet has capacity to sue and be sued. *Bank v. Deposit Co.*, 161 U. S. 7, 16 Sup. Ct. 439, 40 L. Ed. 595.

[3] This does not mean that at any time the bank can interfere with the Comptroller's and receiver's possession of the assets and their management and administration—in other words, bring suit on its causes of action—but means only that if the receiver unreasonably refuses to bring such action, and if the Comptroller likewise refuses to compel the receiver to sue, the association may treat their refusal as an abandonment of the cause to it, and yet having both capacity to sue and title to its causes of action, may sue thereon. If it does or will do so, there is no necessity for a stockholder to resort to a suit in equity in behalf of the association for the protection of his equitable

interest in the cause of action, the corporate property, and so he has no power to do so. If the association likewise refuses, and cannot be compelled to bring the action, a stockholder may have his action, making the receiver a party defendant, so that, if the suit fails, the receiver and through him the association will be bound by the decree and disabled from renewing the litigation. It would seem that the impropriety of a stockholder's suit under any other circumstances is obvious.

In the instant case there appears no reason why the complainant, owning 90 per cent. of the association's stock and so controlling the association, could not, if necessary, have procured it to bring the action. And the action would have proceeded at law, before a jury, more appropriate than this suit in equity.

The damages should be determined by the verdict of a jury. The necessary demand not having been made, plaintiff cannot maintain the suit, and the motion to dismiss is granted.

JUSTICE v. EMPIRE STATE SURETY CO.

(District Court, E. D. Pennsylvania. November 25, 1913.)

No. 1,356.

1. PRINCIPAL AND SURETY (§ 59*)—CONTRACT—CONSTRUCTION—PAID SURETY—STRICTISSIMI JURIS.

The rule of strictissimi juris, applicable to relieve an individual voluntary surety, is inapplicable to relieve a paid surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

2. PRINCIPAL AND SURETY (§ 97*)—PAID SURETY—DISCHARGE—CONTRACT—MATERIAL VARIANCE.

A paid surety company can be relieved from its obligation only where a departure from the contract is shown to be a material variance.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146-168; Dec. Dig. § 97.*]

3. PRINCIPAL AND SURETY (§ 100*)—BUILDER'S CONTRACT—DISCHARGE OF SURETY—VARIANCE—FAILURE TO RETAIN FUNDS.

The bond of a paid surety company for a building contractor provided that the owner should make specified payments during progress of the work and should retain not less than 10 per cent. of all payments for work performed and materials furnished until complete performance by the principal. Instead, the owner, at the time of the contractor's default, had paid \$2,000 more than the advance payments provided for by the contract, and had not deducted 10 per cent. from any payment. *Held*, that such provision of the bond was for the indemnity and benefit of the surety, as well as the owner, and the latter's failure to comply therewith constituted a material variance, which relieved the surety from liability, without proof of actual injury therefrom.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 162-165; Dec. Dig. § 100.*]

At Law. Action by George L. Justice against the Empire State Surety Company. On motion for new trial. Denied.

Sydney Young and William W. Montgomery, Jr., both of Philadelphia, Pa., for plaintiff.

Hepburn, Carr & Krauss, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The plaintiff brought suit against the defendant, a surety company, to recover the sum of \$5,047.83 upon a bond entered into by the defendant, as surety, and Francis T. Maguire, as principal, with the plaintiff, conditioned that Maguire, as contractor, should fully perform his contract with the plaintiff for the erection of a house and barn. The contract provided that the total price for the work and material was to be \$14,484 for the house and \$3,750 for the barn. The contract provided for payments of certain sums to the contractor upon certificates of the architects at specified stages in the progress of work. Upon the house five payments, aggregating \$10,200, were to be made during the progress of the work, and upon the barn one payment of \$1,500, the balance to be paid when the contract was completed. The bond was in the sum of \$10,950, and provided, *inter alia*:

"Second. That the obligee shall retain not less than 10 per centum of all payments for work performed and materials furnished in the performance of said contract, until the complete performance by said principal of all the terms, covenants, and conditions thereof, on said principal's part to be performed."

It appeared at the trial that the plaintiff had made the payments provided for during the progress of the work and an additional payment of \$2,000 to the contractor in excess of the amounts specified in the contract, all upon certificates of the architect, and had not deducted 10 per cent. from the amount of any payment. The plaintiff, therefore, had paid the contractor \$13,700 before the contractor defaulted in his contract, which was \$3,170 in excess of the payments due under the terms of the contract and bond. The plaintiff thereupon completed the work at a cost to him of \$621.03, and paid \$7,789.99 to clear the property of liens which had been filed by materialmen and subcontractors. He claimed for those amounts, together with the amounts of undetermined liens, \$920.81, and counsel fees in contesting the liens, \$250, making a total of \$9,581.83, less the amount due the contractor at the time of default, \$4,534, making his total claim \$5,047.83. At the close of the plaintiff's evidence, counsel for the defendant moved for binding instructions upon the ground that the plaintiff had materially varied the terms of the contract by anticipating payments and by failure to deduct from each payment 10 per cent. provided for by the bond. The jury was accordingly directed to return a verdict for the defendant.

In the case of *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, Mr. Justice White, in delivering the opinion of the court, said:

"That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration, is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed. That it raises an equity in the surety in the fund to be created, and that a disregard of such stipulation by the voluntary act of the creditor operates to release the sureties, is amply sustained by authority."

The Circuit Court of Appeals in this circuit, in the case of Fidelity & Deposit Co. v. Agnew, 152 Fed. 955, 82 C. C. A. 103, following the rule in *Prairie State Bank v. United States*, said:

"The provision in a building or working contract that the contractor or builder shall be paid as the work progresses according to the amount of materials furnished or work performed, upon estimates to be made by the supervising architect or engineer, whether a percentage is to be retained therefrom until the whole is done or not, redounds to the benefit of a surety or guarantor of the party who is to fulfill the contract; and upon payment being made in disregard of it there is such a departure from the contract upon which the undertaking of the surety or guarantor is based that he is released. The purpose of such a stipulation is to guard against the consequences of a default, in case the principal contract proves a losing one, or the contracting party for any reason fails to comply, the percentage retained, where that is provided for, affording additional security, as well as holding out an incentive; and when it is not observed, and advance or overpayments are made, it is so obviously to the prejudice of the surety that it operates as a discharge as matter of law."

[1] Counsel for plaintiff concedes that the rule of *strictissimi juris* is applicable in relief of an individual voluntary surety, but insists that it is inapplicable to relieve a paid surety on a contractor's bond, but actual damage must be proved at the trial. While the question as to whether the rule applies to a paid surety company does not appear to have been raised in the case of *Fidelity & Deposit Co. v. Agnew*, it is apparent that the defendant was such a surety company. In discussing that question in the case of *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 422, 24 Sup. Ct. 143, 48 L. Ed. 242, Mr. Justice Brown said:

"Counsel for the Brick Company argued with much persuasiveness that this rule of *strictissimi juris*, though universally accepted as applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary consideration, has no application to the guaranty companies, recently created, which undertake, upon the payment of a stipulated compensation and as a strictly business enterprise, to indemnify or insure the obligee in the bond against any failure of the obligor to perform his contract. It is, at least, open to doubt, however, whether any relaxation of the rule should be permitted as between the obligee and the guarantor, which may have signed the guaranty in reliance upon the rule of *strictissimi juris*, and with the understanding that it is entitled to the ordinary protection accorded to guarantors against changes in the contract or extensions of the time of payment."

In that case, in which the breach consisted in an extension of time for payment to subcontractors, the court said:

"Not knowing when or by whom these materials will be supplied, or when the bills for them will mature, it can make no difference to him whether they were originally purchased on a credit of 60 days, or whether, after the materials are furnished, the time for payment is extended 60 days, and a note given for the amount maturing at that time. If a person deliberately contracts for an uncertain liability, he ought not to complain when that uncertainty becomes certain. * * * The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation, which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute."

[2] The courts generally hold that a paid surety company can be relieved from its obligation of suretyship only where a departure from the contract is shown to be a material variance. *Young v. American Bonding Co.*, 228 Pa. 373, 77 Atl. 623; *Philadelphia v. Fidelity & Deposit Co.*, 231 Pa. 208, 80 Atl. 62, Ann. Cas. 1912B, 1085; *Brown v. Title Guarantee & Trust Co.*, 232 Pa. 337, 81 Atl. 410, 38 L. R. A. (N. S.) 698; *United States v. U. S. Fidelity & Guaranty Co.* (C. C.) 178 Fed. 721.

[3] After a somewhat careful examination of the cases, I have been unable to find any case in which the relaxation of the rule of strictissimi juris was extended as between the surety and the obligee in the bond to the extent of requiring proof of actual injury in the case of breach of the terms of the bond by anticipation of payments by the obligee to the contractor. In such case, for the reasons stated in *Prairie State Bank v. United States and Fidelity Co. v. Agnew*, and upon the authorities there cited, anticipation of payments by the obligee is held as a matter of law to be a material variance from the terms of the contract.

My opinion is that there was no error in giving binding instructions, and therefore the motion for new trial is denied.

H. E. POGUE DISTILLERY CO. v. PAXTON BROS. CO. et al.

(District Court, E. D. Kentucky. October 8, 1913.)

SALES (§ 48*)—CONTRACT—VALIDITY—PUBLIC POLICY—FRAUD.

Plaintiff sued to recover damages for defendants' breach of a written contract to make and sell to defendant, P. Bros. Co., certain Bourbon whisky; the contract providing that the whisky was to be made, sold, and warehoused by plaintiff, but in the name and under the brand of P. Bros. Co., who should have the use of plaintiff's bottling house and facilities so far as the same might be allowed by the United States, and did not interfere with the reasonable use thereof by plaintiff, and that plaintiff should not object to any representations by the buyer or its agent that it was interested in plaintiff's distillery, provided they should not involve plaintiff for any liability or obligations of the buyer, the distillery to be run in such manner that the bottles, when placed in bond, should show the buyer instead of the plaintiff as the distiller. *Held*, that the contract provided for misrepresentations as to the manufacture of the whisky to deceive the public, and was therefore unenforceable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 101-107; Dec. Dig. § 48.*]

At Law. Action by the H. E. Pogue Distillery Company against the Paxton Brothers Company and another. On special and general demurrers of the Paxton Brothers Company to plaintiff's amended petition. Sustained.

Mackoy & Mackoy, of Louisville, Ky., and Pogue & Pogue, of Cincinnati, Ohio, for plaintiff.

Paxton, Warrington & Seasongood, of Cincinnati, Ohio, and J. C. Wright, of Newport, Ky., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

COCHRAN, District Judge. This cause is before me on the special and general demurrers of the defendant the Paxton Bros. Company to plaintiff's amended petition. The defendant the Edgewood Distilling Company has not been served with process and is not before the court. The ground of the special demurrer is that the defendant the Edgewood Distilling Company is an indispensable party to the suit. I do not think that it is, and the special demurrer is therefore overruled.

The action is one to recover damages for breach of a written contract to make and sell 12,500 barrels of Bourbon whisky. On its face the contract is between the plaintiff and the demurring defendant. There is no indication in the contract itself of the other defendant having any connection therewith. The plaintiff owns and operates a distillery at Maysville, Ky. If one limits himself to what the contract discloses, the demurring defendant is a wholesale liquor dealer or jobber.

By the contract it was expressly provided that plaintiff was to make and sell to the demurring defendant 12,500 barrels of Bourbon whisky, as therein set forth, for the price therein named. The details of the contract in relation to the time when the whisky was to be made and sold or the prices at which it was to be purchased need not be set forth. Possibly note should be taken of the circumstance that the contract contemplated that the price might go over 30 cents or below 25 cents, and in the one contingency the demurring defendant was not bound to take the whisky, notice of its determination not so to do to be given by a certain time, and in the other contingency plaintiff was not bound to make and sell the whisky, notice of which seems not to have been required.

The thing to be emphasized is that, according to the contract, the plaintiff's relation to the whisky with which it had to do was that of manufacturer, seller, and warehouseman, and the demurring defendant that of purchaser. It was provided, however, that the whisky so to be made, sold, and warehoused by plaintiff was to be made in the name and under the private brand of the demurring defendant; that the latter should have the use of plaintiff's bottling house and bottling facilities so far as same might be allowed by the United States government and did not interfere with the reasonable use by plaintiff in the requirement of its business; that no objection would be made by plaintiff to any representations on the part of the demurring defendant or its agents that it was interested in plaintiff's distillery, provided that the representations should in no wise involve the plaintiff for any liabilities or obligations of the demurring defendant or its agents or representatives; that the contract was subject to the laws and regulations of the United States government; and that, according to a clause below the signatures, which I assume to be a part of the contract, the distillery was to be run in such manner that the government stamp and bottle will show the Paxton Bros. Company when bottled in bond under government regulations. The latter provision indicates that the distillery could not have been run in plaintiff's name, and the government stamp and label on the bottle, when the whisky was bottled in bond, show demurring defendant's name—that is, that it was the distiller; and it is conceded that such is the case.

It is clear, therefore, that though the plaintiff was in fact to make the whisky and to sell it to the demurring defendant after it was made and then to warehouse it for it, the contract contemplated that the latter was to represent to the trade that it had in fact made the whisky, and to this end the distillery was to be so operated and the whisky was to be so branded as to afford a basis for such a representation. According to the allegations of the amended petition the plan of operation understood between the parties at the time the contract was entered into was this: The plaintiff's distillery plant was to be leased to H. E. Pogue, a person connected with plaintiff and then in charge of its warehouse, according to the recital of the contract, as the agent of the plaintiff, and to be operated by "H. E. Pogue as the Paxton Bros. Company." It is likely that it was intended to allege that the lease was to be to H. E. Pogue as agent of the demurring defendant, for if it was to be to him as agent of plaintiff the lease would be really to itself. H. E. Pogue was to give notice of his operation of the plant to the government, filing his annual bond and form 27a, the bond reciting the name adopted as the name under which the plant was to be operated, to wit, "H. E. Pogue, as the Paxton Brothers Company, Distillers." All this was a sham and a pretense. Notwithstanding it, plaintiff was to purchase and pay for all the material used, to employ and pay all the labor required, and to superintend the making through its representative, H. E. Pogue, and the whisky when made was to be its whisky until warehouse receipts were issued and notes given therefor with the receipts attached as collateral security. I cannot conceive that it is possible that the laws and regulations permit of such a way of doing things. No doubt they permit one to operate a distillery under any name or style which he may adopt. The fact that they so do does not authorize one in reality to operate the distillery and make and sell the whisky and the purchaser to get the credit for having made it.

The contract sued on, therefore, contemplated the doing of that which was not permissible under the laws and regulations, so far as I am advised in regard thereto, and the perpetuation of a fraud on the public; i. e., the representation by the demurring defendant that it had made the whisky, which in fact plaintiff had made, and the distribution and sale of the whisky to retailers and consumers on the faith of such representation. And on this ground the contract must be held void, and the general demurrer well taken.

Possibly the amended petition does not state a cause of action against the demurring defendant, even though the contract was enforceable against it. It seems to take the position that the contract was with its codefendant rather than with it. The allegations are that the plaintiff entered into a contract with "the Edgewood Distilling Company in the name of the Paxton Brothers Company," and that "the Edgewood Distilling Company owns and operates the Paxton Brothers Company, defendant herein, and that the defendant the Paxton Brothers Company is merely the name of a nominal company organized for the purpose of operating as distillers and making whisky under said name solely for the use and benefit of the Edgewood Distilling Company aforesaid."

This goes perilously near to alleging that the Paxton Bros. Company is the mere name under which the Edgewood Distilling Company did business. If so, it suggests the question whether recovery can be had against any one but the Edgewood Distilling Company.

Then the amended petition adds terms to the contract of which parol evidence would seem not to be permissible, as, for instance, that the whisky was to be made under the brand of the Edgewood Distilling Company, to be known as Edgewood; that the whisky was to be taken over by that company and to be paid for by it; and that all the business was to be handled and carried on under its name. I do not, however, find it necessary to determine whether the pleading is bad on either of these two grounds. It is sufficient to hold that the contract is not enforceable.

The demurrer is sustained, with leave to amend.

CENTRAL AMERICAN COMMERCIAL CO. v. PACIFIC MAIL S. S. CO.

(District Court, N. D. California, First Division. October 27, 1913.)

No. 13,603.

SHIPPING (§ 122*)—LOSS OF CARGO—LIABILITY OF VESSEL—NEGLIGENT LOADING.

A steamship held liable for the loss of a piece of machinery weighing 4,200 pounds which fell into the sea while being taken on board from a lighter by employes of the vessel by reason of the cutting of the ropes forming the sling by which it was being hoisted, on the sharp edge of a plate on the vessel; no adequate precautions having been taken to prevent such an occurrence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 452, 453, 456, 457; Dec. Dig. § 122.*]

In Admiralty. Suit by the Central American Commercial Company against the Pacific Mail Steamship Company. Decree for libelant.

Van Ness & Denman and R. P. Henshall, all of San Francisco, Cal., for libelant.

Knight & Heggerty, of San Francisco, Cal., for respondent.

DOOLING, District Judge. The libel herein sets forth the delivery in July, 1905, of one compressor frame of the value of \$1,311.98 to respondent at Panama, to be carried to the port of Corinto Nicaragua, and the failure of respondent to deliver the same at any time thereafter, averring that it was lost in the sea while respondent was attempting to load it on board its steamer Aztec, because of improper loading. Respondent denies all negligence and impropriety in the loading, claims that the frame was lost through perils of the sea, or by reason of latent defects in its loading appliances which it was impossible to discover beforehand, and also attempts to avail itself of two certain provisions in the bill of lading, one to the effect that:

"Unless written demand for damage shall be made upon the carrier liable therefor, or upon the carrier which actually delivered the goods, within ten days after delivery, all claims for damage shall be taken to have been waived, and no suit shall thereafter be maintainable to recover the same."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

And the other to the effect that:

"The carriers shall not become liable for any value exceeding \$100.00, upon each package unless the value exceeds that amount and is so expressed in the bill of lading."

In paragraph 7 of the second amended answer, filed May 4, 1909, the bill of lading is set out in full, together with a statement of the manner in which, according to the contention of respondent, the loss of the compressor frame occurred; the said paragraph concluding with the following averment:

"That in and by the terms of the said written contract and bill of lading this respondent is not liable or responsible for, and is exempted from all responsibility for any loss or damage to or the loss of the said compressor frame, under the circumstances thereof hereinbefore stated; and the respondent hereby claims the benefit and protection of each of the terms and stipulations and all of the provisions of said written contract and bill of lading applying to and affecting the loss of said compressor frame as aforesaid, and exempting and relieving respondent from any and all liability and responsibility therefor."

There is in said paragraph 7 no averment that written demand for damage was not made within ten days, nor any averment that the value of said frame was not expressed in said bill of lading; but in paragraph 8 of said answer the provisions of the bill of lading as to written demand were set up as a special defense, and it was in said paragraph averred that no such demand was made, and in paragraph 9 of said answer the provisions as to limiting liability to a value of \$100 were set up as a special defense with the averments that no value was expressed in the bill of lading for said compressor frame, and that said compressor frame constituted one package, and that the same was not expressed in said bill of lading to exceed in value \$100. To each of these paragraphs exceptions were interposed and sustained, thus eliminating them from the answer. Thereafter, however, a stipulation was signed by the proctors for libelant and respondent and filed herein, containing certain amendments to the libel set out in three paragraphs numbered 3, 4, and 5, and containing further certain amendments to the answer, answering said paragraphs 3, 4, and 5, and also containing the following language:

"And the respondent alleges and avers that the only contract or agreement relating to the carriage and delivery thereof, and that the truth and the facts as to the same and the loss of said compressor frame, and everything relating thereto are set out and stated and alleged in article and paragraph 7 of the 'Second Amended Answer' now on file in said court and cause. Said article and paragraph being therein entitled 'For a Further and Separate Answer to the said Libel,' all of which said further and separate answer contained in said paragraph 7 is hereby referred to and made a part hereof with the same force and effect as if specially copied and repeated in this answer to said substituted and amended articles 3, 4, and 5 of said libel.

"It is stipulated further that nothing herein contained shall avoid or affect or abrogate in any way or manner whatever the orders of said court heretofore made herein sustaining the exceptions of libelant to certain parts of the said second amended answer of the respondent herein."

It is by virtue of this stipulation that respondent claims that all of said paragraph 7 is reinstated as a part of its answer herein, and that

by virtue of such reinstatement it may avail itself of the defenses arising from the provisions of the bill of lading requiring written demand for damage, and fixing the liability for loss at not more than \$100. It does not seem necessary to determine to what extent the averments of paragraph 7 are now a part of the answer on file as regards these special defenses. It would seem that the last portion of the stipulation would at least prevent respondent from availing himself of any defense based upon the provisions as to demand and value in view of the fact that each of these provisions had been theretofore set up as separate defenses in separate paragraphs with appropriate averments to show that said provisions were applicable here, and the further fact that those defenses had been by the order of the court expunged. But it is not necessary to determine even that, for paragraph 7 contains no averments that demand was not made, or that value was not expressed, so that the defenses based upon these provisions are not pleaded and are not before the court. This brings us then to the only remaining question: "Was the compressor frame lost through the negligence of respondent while loading it aboard its steamer at Panama?" The only testimony bearing on this question is that contained in the deposition of Ryland Drennan taken on behalf of respondent, but introduced at the trial by libellant. Drennan was an officer of respondent, and was present at the time the frame was lost, and, although he testifies generally that the loading was properly done and that all the appliances for such loading were in good order and properly handled, yet his account of the actual occurrences at the time of the loss was, briefly summarized, as follows:

Respondent was loading this frame from a lighter alongside its steamer by means of a boom supported by various blocks and tackle. This work was being done by its own men, the crew of the Aztec. The Aztec was on an even keel, in a sheltered harbor. From the lighter to the deck of the Aztec was about 18 feet. This frame was one of about ten pieces of machinery belonging to this consignment and was the last to be taken from the lighter. All the others had been safely loaded. The frame weighed about 4,200 pounds and was from 6 to 8 feet in length, 2 feet wide, and 4 feet high. It was placed in a sling and was to be raised by means of a heavy Manila rope attached by a series of blocks to the boom. The signal was given and the frame was lifted a little bit from the lighter, and, as its weight was taken up, it released the lighter so that it drew away from the ship, and the piece of machinery fell against the ship's side, and the sling or the rope by which it was supported struck the sharp corner of a plate, causing it to cut under the strain, and the rope severed, and the machinery was lost overboard. It was cut on a plate above the boot top. All of these plates are very sharp, especially where they come from the butts. There was no guy attached to hold it off from the side of the ship so that it would not strike these plates, but the man probably tried to steady it.

I am satisfied that these facts show that the loss occurred by reason of respondent's failure to properly load the frame aboard its steamer.

To permit a rope at the end of which is a weight of over two tons to strike against a sharp plate, and to make no provision to prevent it, other than the attempt of a man on the lighter to steady it with his hands, is almost to invite disaster. The respondent will therefore be held liable for the value of the frame, and the case is referred to the commissioner to ascertain and report the same.

THE ROANOKE et al.

(District Court, N. D. California, First Division. October 7, 1913.)

No. 15,401.

SALVAGE (§ 13*)—SALVAGE SERVICES—TOWAGE OF DISABLED VESSEL.

A steamer with 93 passengers and freight cargo on board lost her propeller near the California coast, and anchored within $1\frac{1}{2}$ miles of shore, where she remained some 6 or 7 hours, when, in response to a wireless message, another steamer, which belonged to the same owners, came to her assistance, and towed her into a port; the services requiring some 12 hours. The weather was calm, and the sea smooth, and there was no immediate danger, but at that season, and with her nearness to the coast, danger might reasonably be apprehended. *Held*, that the service was one of salvage, and that the crew of the rescuing vessel were entitled to salvage compensation to the amount of a half month's pay each.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 16, 23-25; Dec. Dig. § 13.*]

In Admiralty. Suit for salvage by Oskar Johansen and others against the steamer Roanoke and others. Decree for libelants.

F. R. Wall, of San Francisco, Cal., for libelants.

Chas. H. Sooy, of San Francisco, Cal., for respondents.

DOOLING, District Judge. On April 10, 1913, the steamer Roanoke, bound from San Pedro to San Francisco, with 93 passengers and a cargo of freight, lost her propeller when in the neighborhood of Point Arguello. She drifted inshore from 10:05 a. m. until 11:10 a. m., when the anchor was dropped in $14\frac{1}{2}$ fathoms of water, at a point in the neighborhood of $11\frac{1}{2}$ miles south by east of Point Arguello. There was no wind, and the sea was calm, with a light swell from the west. During the time that she remained so anchored—that is, until about 5:20 p. m.—she was enveloped in a dense fog, and not more than a half mile to the eastward of the regular course of vessels plying along the coast. No rough weather was encountered during this period; the sea remaining calm and there being no wind. The anchor held without any apparent strain. The coast in that neighborhood is rocky in some places, and sandy in others. The steamer Santa Clara en route from San Francisco to Port Harford, about 10:45 a. m. received the following message from the Roanoke:

"Capt. Jessen, S. S. Santa Clara,

"Come to our assistance, lost wheel two miles South Point Arguello.

"Dickerson."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

To which he replied about 10:55 a. m.:

"Capt. Dickerson, S. S. Roanoke,

"Your message received. Coming to your assistance.

Jessen."

At 12:07 the master of the Roanoke sent to the Santa Clara the following message:

"Jessen, Santa Clara,

"We need your assistance at once.

Dickerson."

Upon receipt of the first message the Santa Clara altered her course and steamed directly for the Roanoke arriving there about 4:45 p. m., and took her in tow for San Luis, where they arrived about 4 a. m., and where the Roanoke anchored about 6:45 a. m. outside the breakwater. She remained there until 11 a. m., when the tug Sea Rover, dispatched from San Francisco for that purpose, took her in tow and finally landed her at her dock at the latter place. The Santa Clara dropped her at San Luis in obedience to the orders of the president of claimant, the North Pacific Steamship Company, the owner of both steamers, but was always near enough to assist until the tug arrived. The present libel is by the crew of the Santa Clara for salvage.

It is evident that while the sea remained calm and the anchor held the Roanoke would not be in any immediate danger. But on this coast in the month of April it is impossible to say how long such conditions would continue. A vessel so disabled as to be without motive power, within 1½ miles of a rocky coast, may, if not relieved, reasonably apprehend danger. The telegrams of the master of the Roanoke would indicate that he believed that he was in need of assistance, and the circumstances were such as to render that belief very reasonable. The fact that the danger was not immediately imminent is not at all controlling. It is contended that this was a towage instead of a salvage service; but to this contention I am unable to agree.

"A salvage service is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger, either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger." *McConnachie v. Kerr* (C. C.) 9 Fed. 50.

The services here rendered were salvage services. Both steamers belonging to the same owners, there is no claim made on behalf of the steamer Santa Clara, the action being solely in behalf of the crew—with the exception of the master and the engineer who make no claim. The value of the Roanoke was stipulated to be \$150,000; she was relieved without any difficulty by the Santa Clara with her own lines, brought aboard the Santa Clara by her own crew. No hardships or special dangers were undergone by the Santa Clara's crew, and, under all the circumstances, I think one-half of a month's pay to each of the crew will be ample compensation. This award is made for the reason that all salvage awards should be fairly substantial so that vessels and crews may be rather encouraged to render such services than discouraged from so doing.

A decree will be entered for \$887.50, being for one-half month's pay, which will be distributed to the persons named in the annexed memorandum:

Office.	Name.	Salary.
Second officer.....	Sjogren	\$ 85 00
Third officer.....	J. E. Johnson.....	70 00
First assistant engineer.....	Disher	100 00
Second assistant engineer.....	Reed	90 00
Third assistant engineer.....	Jacobs	80 00
Seaman	Becker	50 00
Seaman	Meislahn	50 00
Seaman	Cain	50 00
Seaman	Palmer	50 00
Seaman	Christenson	50 00
Seaman	A. Johnson.....	50 00
Seaman	Johansen	50 00
Seaman	A. Anderson.....	50 00
Seaman	E. Anderson.....	50 00
Seaman	Andreasson	50 00
First cook.....	J. Pitts	75 00
Second cook.....	Martin	60 00
Third cook.....	W. E. Pitts.....	45 00
Pantryman	Andrews	50 00
Mess boy.....	Tennant	35 00
Purser	Frankel	90 00
Wireless operator.....	K. G. Clark.....	40 00
Fireman	Matson	55 00
Fireman	Fraser	55 00
Wiper	Staley (Fahey).....	45 00
Oiler	Kremer	45 00
Oiler	Caskey	45 00
Oiler	Nelson	45 00
Waiter	A. G. Clarke.....	30 00
Waiter	Kotcharin	50 00
Waiter	Gibson	35 00
Waiter	Hansen	50 00

In re YUNGBLUTH et al.

(District Court, W. D. Washington, N. D. November 29, 1913.)

No. 3,625.

1. ASSIGNMENTS (§ 50*)—BANK DRAFT—EQUITABLE ASSIGNMENT.

The issuance of a check or bill against the funds in a bank does not in general, in the absence of unusual circumstances, effect an equitable assignment of the funds in the bank on which it is drawn, either at common law or under the express provisions of Rem. & Bal. Code Wash. § 3579.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99-105; Dec. Dig. § 50.*]

2. ASSIGNMENTS (§ 50*)—DRAFTS—EQUITABLE ASSIGNMENT.

Claimant, having funds on deposit in the bankrupts' bank, applied for \$400 November 6, 1907, when the bank was insolvent, but in fact had \$448.84 in its vault. The bank manager falsely informed claimant that he did not have the money, but offered a draft on D. H. & Co., the bankrupts' Seattle correspondent, where a deposit amounting to \$1,042.51 was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

maintained. Claimant accepted the draft, whereupon the bankrupts charged the amount to claimant's account and credited it to the account of D., H. & Co. The bankrupts suspended November 15, 1907, and claimant's draft was not presented for payment to D., H. & Co. until the 18th, when payment was refused and the balance of the bankrupts' deposit with them was paid to the bankrupts' receiver, who mingled it with other funds which he turned over to the bankrupts' trustee. *Held*, that the drawing of the draft did not constitute an equitable assignment of any part of the deposit of the bankrupts in the hands of D., H. & Co., nor was it made so by the false representations of the bankrupts' manager or the entry of the transaction on the bankrupts' books, so as to entitle the claimant to a preference.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99–105; Dec. Dig. § 50.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Jacob Yungbluth and August W. Schafer, copartners doing business as Bank of Hamilton, Jacob Yungbluth & Co., Proprietors, etc. On petition to review a referee's order denying the preference to William Tiede, as claimant. Affirmed.

Coleman & Gable, of Sedro-Wooley, Wash., for claimant.

Hadley, Hadley & Abbott, of Bellingham, Wash., for trustee.

CUSHMAN, District Judge. This matter is for decision upon review of the referee in bankruptcy's order denying the preference claimed. The claimant, William Tiede, on November 6, 1907, had on deposit in the bank of the bankrupts \$695, \$400 of which was an open deposit, and the remaining \$295 was in certificates of deposit. On said day the bank had in its vaults in cash \$448.84. The bank was insolvent. This fact was known to its officers, but was unknown to claimant. Claimant was desirous of securing \$400 to enable his son-in-law to pay off a mortgage. The manager of the bank informed claimant that he did not have the money, but said he would give him a draft, as good as money. The manager gave claimant a draft on Dexter, Horton & Co., bankers in Seattle, for \$400, and informed him that he could get the money from Dexter, Horton & Co., upon which the bank charged claimant \$400 and credited the account of Dexter, Horton & Co. with the sum of \$400. On said day the bankrupts had on deposit with Dexter, Horton & Co. \$1,042.51.

On the 15th day of November, 1907, in the state court, a receiver of the bankrupts was appointed and qualified, at which time a balance was shown on the books of the bankrupts with Dexter, Horton & Co. of \$20.83. On the 18th day of November, 1907, the draft given claimant was presented for payment to Dexter, Horton & Co. and payment refused. At all times from the 6th of November until the 18th, when the draft was presented, there was more than sufficient money in the hands of Dexter, Horton & Co. to pay said draft. Dexter, Horton & Co. were never notified by the bankrupts, nor at all, to refuse payment of the draft.

On the 30th of November, 1907, the receiver withdrew from the bank of Dexter, Horton & Co. \$675.13, which funds were commingled

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with other funds coming into the hands of the receiver and by him turned over to the trustee in bankruptcy.

Claimant relies upon the following authorities: *Steller v. Coates*, 88 Mo. 514; *St. Louis v. Johnson*, 5 Dill. 242, Fed. Cas. No. 12,235; *In re Johnson* (*Sherwood v. Central Mich. Sav. Bank*) 103 Mich. 109, 61 N. W. 352; *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 937; *Gardner v. Nat. City Bank*, 39 Ohio St. 601; *Fourth St. Nat. Bank v. Yardley*, 165 U. S. 633, 17 Sup. Ct. 439, 41 L. Ed. 855; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *Eaton & Gilbert on Commercial Paper*, p. 638, § 169.

The trustee relies upon the following authorities: *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749; *Wadhams v. Portland, etc., Ry. Co.*, 37 Wash. 86, 79 Pac. 597; *Rem. & Bal. Code*, §§ 3517, 3579.

[1] The Washington law provides:

"A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same." Section 3517, *Rem. & Bal. Code*; title 357, § 253, *Pierce's Code* (1912).

"A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." Section 3579, *Rem. & Bal. Code*; title 357, § 377, *Pierce's Code* (1912).

Under this statute the Supreme Court of the state of Washington has declined to recognize an equitable assignment upon the giving of a check against a general fund on deposit and has held the drawee is not liable upon a bill of exchange unless and until he accepts the same. *Wadhams v. Portland, etc., Ry. Co.*, 37 Wash. 86, 79 Pac. 597; *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749. The general rule is that the issuance of a draft, in itself, does not, in the absence of any unusual circumstances attending its issuance, act as an assignment of the funds in the bank drawn upon.

[2] In the present case there are no such unusual circumstances attending the transaction as to warrant a finding that there was any intention on the part of either the bankrupts or claimant to make this an exception to the general rule. The claimant did not part with anything on the strength of the representation that the bankrupts had money on deposit with Dexter, Horton & Co. There was no representation of having a specific amount there on deposit; nor is any intention on the part of claimant shown to release the bankrupts from liability upon the acceptance of the draft on Dexter, Horton & Co.—a liability existing in case of refusal by the drawee.

It is urged that the false representation by the manager of the bank to the claimant, to the effect that it did not have sufficient cash to pay him the \$400 at the time he requested it was such a fraudulent representation as to effect an equitable assignment pro tanto of the deposit with Dexter, Horton & Co. Obviously this is not the case. So far as the evidence shows, claimant would not have obtained any advantage if he had been told the truth—that the bank was then insolvent. The bank already had his money and was merely his debtor. As above pointed out, he parted with nothing on the strength of the representation.

The delay in presenting the draft to Dexter, Horton & Co.—from November 6th to November 18th—is inconsistent with any intention to assign a part of such a fund as that with the Dexter, Horton & Co.'s bank, upon the representation that the bankrupts did not have the \$400 required by claimant. The fact that, upon the issuance of the draft, claimant was charged with \$400 and Dexter, Horton & Co. was credited with a like amount, is not significant. If the bankrupts kept any books, they could do no less.

In the case of Fourth Street Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855, it was pointed out that the banks involved in that case were dealing, not as one having a deposit with the bank, but as strangers, and that, upon the representation of the drawer that it had on deposit with the drawee bank a certain sum, money was advanced. Under those circumstances, a finding of an equitable assignment was justified.

In the case of In re Johnson (Sherwood v. Central Michigan Savings Bank) 103 Mich. 109, 61 N. W. 352, a trust was impressed upon the money in the bank, because it was not a general deposit, but was made special by reason of instructions given, that the amount realized should not be credited to the depositor's account, but that the bank should notify him immediately upon the collection, so that he could withdraw the same.

The referee's decision is affirmed.

UNITED STATES v. KENNERLEY.

(District Court, S. D. New York. December 1, 1913.)

INDICTMENT AND INFORMATION (§ 150*)—DEMURRER—PROSECUTION FOR MAILING OBSCENE MATTER—QUESTION FOR JURY.

In a prosecution under Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1129) § 211, as amended by Act March 4, 1911, c. 241, § 2, 36 Stat. 1339 (U. S. Comp. St. Supp. 1911, p. 1651), for sending an obscene book through the mails, whether or not the book is obscene must be determined by the jury under instructions, and the court on demurrer, even when the book is stipulated into the record as a part of the indictment, has power only to decide whether it is so clearly innocent that the jury should not pass on it at all. Rule in *Regina v. Hicklin*, L. R. 3 Q. B. 36, disapproved.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 497; Dec. Dig. § 150.*]

Criminal prosecution by the United States against Mitchell Kennerley. On demurrer to indictment. Overruled.

Demurrer to an indictment found under section 211 of the Criminal Code against the publisher of a book, entitled "Hagar Revelly," alleged to be obscene. The book is a novel of manners presenting the life of a young woman in New York compelled to earn her living. She is represented as impulsive, sensuous, fond of pleasure, and restive under the monotony and squalor of her surroundings. Her virtue is unsuccessfully assailed by a man she does not love and later successfully by one whom she does. After her seduction she has several amorous misadventures and ends with a loveless marriage and the prospect of a dreary future. In order to give complete portrayal to the girl's emotional character, some of the scenes are depicted with a frankness and detail which have given rise to this prosecution.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John Neville Boyle, of New York City, for the United States.

John L. Lockwood, of New York City, for defendant.

HAND, District Judge (after stating the facts as above). It seems to have been thought in *U. S. v. Bennett*, 16 Blatch. 338, 351, Fed. Cas. No. 14,571, that in an indictment of this sort the question whether the case must go to the jury could be raised in advance of the trial by inspection of the book, after it had been made a part of the record, by bill of particulars. However, in *Dunlop v. U. S.*, 165 U. S. 486, 491, 17 Sup. Ct. 375, 376 (41 L. Ed. 799), the Supreme Court said that the book does not ever become a part of the record, and that therefore, "if the indictment be not demurrable upon its face, it would not become so by the addition of a bill of particulars." The same rule is laid down in *U. S. v. Clarke* (D. C.) 38 Fed. 500. It is a little questionable in my mind whether Mr. Boyle's consent that the book should be considered as a part of the indictment really effects any more than if it had been produced by bill of particulars. However, as the result from any point of view is the same, I have considered the case as though the book had been set out in extenso.

Whatever be the rule in England, in this country the jury must determine under instructions whether the book is obscene. The court's only power is to decide whether the book is so clearly innocent that the jury should not pass upon it at all. *U. S. v. Clarke* (D. C.) 38 Fed. 500; *U. S. v. Smith* (D. C.) 45 Fed. 478. The same question arises as would arise upon motion to direct a verdict at the close of the case. *Swearingen v. U. S.*, 161 U. S. 446, 16 Sup. Ct. 562, 40 L. Ed. 765, did not decide that the court is finally to interpret the words, but that matter was left open, because the instructions in any case misinterpreted the statute. The question here is, therefore, whether the jury might find the book obscene under proper instructions. Lord Cockburn laid down a test in *Reg. v. Hicklin*, L. R. 3 Q. B. 36, in these words:

"Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

That test has been accepted by the lower federal courts until it would be no longer proper for me to disregard it. *U. S. v. Bennett*, 16 Blatch. 338, Fed. Cas. No. 14,571; *U. S. v. Clarke* (D. C.) 38 Fed. 500; *U. S. v. Harmon* (D. C.) 45 Fed. 414; *U. S. v. Smith* (D. C.) 45 Fed. 478. Under this rule, such parts of this book as pages 169 and 170 might be found obscene, because they certainly might tend to corrupt the morals of those into whose hands it might come and whose minds were open to such immoral influences. Indeed, it would be just those who would be most likely to concern themselves with those parts alone, forgetting their setting and their relevancy to the book as a whole.

While, therefore, the demurrer must be overruled, I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, "obscene, lewd, or lascivious." I question whether in the end men will regard that as obscene which is honestly relevant to the ade-

quate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature. That such latitude gives opportunity for its abuse is true enough; there will be, as there are, plenty who will misuse the privilege as a cover for lewdness and a stalking horse from which to strike at purity, but that is true to-day and only involves us in the same question of fact which we hope that we have the power to answer.

Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. If there be no abstract definition, such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.

Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech.

Demurrer overruled.

SAVAGE et al. v. NIXON et al.

(District Court, N. D. California, Second Division. October 9, 1913.)

No. 14,900.

MINES AND MINERALS (§ 55*)—CONTRACT FOR SALE OF MINING PROPERTY—CONSTRUCTION AND OPERATION.

Under a contract for the sale of mining property, which authorized the purchasers to extract and remove ore therefrom, ore extracted by them, but rejected as tailings and thrown on the dump, where it remained until after the contract was canceled and a new contract for the sale of the same and other property substituted therefor, *held* to have become, on such cancellation, a part of the mine property, and its subsequent removal and sale by the purchasers to have been subject to the terms of the second contract.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

At Law. Action by M. Savage and W. H. Warden against George S. Nixon and George Wingfield, copartners as Nixon & Wingfield. Judgment for plaintiffs.

Ben P. Tabor, of Auburn, Cal., and Vecki & Wythe, of San Francisco, Cal., for plaintiffs.

Hoyt & Gibbons, of Reno, Nev., for defendants.

DOOLING, District Judge. Plaintiffs by a contract executed February 19, 1907, agreed to sell to defendants a five-sixths interest in certain mining property situated in Placer county for \$100,000, of which sum \$50,000 was paid at the date of the contract, the remaining \$50,000 to be paid on or before the expiration of 90 days. The contract further provided:

"That the parties of the second part [defendants] shall be and they are hereby let into immediate possession of said mining properties, with full power and license to prospect upon, work, develop, and extract and remove ore from said mining properties, and mill the same, at such places and in such manner as they may see fit."

Under this contract defendants went into possession of said properties and extracted certain ore therefrom, which was of the value of about \$30,000. This ore body was discovered near the expiration of the 90 days, but all of the ore was removed before said time had expired. Certain other ore, however, was extracted during this period, but was not removed from the properties, having been placed, as one of the defendant's witnesses expressed it, "in the dump"; his language being, "there was rejected tailings in the dump." The contract expired on May 20, 1907, and on that day another contract was entered into between the same parties, by which the plaintiffs agreed to sell to defendants a five-sixths interest in the same properties, with other additional properties, for the sum of \$50,000, to be paid on or before the expiration of 180 days; the contract further providing:

"That the parties of the second part shall be, and they are hereby, let into the immediate possession of said mining properties, and are hereby given full

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

power and license to prospect upon, work, develop, and extract and remove ore from said mining property, and mill the same; provided, that the proceeds derived from all ore extracted from said properties shall be, so fast as returned therefrom or received, deposited in the Placer County Bank to the credit of the parties of the first part, until the same shall amount to \$50,000, the same to be treated as and to be considered to be payments upon the purchase price."

This contract further provided:

"It is understood and agreed that all prior contracts and agreements made between the parties hereunto are hereby abrogated and set at naught."

Under this second contract the defendants remained in possession of the said properties embraced in the first contract until some time in October, when they abandoned the properties without having paid any portion of the \$50,000 or deposited any sums to the credit of the plaintiffs. During this latter period, however, they worked over and sacked up certain of the ore heretofore mentioned as having been extracted during the life of the first contract and placed on the dump, and in the latter part of September they removed the same from the property and sent it to the smelter. The value of this ore was \$2,434.20. Of this sum one-sixth, or \$405.70, was paid to plaintiffs, and this action is for the conversion of the remainder.

Defendants' contention is that, as the ore was extracted during the life of the first contract, it became their property thereunder, even though left on the dump until after said contract expired, and that, even if this were not so, the peculiar provisions of the second contract, which permitted them "to extract and *remove*" ore, and required them to deposit only the proceeds of the ore "*extracted*," would warrant them in "removing" for their own sole benefit ore previously "extracted."

The plaintiffs contend that whatever rights defendants had under the first contract expired therewith, particularly in view of the provision of the second contract that all "previous agreements should be abrogated and set at naught," and that all of this ore, being then on the dump, was a part of the mine and belonged to them, and that if defendants removed it therefrom they were bound under the terms of the second contract to deposit the proceeds to their credit.

The rights of the defendants must be determined by the provisions of the first contract, as the second contract adds nothing to them in so far as the ore in question is concerned. They might have segregated and removed this ore during the life of the first contract, but they did not do so. It was thrown on the dump with the refuse of the mine, and their superintendent, then in charge, speaks of it as "rejected tailings." It had to be picked out from the other rock and earth with which it was mingled on the dump, and this was not done, so far as the evidence discloses, until three or four months after the expiration of the contract under which it was extracted. I am of the opinion that defendants placed this ore on the dump, having rejected it, with no intention of thereafter claiming it, and that, had it not been for their going into possession of the mining property under the second contract, they would never have

thought of removing it, but that when, under said contract, they made no new discovery of ore in the mine proper, they began to work over the dump.

All the circumstances lead me to the conclusion that the dump, including this ore, became part of the mine at the expiration of the first contract, and that, under the second contract, the proceeds of this ore should have been deposited to the credit of the plaintiffs.

Judgment will therefore be entered for plaintiffs for the sum of \$2,028.50, and costs.

In re COTTON et al.

(District Court, N. D. California, First Division. September 26, 1913.)

No. 7,568.

1. BANKRUPTCY (§ 288*)—ADMINISTRATION—MONEY BELONGING TO BANKRUPT—ADVERSE CLAIM—PROCEEDINGS.

Where a third person holds money or property under a claim adverse to the bankrupt which is not merely colorable, such property or money may not be summarily taken by the bankruptcy court, but the validity of the claim must be determined by a court of plenary jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

2. BANKRUPTCY (§ 155*)—PROPERTY BELONGING TO ESTATE—ADVERSE CLAIM—MUNICIPAL CORPORATIONS—PROCEEDS OF CONTRACTS—NOTICE OF LABORERS' LIENS.

Code Civ. Proc. Cal. § 1184, provides that mechanics, materialmen, laborers, etc., may at any time give to the owners a notice that they have performed labor or furnished materials, stating in general terms the kind of labor and materials, the amount and value thereof, and that on such notice being given in cases of property which, for reasons of public policy or otherwise, is not subject to liens, the owner shall withhold from his contractor sufficient money due or to become due to such contractor to answer the claim and any lien that may be filed thereafter. *Held*, that since, under such section, the giving of such notices to a municipal corporation by laborers and materialmen having claims against the bankrupt in connection with the performance of contracts by him for such corporations operated as an equitable assignment of a sufficient amount of the fund required to pay the claims of those giving the notices and the corporations for failure to retain the fund might be subjected to personal judgment, their claim of right to hold the fund pursuant to the notices was not colorable, though they admitted they had no personal interest therein, and hence the bankruptcy court had no jurisdiction to compel payment of the same to the bankrupts' trustee notwithstanding the notices.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Charles E. Cotton and others, doing business as Cotton Bros. & Co. On petition to review a referee's order directing that municipal corporations holding proceeds of certain contracts performed by the bankrupts pay over the same to the bankrupts' trustee. Reversed.

Mansfield & Newmark, of San Francisco, Cal., for creditors.

A. E. Bolton, of San Francisco, Cal., for bankrupt.

DOOLING, District Judge. The facts, briefly stated, are as follows: Cotton Bros. & Co., the bankrupts, were contractors, and had under way three certain contracts for the construction of public works, one with the county of San Joaquin, one with the city of Oakland, and the third with the city of Bakersfield. During the progress of these contracts certain materialmen and laborers filed with the municipal bodies mentioned notices to withhold enough money due or to become due to the contractors to satisfy their claims, as provided in section 1184 of the Code of Civil Procedure of the state of California. Pursuant to such notices, and withheld from the contractors thereunder, the county of San Joaquin has in its possession \$13,822.47, against which are claims to the amount of \$15,622.06, the city of Oakland has \$15,033.33, with outstanding claims amounting to \$18,459.84, and the Security Trust Company, under a trust agreement, has money and bonds, either in its possession or due from the city of Bakersfield, to the amount of \$8,830.65, against which notices have been filed with the city of Bakersfield, aggregating something over \$3,000. All of the parties holding said moneys, and such claimants against the various amounts as had then filed their notices, were brought before the referee upon an order to show cause why the various holders of these moneys should not be directed to pay them over to the trustee, and the county of San Joaquin, the city of Oakland, and the Security Trust Company each answered, denying the jurisdiction of the referee to make such order, but averring a willingness to pay the money to any person found entitled thereto, if they themselves are protected in such payment against further liability. The matter was heard before the referee upon extended briefs by various claimants, as well as by the holders of the funds, wherein the payment to the trustee was vigorously resisted, on the ground that such payment would afford no protection against suits already pending and suits which were about to be instituted by the various claimants, who had served upon the holders of the funds the notices to withhold the same to satisfy their claims under the mechanic's lien law. The referee ordered the payment, and this order is now before the court for review.

[1, 2] It is a well-established principle that where a third person holds money or property under a claim adverse to the bankrupt, which is not merely colorable, such property or money may not be summarily taken by the bankruptcy court, but the validity of such claim must be determined by a court of plenary jurisdiction. To this principle we must look in passing upon the validity of the referee's order in the present instance. Section 1184 of the Code of Civil Procedure of the state of California provides that: Mechanics, materialmen, laborers, and others specified may at any time give to the owners a notice that they have performed labor or furnished materials or both to the contractor stating in general terms the kind of labor and materials and the amount in value thereof. It further provides that, upon such notice being given in case of property which, for reasons of public policy or otherwise, is not subject to liens, the owner shall withhold from his contractor sufficient money due or to become due to such contractor to

answer such claim and any lien that may be filed therefor, including the reasonable cost of any litigation thereunder.

Upon the giving of the notices mentioned, therefore, it became the duty of the holders of the various funds herein to withhold them from the contractors to answer the claims in such notices mentioned. The Supreme Court of California, in passing upon the effect of such notices, has held that the service of such notice operated as an equitable assignment and entitled the persons serving them to receive so much of the money withheld thereunder as would satisfy their claims, and to recover a personal judgment against the owner therefor. *Butler v. Ng Chung*, 160 Cal. 435, 117 Pac. 512, Ann. Cas. 1913A, 940.

As these fund holders are thus in danger of being subjected to a personal judgment against them for the amount withheld under the notices given them, it is difficult to see how their claim of right to retain such funds in order to satisfy any such judgment can be held to be merely colorable. On the contrary, it is very substantial. The bankrupts themselves would not be entitled to recover the moneys so withheld from them, and their trustee is in no better position than they would be. In *re Grissler*, 136 Fed. 754, 69 C. C. A. 406. The only interest the bankrupts had in these moneys was in whatever surplus there might be after the claims covered by the notices had been paid. In such case the court in bankruptcy will not disturb the possession of the holders, who have retained them for their own protection against such claims. In *re Horton*, 102 Fed. 986, 43 C. C. A. 87.

It is only fair to the referee to say that in the opinion of the court he was misled by the disclaimer on the part of the holders of said funds of any interest therein. But that disclaimer should be read in connection with all their objections, and, so read, means no more than that they are willing to pay to any person entitled to receive the money, if such payment will discharge them from any further liability. The payment to the trustee would not, in my opinion, so discharge them from their liability to a personal judgment in favor of the claimants under the notices to withhold.

My conclusion is that the order of the referee must be reversed; and it is so ordered.

ALESSANDRELLI v. ARBOGAST.

(District Court, M. D. Pennsylvania. November 10, 1913.)

No. 458.

LIMITATION OF ACTIONS (§ 127*)—ACTION FOR WRONGFUL DEATH—AMENDMENT OF STATEMENT OF CLAIM.

Under Act Pa. April 25, 1855 (P. L. 309), as amended by Act June 7, 1911 (P. L. 678), which gives a right of action for wrongful death to the husband, widow, children, or parents of the deceased, successively and in the order named, but not jointly, but limits the time for bringing action to one year after the death, the causes of action of the three classes named are separate and distinct and require different proof as to damages, and under the law of the state as settled by decision a statement of claim in such an action, in which plaintiff is described as widow, can-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not be amended after the expiration of the period of limitation to allege that plaintiff is the mother of deceased.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

At Law. Action by Giovanna Alessandrelli against Edward P. Arbogast. On motion by plaintiff for leave to amend pleadings. Motion denied.

M. A. Viti, of Philadelphia, Pa., and John McGahren and M. H. McAniff, both of Wilkes-Barre, Pa., for plaintiff.

F. B. Holmes, of Stroudsburg, Pa., for defendant.

WITMER, District Judge. An action of trespass was instituted by the plaintiff, as widow, to recover damages for the alleged negligent death of an alien, Giovanna Aulino. The accident occurred December 14, 1911, from which death resulted four days thereafter. The summons was issued December 17, 1912, and plaintiff's statement filed February 6, 1913, wherein it is alleged substantially that:

The "plaintiff is a subject of the king of Italy, and the widow of Giovanna Aulino, deceased; that the death of the said Giovanna Aulino resulted from certain alleged negligence of the defendant; that the plaintiff, as widow of said Giovanna Aulino, has sustained damages in the sum of \$15,000, and therefore she brings suit."

The defendant, February 24, 1913, filed his plea alleging that the plaintiff is not the widow of the decedent, whereupon, on May 20, 1913, plaintiff moved to amend the record and pleadings by changing the capacity in which plaintiff sues from that of "widow" to that of "mother of the decedent," to which the defendant objects upon the ground that the proposed amendment would change the legal capacity in which the plaintiff sues, whereby a new and different cause of action would be introduced, depriving the defendant of the right which had accrued to him to plead the statute of limitation.

A civil action to recover damages for loss occasioned by the negligent or violent destruction of life is unknown to the common law. It can be maintained only by virtue of the statute creating it; and recovery must be accordingly to the course and measure of relief provided by the statute and at the suit of the person or persons on whom the statute confers the right of action. The plaintiff's right of action, if she has any, whether as widow or mother of the decedent, is under the Pennsylvania statute of the 25th of April, 1855 (P. L. 309), as amended by the act of June 7, 1911 (P. L. 678). The act, as amended, reads as follows:

"Section 1. Be it enacted, etc., that the persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased, and no other relatives; and that such husband, widow, children, or parents of the deceased shall be entitled to recover, whether he, she, or they be citizens or residents of the commonwealth of Pennsylvania, or citizens or residents of any other state or place subject to the jurisdiction of the United States, or of any foreign country, or subjects of any foreign potentate; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors under the laws of this commonwealth.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Sec. 2. The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death, and not thereafter."

Herein provision is made for three classes of persons in whom the right of action may successively, but not jointly, exist: First, the husband or widow; second, the children; and, last, the parents.

"Where the deceased left children, his parents have no right; nor have they where he left a widow and no children." *Lehigh Iron Co. v. Rupp*, 100 Pa. 98.

"They cannot all claim jointly, but each class in its own right and its own order." *Lewis v. Turnpike Co.*, 203 Pa. 513, 53 Atl. 349, 93 Am. St. Rep. 774.

Each class therefor has a separate and distinct cause of action. A cause of action has been defined as the particular matter for which suit is brought. In this case the cause of action is not simply that the deceased came to his death through the alleged negligence of the defendant, but it is more especially the taking away of the pecuniary expectancy which the plaintiff had in the continuance of the life that was lost. The demand the plaintiff is proposing to make under the amendment sought is different from that in the original claim. It will not be denied, as argued by counsel, that the pecuniary expectancy of the mother, and the expectancy of the widow are different, and that proof of value or amount of such depend on different facts requiring different evidence to establish the same. The expectancy of the widow and children depends on what the deceased would probably have earned during the balance of his lifetime. The law presumes that whatever the husband or father would earn during the whole of his lifetime would be for the benefit of his family, no matter where he might be or how far his work might take him from them. The mere fact of their relationship establishes their right to recover whatever the evidence show such earnings would have likely been.

But where suit is by the parents, the matter is different. The mere fact that the deceased was a child is not sufficient. It must be shown that there was an actual family relationship; that is, that the child still continued as a part of the family, that he was contributing to the support of the parents with sufficient regularity to justify the expectation that such support would be continued. The family relation must be established as a matter of fact. And before the parents may recover it must be made to appear that the decedent left surviving neither widow nor children. Surely the proposed amendment with necessary modification of the plaintiff's statement would affect the measure and character of proof required to establish the alleged tort, and necessarily increase the standard by which the damage is determined, and thus contravene the rule laid down by the Supreme Court in *Com. v. Baxter*, 235 Pa. 188, 84 Atl. 139, 42 L. R. A. (N. S.) 484:

"That the proposed amendment must not change the nature of the cause of action, nor destroy the identity of the original transaction, and that the damages are to be ascertained by the same standard."

The proposed amendment would also undoubtedly operate to the prejudice of the defendant, since it would require such defendant to

produce evidence by way of defense which he had a right to expect would no longer be needed; the statutory period having intervened. That a new cause of action cannot be introduced, or new parties brought in, or a new subject-matter presented, or a fatal and material defect in the pleadings be corrected after the statute of limitations has become a bar, has been so often recognized that no authorities need be cited. The proposed amendment is denied.

ALESSANDRELLI v. STROUDSBURG HOSPITAL et al.

(District Court, M. D. Pennsylvania. November 10, 1913.)

No. 459.

At Law. Action by Giovanna Alessandrelli against the Stroudsburg Hospital and Joseph F. Miller. On motion by plaintiff for leave to amend pleadings. Motion denied.

M. A. Viti, of Philadelphia, Pa., and John McGahren and M. H. McAniff, both of Wilkes-Barre, Pa., for plaintiff.

Rogers L. Burnett, of Stroudsburg, Pa., and J. C. Ingham, of Towanda, Pa., for defendants.

PER CURIAM. And now, November 10, 1913, for reasons assigned in an opinion this day filed in the case of Giovanna Alessandrelli v. Edward P. Arbogast (No. 458) 209 Fed. 126, February term, 1912, the motion to amend plaintiff's statement is denied.

CARL LAEMMLE MUSIC CO. et al. v. STERN et al.

(District Court, S. D. New York. October 16, 1913.)

1. COURTS (§ 308*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

A suit in a federal court sitting in New York, in which complainants were an Illinois corporation and four residents of New York and defendants were likewise residents of New York, was not maintainable on a ground of diverse citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 855, 856; Dec. Dig. § 308.*]

2. COURTS (§ 508*)—FEDERAL COURTS—JURISDICTION—COPYRIGHTS.

Copyright Act March 4, 1909, c. 320, § 25, 35 Stat. 1081 (U. S. Comp. St. Supp. 1911, p. 1480), authorizing injunctions to restrain infringement of copyrights, does not authorize a suit to restrain the state courts from prosecuting certain actions against complainants to restrain them from publishing and selling a certain song in which they relied on a copyright as a defense.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. § 508.*]

3. COURTS (§ 508*)—SUBJECTS OF RELIEF—PROCEEDINGS IN STATE COURT.

Defendants sued complainants in a state court for breach of contract to transfer a song of which one of the complainants was the author, alleging that complainant corporation, with knowledge of defendants' rights, had published and sold large numbers of copies. In answer complainant corporation set up a copyright of the song as a defense. Defendants successfully demurred, and on the trial the corporation was enjoined from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 209 F.—9

publishing the song. Afterwards defendants sued complainants at law for damages for publishing the song, which action was pending when complainants sued to restrain the further prosecution of the actions at law. *Held* that, since the state court had jurisdiction of the proceedings there would under no circumstances be any ground for such an injunction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. § 508.*]

4. COURTS (§ 508*)—FEDERAL COURTS—JURISDICTION.

A federal court has no jurisdiction to restrain the further prosecution of suits in a state court, although the state court had no jurisdiction, unless it be to protect its own jurisdiction previously acquired. Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), covers such a case, and the only remedy is by appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. § 508.*]

In Equity. Suit by the Carl Laemmle Music Company and others against Joseph W. Stern and another doing business as Joseph W. Stern & Company. On motion to dismiss bill. Granted.

This is a motion to dismiss a bill in equity, and is therefore to be determined solely by the bill itself. The complainants are an Illinois corporation and four residents of New York, and both defendants are residents likewise of New York. The bill alleges that the individual complainants composed a song to which the corporation afterwards acquired title and upon which it secured a copyright; and afterwards the defendants brought an action against the individual complainant in the Supreme Court of the state of New York, to enjoin their use of this copyright. The defendants' complaint in the state court alleged that the complainant Solman was the author of the song; that he was under contract to convey it to the defendants, in whom the title was therefore vested; and that the complainant corporation, with knowledge of the defendants' rights, had published and sold large numbers of copies. In the answer in the action in the state court the complainant corporation set up its copyright as a defense, to which the defendants successfully demurred. Afterwards the case was tried, and the complainant was again unsuccessful; the corporation being enjoined from publishing the work in question, and on appeal to the Appellate Division this decree was affirmed. Afterwards the defendants sued all the complainants at law for damages in publishing the said song, which action is still pending. The bill concludes with a prayer of injunction against the prosecution of these suits in the state court.

George N. Sage, of New York City, for complainants.

Theodore B. Richter, of New York City, for defendants.

HAND, District Judge (after stating the facts as above). [1, 2] I can see no possible jurisdiction over such a suit as this. It does not depend on diverse citizenship, and may perhaps be thought to rest upon the seventh subdivision of section 24 of the Judiciary Act (Act March 3, 1911, c. 231, 36 Stat. 1091 [U. S. Comp. St. Supp. 1911, p. 135]) as a suit arising under the Copyright Law. That statute, section 25 (Act March 4, 1909, c. 320, 35 Stat. 1081 [U. S. Comp. St. Supp. 1911, p. 1480]), only authorizes suits for infringement, of which this is not one. Nor does this suit arise under the laws of the United States (subdivision 1 of section 24).

[3] It is true that the state suit will incidentally affect the copyright, because the copyright law gives the protection of the statute only to the author or proprietor of the literary property in question, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the question of ownership will be determined in the state suit. That determination will be fatal to any subsequent suit on the copyright itself, but there is no rule anywhere in the books which suggests that a federal court may enjoin a state court from determining a question of fact which may afterwards turn out to be vital to some right secured by a law of the United States. Supposing, for instance, A. registers some mark, itself a wrongful infringement of another's common-law trade-mark. Is it not absurd to suppose that a state court has no jurisdiction to entertain a suit to enjoin the infringement of the common-law mark, because the adjudication will eventually defeat the registered trade-mark? Or suppose that A., stealing a trade secret, gets a patent upon it. Can it be said that a state court may not enjoin A. because the result will be to establish by estoppel some fact which will defeat A.'s patent if he sues upon it? There are many questions constantly decided in the state courts which may destroy or validate rights granted under the laws of the United States. The idea that, as soon as it appears that some such question of fact is shown to exist, the state court may be enjoined from acting, has no support in precedent or principle.

[4] Furthermore, even though the state court were wrong, the only remedy would be an appeal to the Supreme Court of the United States, for section 720 of the Revised Statutes (U. S. Comp. St. 1901, p. 581) is designed to meet just such a case. The plaintiff, having a right secured him by the laws of the United States, has recourse to the federal courts, when he sues on that right; but, if the state courts commit some error in cases where his right is incidentally involved, he must wait for an appeal. Congress does not mean that inferior federal courts are to enjoin proceedings elsewhere for supposed errors of those judges. It is substantially only in cases of bankruptcy or where it is necessary to protect their own pre-existing possessory jurisdiction that an inferior federal court may enjoin such suits.

The complaint will be dismissed, with costs.

THE WINDBER.

(District Court, N. D. California, First Division. October 3, 1913.)

No. 15,333.

ADMIRALTY (§ 61*)—INSURANCE—LOSS OF GOODS—LIBEL.

Where a bill of lading for goods, alleged to have been lost on a steamship, provided that, in case of loss for which the carrier would be liable, it should have the benefit of any insurance thereon, and, on a libel for such loss, the carrier alleged that libellant was covered by insurance, but that the carrier had no knowledge as to whether any portion thereof had been collected, etc., the carrier was entitled to discovery of the insurance policy, together with what, if any, amount had been collected thereon, without reference to its right to the benefit of the insurance.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 497-506; Dec. Dig. § 61.*]

In Admiralty. Libel by the United States Steel Products Company against the American steamer Windber, in which the Pacific American

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Fisheries, a corporation, filed claim. On exceptions to a portion of claimant's answer demanding discovery of the amount of insurance carried by libelant on the goods in question and whether any portion thereof had been collected. Granted.

Andros & Hengstler, of San Francisco, Cal., for libelant.

Page, McCutchen, Knight & Olney, of San Francisco, Cal., for respondent.

DOOLING, District Judge. Exceptions of libelant to the following portion of claimant's answer:

"IV. That said bills of lading further provided that in case of any loss, detriment, or damage done to or sustained by the said goods, or any part thereof, for which the carrier would be liable to the shipper or consignee, the carrier should have the full benefit of any insurance that may have been effected upon, or on account of, said goods. That claimant is informed and believes, and therefore alleges, that libelant herein was covered by insurance on said merchandise; but claimant has no knowledge as to whether libelant has collected any portion of said insurance, and for that reason demands that proof of the same be made that, if said goods were damaged from any cause for which claimant is liable, claimant herein claims the benefit of said insurance."

It was held in *Phoenix Insurance Co. v. Erie & Western Transportation Co.*, 117 U. S. 312, 6 Sup. Ct. 1176, 29 L. Ed. 873, that a provision in a bill of lading that the carrier, when liable for the loss, shall have the full benefit of any insurance that may have been effected upon the goods, is valid as between the carrier and shipper, and that the right, by way of subrogation, of an insurer, upon paying the loss, to recover over against third persons, is only the right which the assured himself has. And in *Liverpool Steam Co. v. Phoenix Insurance Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, the same doctrine is impliedly, if not directly, reiterated. The rights of the various parties, the shipper, the carrier, and insurer, must be determined by the provisions of the bill of lading and the policy of insurance, and in the case last above cited the failure of such a defense as is here set out arose from the bill of lading itself.

In *Walter Baker Co. v. New York, N. H. & H. R. Co.* (D. C.) 162 Fed. 496, the defense was based on the proposition that the libelant should first proceed against the insurer, which defense was held untenable. In *Inman v. South Carolina Ry. Co.*, 129 U. S. 128, 9 Sup. Ct. 249, 32 L. Ed. 612, the defense was held unavailable because of express provisions in the policy that:

"Any act of the insured waiving or transferring or tending to defeat or decrease any such claim against the carrier, * * * whether before or after the insurance was made under this policy, shall be a cancellation of the liability of the said insurance company"

—the court holding that under such provision the insurance could not be made available to the carrier. In the case at bar it is impossible at this stage of the proceedings to determine just what the rights of the various parties are. The provisions of the insurance policy are not before the court, and, being unknown to claimant, cannot be set out in his answer. What is really sought by the parts of the answer excepted to is that the provisions of the insurance policy be disclosed,

and that proof be made as to what, if any, amount has been collected thereon. When these facts are disclosed, they may or may not constitute a defense pro tanto to the libel. But whether they do constitute such defense or not cannot be ascertained in advance of such disclosure.

The exceptions other than those dealing with the substance, rather than the form, do not seem to require any discussion. I am of the opinion that claimant is entitled to the information sought, and the exceptions to the answer are therefore overruled.

In re WALTERS.

(District Court, D. Montana. November 21, 1913.)

No. 857.

BANKRUPTCY (§ 410*) — DISCHARGE — APPLICATION — TIME — "NEXT TWELVE MONTHS."

Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), provides that any person, after the expiration of one month and within "the next twelve months" subsequent to being adjudged a bankrupt, may file an application for a discharge, which application may also be filed within, but not after the expiration of, the next six months. *Held*, that the section creates three limitations of time, all subsequent to adjudication, the first one month thereafter, the second "the next twelve months" after the first, and the third the next six months after the second, so that the "next twelve months" begin to run, not from the date of the adjudication, but from the expiration of one month thereafter.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig. § 410.*]

In Bankruptcy. In the matter of the bankruptcy proceedings of Otto E. Walters. Application of the bankrupt for discharge. Granted.

Homer G. Murphy, of Helena, Mont., for bankrupt.

BOURQUIN, District Judge. Adjudication herein was on September 18, 1912. Application for discharge was filed October 6, 1913. Affidavits, claimed to make it appear applicant was unavoidably prevented from filing said application within twelve months subsequent to adjudication, were also filed. Informal objections have been made. Whether or not unavoidable prevention is made out, the court is of the opinion the application is in time. Section 14, Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), provides that:

"Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge," and "it may be filed within but not after the expiration of the next six months."

It would seem the legislative intent was to measure "the next twelve months," not from adjudication, but from the point of time "after the expiration of one month" subsequent to adjudication. Otherwise the words "the next" are superfluous, and serve only to create ambiguity. The section should be read either with a comma after "the next twelve

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

months," or as though it were arranged, "any person may after the expiration of one month subsequent to being adjudged a bankrupt and within the next twelve months file an application for discharge." The section creates three limitations of time, all subsequent to adjudication; the first one month thereafter, the second the next twelve months after the first, and the third the next six months after the second. The time for filing such application is first made unlimited after the expiration of one month subsequent to adjudication. Then Congress proceeded to attach a limitation, to qualify the unlimited time by the phrase "and within the next twelve months." The time so qualified is not that commencing to run from adjudication, but that commencing to run after the expiration of one month subsequent to adjudication. The latter and not the former is the antecedent of the qualifying words "within the next twelve months." If the intent was that the twelve months are to be measured from adjudication, even as the one month is, there was no more necessity to add the words "the next" to the former than there was to add them to the latter. Absent from the latter, their addition to the former indicates a different intent, meaning, and point of departure in computation of time.

In the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) the twelve months within which application for discharge could be filed were clearly computed from adjudication, but the words "the next" were not found necessary nor inserted to indicate this. It will be noted that nowhere else in the present Bankruptcy Act are the words "the next" inserted in admeasurement of time. These changes and differences of phraseology are not to be overlooked. They are to some extent indicative of different intent. If the time when an act may first be done is fixed a certain number of months after an event, and the duration of time within which the act may be done is limited to *the next* certain number of months, the latter run from the point of time when the act first may be done and not from the event.

The bankrupt has twelve months within which to file his application for discharge as of right and course, commencing after the expiration of one month subsequent to adjudication. The application herein will be set for hearing.

In re GRIESHEIMER et al.

(District Court, N. D. California, First Division. October 17, 1913.)

No. 8,125.

BANKRUPTCY (§ 484*)—RECEIVERS—FEES.

A receiver was in possession of the bankrupts' property but six days, during which time the store was closed. Not more than three times the receiver opened the store to permit prospective purchasers to view the stock, occupying 10 or 15 minutes each time, and sale was finally effected through no efforts of the receiver. He employed an attorney, who prepared the necessary papers, who presented a claim for \$200, which was reduced to \$75. *Held*, that the receiver was only entitled to a fee of 2 per cent. on the first \$1,000 and one-half of 1 per cent. on the balance, as pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vided by Bankr. Act July 1, 1898, § 48d, as added by Act June 25, 1910, c. 412, § 9, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1503).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896; Dec. Dig. § 484.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Chas. Griesheimer and another, as copartners doing business under the name and style of the Variety Store, and such persons individually. On petition for review of referee's order allowing receiver's fees. Modified.

Jas. P. Keleher and Jos. Kirk, both of San Francisco, Cal., for trustee.

F. S. Howell, for Geo. M. Brush.

DOOLING, District Judge. Petition for review of referee's order allowing receiver's fees. The receiver was in possession of the property not more than six days. During that period the store was closed. If any purchaser offered himself, the receiver let him into the store, which on each occasion occupied only 10 or 15 minutes. This happened not more than three times. The offer of 65 per cent. of the value of the stock from Raymond Bros., to whom it was finally sold, was secured through no effort of the receiver. He employed an attorney to prepare the few papers necessary and presented a claim for \$200 for attorney's fees. This was cut by the referee to \$75. He also presented a claim for \$76.80 for his own services, which was reduced by the referee to \$50.

It does not seem to me that the receiver performed any such services, or carried on the business to any such extent, as would warrant the allowance of any larger fee than 2 per cent. on the first \$1,000 and one-half of 1 per cent. on all above \$1,000, as provided in section 48d of the Bankruptcy Act.

The order will be modified, to allow the receiver the sum of \$24.20.

SAN FRANCISCO BRIDGE CO. v. UNITED STATES.

(District Court, N. D. California, Second Division. October 9, 1913.)

No. 15,574.

1. UNITED STATES (§ 70*)—CONTRACTS—PERFORMANCE—AVAILABLE FUNDS—DUTY OF CONTRACTOR.

Where plaintiff, having a contract with the government for harbor excavation at a specified rate per cubic yard, was notified by government officers that there were only funds enough available to pay for 60,000 cubic yards, plaintiff was bound to heed the fact, and could not bind the government by a larger excavation, but was equally entitled to excavate to the full extent specified under the directions of the government inspector and to pay for such amount.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 53; Dec. Dig. § 70.*]

2. UNITED STATES (§ 74*)—HARBOR EXCAVATION—NATURE AND CHARACTER—GOVERNMENT'S LIABILITY.

Where plaintiff was directed by government inspectors to make harbor excavations at specified places under contract with the government to make excavations in the harbor at a specified rate per cubic yard, it was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

no defense to the government's liability that an excavation made at a certain point was not within the contract, because the fill which rendered the work necessary was not a natural one, but was occasioned through the negligence of the city.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 57; Dec. Dig. § 74.*]

At Law. Action by the San Francisco Bridge Company against the United States on a contract for harbor excavation. Judgment for plaintiff for part of the relief demanded.

Corbet & Selby, of San Francisco, Cal., for plaintiff.

Thomas H. Selvage, Asst. U. S. Atty., of San Francisco, Cal.

DOOLING, District Judge. Under plaintiff's contract with the government it was to receive 18.8 cents per cubic yard for excavating in Oakland harbor. On July 2, 1910, it was notified by letter that the available funds under the appropriation would permit only the excavation of 60,000 cubic yards in addition to what had already been excavated, and that the inspector in charge would give instructions as to where "it was desired to apply the work so as to obtain the best results with the funds expended." The inspector directed certain excavations which amounted to 35,000 cubic yards in section D, 6,660 cubic yards near the Alaska Packing Company's dock, and 35,000 cubic yards at the foot of Fallon street. The plaintiff was paid for 41,660 cubic yards, being the excavating done in section D and near the dock, leaving the 35,000 cubic yards at the foot of Fallon street unpaid for; this being the amount in suit.

[1] It is true that plaintiff could not knowingly overrun the appropriation and bind the government. But it is equally true that it was entitled to rely upon the statements of the officers in charge, who kept the accounts and should know the amount still available to be applied to the work on hand. When they informed plaintiff that there were funds enough to pay for only 60,000 cubic yards, it was incumbent on plaintiff to heed that fact, and if it excavated more than that quantity it did so at its own risk, and could not by so doing bind the government. But it was equally entitled to excavate to the full extent of 60,000 cubic yards under the direction of the inspector, and is entitled to pay for that amount.

Plaintiff insists that, as the government officers were making the measurements, it relied upon them, and that if it overran the amount of available funds it was not its own fault, but the fault of such officers. Such claim, however, cannot avail. It had the means of knowing, and was bound to know, the amount of work done by it, and must be held responsible for what it could and should have known.

[2] The government contends that the work done at the foot of Fallon street was extra work, not provided for in the contract, and that as the fill which rendered that work necessary was not a natural one, but was occasioned through the negligence of the city of Oakland, plaintiff should look to the city for its pay. But plaintiff had no connection, either proximate or remote, with the city of Oakland, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

work done and which is in dispute comes fairly within the terms of the contract, was done at the instance of the inspector in charge, and must be paid for to the full extent of the 60,000 cubic yards that the plaintiff was advised before such work was commenced could be paid for out of the available funds.

For the excavation of 41,660 cubic yards plaintiff has been paid, leaving 18,340 cubic yards, at 18.8 cents, or \$3,447.92, still due. For this amount judgment will be entered. The question of costs will be reserved.

UNITED STATES ex rel. TREMAINE v. COMMISSIONER OF IMMIGRATION et al.

(District Court, S. D. New York. October 17, 1913.)

1. ALIENS (§ 54*)—EXCLUSION—POWERS OF SECRETARY OF LABOR.

The Secretary of Labor is not concluded by a ruling in favor of the admission of an alien immigrant, but may reverse such ruling.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

2. ALIENS (§ 49*)—EXCLUSION—DISCRETION OF SECRETARY OF LABOR.

The Secretary of Labor may in his discretion order the deportation of an alien immigrant who is under 16 years of age, an orphan, and without money.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 107; Dec. Dig. § 49.*]

Habeas Corpus. Suit by the United States, on relation of Dorothy Tremaine, against the Commissioner of Immigration at New York and the Secretary of Labor. Petition denied.

Charles E. Thorn, of New York City, for petitioner.

H. Snowden Marshall, U. S. Atty., of New York City.

WARD, Circuit Judge. The relator is an orphan child under 16 years of age, coming to this country, of course, unaccompanied by either parent. September 29, 1913, the board of inspection ordered her to be deported as a person liable to become a public charge. October 3d, a rehearing having been granted by the acting commissioner, the board reaffirmed its original order. October 7th, on appeal, the Secretary of Labor directed the landing of the relator, upon Dr. and Mrs. Clark giving bond in the sum of \$500 conditioned to adopt the child or to return her to England within one year, and that she should not become a public charge and should be kept in school in the meantime. The bond was given and accepted by the immigration authorities. October 11, 1913, the Secretary of Labor changed his mind, affirmed the order of the board, and directed the relator to be deported.

[1, 2] I cannot agree with the relator's counsel that the original order of the Secretary of Labor, which has been carried out, creates any estoppel or prevents the Secretary from changing his mind. This leaves only the question whether there was any evidence to support the finding of the board that the relator is likely to become a public charge. The fact that she is an infant and without money does tend

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to support that charge, and it makes no difference whether I agree with the conclusion of the board or not. Furthermore, being under the age of 16 years and unaccompanied by either parent, it is at the discretion of the Secretary of Labor to order the relator to be deported, which he has done.

The petition for the writ is denied, and the relator remanded.

In re BURR MFG. & SUPPLY CO.

(District Court, E. D. New York. November 4, 1913.)

BANKRUPTCY (§ 269*)—SETTING ASIDE SALE OF PROPERTY BY TRUSTEE.

A sale of property by a trustee set aside and a new sale ordered on conditions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 370; Dec. Dig. § 269.*]

In the matter of the Burr Manufacturing & Supply Company, bankrupt. On motion to set aside sale. Granted on conditions.

Franklin Taylor, of New York City, for purchaser.

Rambaut & Wilson, of New York City, for second mortgagee and another.

B. Foody, Jr., of New York City, for third mortgagee.

Henry A. Blumenthal, of New York City, for trustee.

CHATFIELD, District Judge. The original order of sale was not correct in form, the proof of notice of sale is indefinite, and, while it makes a prima facie compliance with the law, yet the notices do not seem to have been received. As the parties had appeared in the proceedings, they should have been served personally or by attorney rather than by mail. The "sale" was only a receipt of bid by the auctioneer, and, if all the facts now shown had been presented to the court, it would seem that the sale would not have been confirmed. Further the order of confirmation was not on notice to the parties whose rights were cut off. All steps since that have been predicated on that order or on defaults by Myers, who (under the title of "trustee" but in fact exercising no legal trust) surrendered the security (mortgage and pledged stock), later tried to withdraw that surrender, and at all times has intervened to oppose everything except those applications which were made by the attorney for the trustee in bankruptcy, who acted as his attorney in proving the claim which he now seeks to withdraw.

One Hughes, who was largely interested in the third mortgage, has acted as agent for the second mortgagee and has attempted at all times to force a foreclosure in the state court and to prevent confirmation of sale herein. But he also, as agent for the second mortgagee, swore that the security for that was insufficient and made no attempt to protect the third mortgage in which he was interested, and this proceeding was based upon an appraisal by the broker who made the bid for the present purchaser.

The court is unwilling to find an estoppel where there are so many conflicting equities and where the purchaser was told at the sale that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his bid would not be accepted. On the other hand, there is no reason why Haff, Hughes, and Myers should be allowed to withdraw the surrender of their security and their general proof of claim. Nor should Mr. Myers be relieved of his defaults if he merely seeks now to drive a better bargain than he before thought possible.

The court will set aside the sale and all proceedings based thereon and order a new sale of the title of the bankrupt to the property, free and clear of all liens, on ten days' notice, if Mr. Haff or Mr. Myers or Mr. Hughes deposit, within three days, the sum of \$500 (to cover expenses if no sale be confirmed and to cover in that event what may be allowed to Mr. Porter) and will agree to bid or produce a bid of not less than \$7,500 (they have offered to bid \$8,500) and consent to have the balance over liens and expenses go into the estate generally. The sale to be subject to confirmation, and no bid is to be considered of less than \$7,500. Otherwise the motions to set aside proceedings and to withdraw proof of claim will be denied and the motion to punish Myers for contempt will be granted.

BEN LEVY CO. v. TETLOW.

(District Court, E. D. Pennsylvania. November 28, 1913.)

No. 1,059.

TRADE-MARKS AND TRADE-NAMES (§ 95*)—UNFAIR COMPETITION—GROUNDS FOR RELIEF.

To authorize the granting of an injunction to restrain unfair competition by the alleged imitation of complainant's packages containing face powder, where the maker's name appears on each package, it is not sufficient that complainant's and defendant's boxes are of the same size and shape, but there must be such resemblance between them as is likely to deceive ordinary purchasers, exercising such care as is commonly used in purchasing such articles.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

In Equity. Suit by the Ben Levy Company against Clara Tetlow, trading under the name of the Tetlow Manufacturing Company. On motion for preliminary injunction. Denied.

Arthur v. Briesen, of New York City, and Henry P. Brown, of Philadelphia, Pa., for complainant.

Augustus B. Stoughton, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. In the state of uncertainty disclosed by the record upon the present motion, a preliminary injunction must be denied. The similarity in size and shape of the boxes used by the defendant in packing her powder to those of the plaintiff cannot be doubted, but without more that would not entitle the plaintiff to the relief asked for. The plaintiff relies, in connection with the similarity in the boxes, upon the similarity in design, ornamentation, and manner of labeling and lettering the boxes. There is a similarity in the general appearance of the packages of the respective parties in these respects, but there is so much substantial difference in the details that a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

careful purchaser, familiar with the plaintiff's powder, would not be misled into purchasing that of the defendant. There can be no risk of deception as to purchasers buying the plaintiff's powder by name, as the defendant's trade-names plainly appear upon her packages. The question is: Do they bear such resemblance as is likely to impose on ordinary purchasers, exercising such care only as is commonly used in purchasing such articles? *Van Camp Packing Co. v. Cruikshanks Bros. Co.*, 90 Fed. 814, 33 C. C. A. 280; *Pfeiffer v. Wilde* (C. C.) 102 Fed. 658.

There is no evidence to satisfactorily establish a conclusion that the ordinary purchaser of face powder relies upon the general appearance of the packages rather than upon the name under which the article is sold, and would therefore be misled into purchasing powder of the defendant upon the reputation of that of the plaintiff, and there is no evidence as to any purchaser having been so misled. As stated in the syllabus of the case of *Fairbank Co. v. Bell Manufacturing Co.*, 77 Fed. 869, 23 C. C. A. 554:

"In applying the test recognized by the authorities, namely, the likelihood of deception of an 'ordinary purchaser exercising ordinary care,' regard must be had to the class of persons who purchase the particular article for consumption, and to the circumstances ordinarily attending their purchase."

As was said by the Supreme Court of New York in *Morgan v. Troxell*, *Manual of Trade-Mark Cases*, Cox, Case 674:

"Very broad scene-painting will deceive an ignorant, thoughtless, or credulous domestic, looking for an article in common and daily use, and of no particular interest to her personally. The same kind of deception would be instantly detected by an intelligent woman of the world, looking for her favorite perfume, soap, or dentifrice, or by a man of luxurious tastes, inquiring for some special brand of champagne."

It is not shown with any sufficient degree of certainty whether the feminine purchaser of face powder ordinarily relies upon the name of her favorite make of this toilet article, or relies entirely upon the general appearance of the package. In view of the uncertainty of the evidence bearing upon that question, it is unnecessary to consider other aspects of the case raised upon the defendant's brief.

The motion is denied.

THE ELIZABETH.

(District Court, N. D. California, First Division. October 21, 1913.)

No. 15,452.

MARITIME LIENS (§ 65*)—SUIT TO ENFORCE LIEN FOR REPAIRS—SET-OFF.

That one making repairs on a vessel estimated that it would take "about a week" does not amount to a contract to complete the work within that time, which entitles the owner to a set-off as damages in a suit to enforce a lien for the repairs, because they were not finished within that time.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. § 103; Dec. Dig. § 65.*]

In Admiralty. Suit by the Christie Machine Works against the tug Elizabeth. Decree for libellant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

McGowan & Westlake, of San Francisco, Cal., for libelant.
R. F. Mogan, of San Francisco, Cal., for respondent.

DOOLING, District Judge. This is a libel for repairs to the tug Elizabeth; the repairs amounting in value to \$515.20. The amount and value of the work is not disputed by claimant, but a set-off of \$200 is claimed as damages, because the work was not done within the stipulated time.

It is well settled that damages may be recovered for failure to finish a structure, or repairs thereon, within the time agreed; but the evidence here shows no such agreement to perform the work within a stipulated time as would render the libelant liable for damages for failure so to do. The most that can be said of the testimony in favor of claimant is that it shows that libelant's manager estimated that it would "take him about a week" to perform the work required; but there is nowhere any testimony that he agreed to perform the work within that time, and he himself testified positively that he did not. Such being the state of the evidence, libelant is entitled to a judgment for the full amount sued for.

Let a decree be entered for the sum of \$515.20 and costs.

THE ERSKINE M. PHELPS.

(District Court, N. D. California, First Division. September 12, 1913.)

No. 15,406,

SHIPPING (§ 132*)—SUIT FOR DAMAGE TO CARGO—PLEADING.

In a suit to recover for damage to cargo, an allegation in the answer that the damage was from dangers of the seas, which were excepted in the bill of lading, must state the facts relied on to bring the case within such exception.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471-487; Dec. Dig. § 132.*]

In Admiralty. Suit by the Crane Company against the ship Erskine M. Phelps. On exceptions to answer. Exceptions sustained.

Denman & Arnold, of San Francisco, Cal., for libelant.

Andros & Hengstler, of San Francisco, Cal., for claimant.

DOOLING, District Judge. The matter excepted to is as follows:

"If it be true that the articles mentioned were damaged, the said damage was caused by a cause excepted in the bill of lading in article 4 of said libel referred to, to wit, the dangers of the seas."

The grounds of the exception are that the matter excepted to is imperfect, uncertain, insufficient, and evasive for the reason that it does not appear therefrom by what particular danger of the sea the said goods were damaged.

It is a general rule of pleading that a party relying upon an exception must state the facts which bring his case within the exception. The dangers of the sea are many and varied, and it should appear to the court from a statement of facts that the matters relied upon as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

constituting dangers of the sea do come within that category. It does not so appear, nor does it appear at all just what is relied upon as a defense. It is claimed that this is the usual method of pleading in this court. As to this I am not advised, but an examination of reported cases has disclosed to me no pleading in this form and very many where the matters relied upon are set out at length. I think this the better practice. The information is generally solely within the knowledge of the claimant. Both the libelant and the court should be informed by the answer just what matters the claimant will rely upon as constituting the dangers of the sea exempting him from liability.

The exceptions to the answer will be sustained, and claimant allowed, if he so desire, to amend the answer to conform to these views.

THE J. L. LUCKENBACH.

(District Court, N. D. California, First Division. November 6, 1913.)

No. 15,063.

SHIPPING (§ 141*)—DAMAGE TO CARGO—LIABILITY OF VESSEL.

Under a bill of lading which exempts the vessel from liability for internal or other breakage or rust of metals, she cannot be held liable for damages to articles of hardware from breakage or rust, without proof that it resulted from negligence of the carrier.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497-499; Dec. Dig. § 141.*]

In Admiralty. Suit by the Pacific Hardware & Steel Company against the steamship J. L. Luckenbach. Decree for respondent.

Charles A. Strong, of San Francisco, Cal., for libelant.

McCutchen, Olney & Willard, of San Francisco, Cal., for claimant.

DOOLING, J. Libelant sues to recover \$1,283.02, with interest from the date of the filing of the libel for damages alleged to have been suffered by certain merchandise shipped from New York on the steamship J. L. Luckenbach in good condition and delivered at San Francisco in a damaged condition. The receipt of the merchandise in a good condition and its delivery in a damaged condition are admitted by claimant, but exemption from liability is claimed by reason of the following provision in the bill of lading:

"The ship shall not be accountable for leakage, internal or other breakage, rust of metals, chafing of unpacked merchandise, or splits in lumber."

The proofs on the part of libelant show that some of the merchandise, consisting of various articles of hardware, were received in a badly damaged condition; the damage to some of the articles having been occasioned by breakage and to others by rust. The manner in which the articles were broken is not shown, and the only evidence as to the rust is that it was caused by water. All of the damage shown, having been occasioned by breakage or rust, comes within the exemption in the bill of lading, and libelant cannot recover therefor, without proof that the breakage and rust were due to the negligence of claim-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant or his agents. Once it is shown that the damage arose from one of the excepted causes, whether this proof is made by libellant or by claimant, the burden is then upon the shipper to establish that the negligence of the carrier takes the case out of the exception. No such proof was presented here; the libellant being content to rest upon proof of breakage and rust from water. Neither of these shows any negligence on the part of the carrier.

The ship cannot be held accountable for "internal or other breakage or rust of metals." This is the covenant, and it is broad enough to include, not only rust occasioned by dampness of the atmosphere, but rust occasioned by water as well.

The damage to the goods falling wholly within the terms of the exception, and there being no proof of negligence on the part of the carrier, the libel must be dismissed; and it is so ordered.

In re McPHEE.

(District Court, E. D. Pennsylvania. November 29, 1913.)

No. 9,886.

ALIENS (§ 68*)—NATURALIZATION—CONSTRUCTION OF STATUTE.

The certificate from the Department of Labor, which an applicant for naturalization is required to file with his petition by Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529), showing the date, place, and manner of his arrival, is not necessarily the same certificate which it is provided by section 1 (U. S. Comp. St. Supp. 1911, p. 124) shall be issued to an immigrant on his registry by the Commissioner of Immigration, nor need it be made up from the record of his registry, since he may be admitted to citizenship on proof of the requisite facts, although he did not come into the United States through a regular port of entry.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

In the matter of the petition for naturalization of George McPhee. Petition granted.

Jerome C. Shear, Chief Naturalization Examiner, of Collinswood, N. J., for the United States.

THOMPSON, District Judge. The objection of the Naturalization Examiner to the granting of the petition for naturalization in this case raises the identical questions considered by Judge Orr in the Western district of Pennsylvania in the case of *In re Schmidt*, 207 Fed. 678. Aside from the desirability of conformity with the decisions of the courts in this circuit, I entirely concur in the reasoning and conclusions of Judge Orr in that case, in which Judge Young concurred.

It is therefore ordered that the prayer of the petition be granted. The petitioner may be admitted to citizenship on taking the proper oath at a naturalization hearing in this court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In re WALKER.

(District Court, N. D. California, First Division. September 22, 1913.)

No. 7,559.

BANKRUPTCY (§ 413*)—DISCHARGE—SUFFICIENCY OF OBJECTIONS.

Amended specifications of objection to the discharge of a bankrupt *held* insufficient, and a demurrer thereto sustained without leave to amend.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712-718, 725, 727; Dec. Dig. § 413.*]

In the matter of John J. Walker, bankrupt. On demurrer to amended specifications of objection to discharge. Demurrer sustained.

Chas. F. Craig and J. Early Craig, both of San Francisco, Cal., for bankrupt.

Olin L. Berry, of San Francisco, Cal., for opposing creditors.

DOOLING, District Judge. The bankrupt having petitioned for his discharge, the Royal Investment Company has filed its objections to such discharge, to the specifications wherein the bankrupt demurs, the demurrer to a previous objection having been sustained. The court is inclined to the belief that this opposition is based more upon the character of the business conducted by the opponent than upon the false representations of the bankrupt. The schedule shows that the notes of opponent bear interest at 10 per cent. per month. In such case the court will not go out of its way to assist opponent in keeping alive such a usurious contract.

The specifications herein are insufficient, and, as opponent has already been allowed once to amend, the demurrer thereto will be sustained, without leave to amend.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GOLDSTEIN v. SCRANTON RY. CO.

(Circuit Court of Appeals, Third Circuit. December 9, 1913.)

No. 1,774.

CARRIERS (§ 320*) — ACTION FOR INJURY TO PASSENGER — STREET RAILROAD — QUESTIONS FOR JURY.

Plaintiff was a passenger on a street car of defendant, sitting next a window, and when a meeting car passed on the adjoining track his arm was struck and broken. There were three horizontal rods running across the front of the window. Several passengers in the car testified that plaintiff was resting his arm on the window sill, with his head on his hand, and that when the meeting car passed they heard a scraping sound along the side of their car. *Held*, that such evidence tended to show negligence on the part of defendant, and might raise a presumption of such negligence, which would shift the burden of proof, and should have gone to the jury, and that it was error to grant a compulsory nonsuit.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action at law by Wolf Goldstein against the Scranton Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

R. L. & L. M. Levy, of Scranton, Pa., for plaintiff in error.

Walter L. Hill and Everett Warren, both of Scranton, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. This case comes before us on a writ of error to the action of the court below, in refusing, upon the motion of the plaintiff, to strike off a judgment of compulsory non-suit. The material facts disclosed by the record are as follows:

The defendant company was engaged in the operation of a system of street railways in the city of Scranton and state of Pennsylvania, and on or about the 18th day of July, 1912, operated as part of its system certain double tracks situate upon Madison avenue in the said city. On that day, the plaintiff, Wolf Goldstein, was a passenger on one of defendant's cars, about 10 o'clock in the evening. The car was what was known as a closed car. The seats on one side—the left side, facing the front of the car and next to the track upon which cars were moved in the opposite direction—were arranged like those in an ordinary railroad coach, designed to be occupied by two persons each, and stood at right angles to the side of the car. On the opposite side was a long seat running longitudinally. The plaintiff boarded the car in the central part of Scranton, to ride to his home in the suburbs. He took a seat on the left-hand side, the third from the front. There was no one else in the seat and, the weather being warm, he sat next to the window, which was open, with this left arm or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
209 F.—10

elbow resting on the sill. Along the outer edge of the wall of the car were three small horizontal iron guard rods that ran the entire length of the car, several inches apart, past all the windows, the lowest being a few inches above the sill. The car proceeded out Madison avenue, on which are two tracks of the defendant company, and at a certain point on said avenue was passed by another car of the defendant, of the same type, on the adjacent or inbound track and traveling in the opposite direction. When the fronts of the cars were opposite each other, there was a sound which some of the plaintiff's fellow passengers, who were called as witnesses, testified was like a scraping sound against the side of the car in which they were riding, and the plaintiff, with a cry of pain, was seen to fall over on his seat. His arm had been broken. Plaintiff was a traveling salesman and accustomed to ride on street cars.

One of the passengers, William Page, testifies that he was in the car with the plaintiff at the time of the accident, and was sitting on the left side thereof (the same side on which plaintiff was sitting) and close behind him; that he knew the plaintiff; that there were not many people in the car and that, "as we were going up the hill on Madison avenue, there was a Moosic Lake car coming down, and I heard a scraping the minute the two cars met together; they scraped all the way down along the whole length of the car, and I heard Mr. Goldstein holler after the car passed"; that he (Page) made an exclamation when he heard the scraping; that "when I heard Mr. Goldstein holler I went up and recognized him." In answer to the question, "Did you look out of the window to see where the Moosic Lake car was, with reference to your car?" he answered:

"Why it went by, and I went like that when it went by (indicating). Q. Why did you go like that? A. Because the car was so close to me. Q. So close to you? A. Yes, it certainly was."

He also testifies that he helped take plaintiff to the hospital, where it was found that his arm was broken in two places, and that there was a bruise on the elbow.

Another passenger, Davis R. Davis, after testifying that he occupied a seat directly behind the plaintiff, and describing the latter's position in the car, with his left elbow resting on the window sill and his head on his hand, replied to the question, "Tell us what you saw take place," as follows:

"I was sitting just the same as I am now, about, and I could hear some noise coming in the opposite direction, as if there was something rattling on the car, and I moved in, you know, and with that, the car passed and struck me."

This testimony, on motion of defendant's counsel, was struck out by the learned judge of the court below. No reason is given therefor, but, as we think it was properly part of the *res gestæ*, we here recite it as evidence entitled to consideration on the motion for a non-suit. He says he heard the plaintiff cry out and saw him double up in pain, just after the car passed.

Another witness, Frances Burke, who, with two other young women, was riding in the car on the night of the accident, testified that she

was sitting right across the car from the plaintiff, facing towards him. She says the plaintiff had his arm on the window sill and that his head was leaning on his hand; that she saw something from the other car flash along and strike plaintiff; that she could not tell what it was, but that as it went along it flashed, whatever it was; that she saw the plaintiff fall over on his side and cry out; that the Moosic Lake car seemed quite close, but she could not see how close; that she heard a noise as the car passed, but she could not tell what it was.

One of her companions, Loretta Campbell, who was sitting also across the aisle from the plaintiff, testified that she remembered a car coming towards the city, between Mulberry and Pine, on Madison, and the "conductor of our car was on the front platform, and whatever struck the car, when it did strike, he came rushing in and wanted to know who was struck." She testified that she "saw the car pass and it was going at an awful rate of speed and something struck the car" in which she was; that she heard "an awful scraping sound" as the two cars were passing; heard the plaintiff cry out as the car passed.

Regina Campbell, the other of the three young women, testified to about the same effect; that the plaintiff was sitting with his arm on the sill and his head on his hand; that she noticed the other car passing and heard the scraping sound and then the cry of the plaintiff.

Plaintiff himself testified that he saw the Moosic Lake car approaching him, before it struck, and that he was under the impression that the end or corner of that car struck the car in which he was riding, and inflicted the injury complained of upon his arm. The testimony tended to show that the plaintiff was struck just as the motorman on the other car passed the window at which he was sitting.

Under a stipulation of counsel, the deposition of one Joseph E. O'Malley was taken by the defendant and read in evidence. He was a passenger on the Moosic Lake car, the car going in the opposite direction to that in which the plaintiff was riding, and which it is alleged collided therewith, or in some way caused the injury complained of. He said that while the car was on Madison avenue, about Vine street or near Vine street, just as another car was passing, he heard somebody shout "Oh," and a dull thud at the same time, and that the noise came from the outside of the car in which he was riding; that he was sitting in the back of the car and the noise appeared to come from the front. He also testified that on the arrival of the car at its destination, he, with some other persons, went to look at the car in which he, the witness, was riding, to see what had happened, but that he observed nothing on the side of the car to indicate any collision; that no scratches or abrasions appeared thereon. But this was not the car in which plaintiff was injured.

If a collision of the two cars, as alleged by plaintiff, is not so supported by the evidence as to constitute, as a matter of law, a prima facie case for the plaintiff, it at least tends to show negligence on the part of the defendant; that is, it tends to show that there was either an actual collision between the front end of the Moosic Lake car and the near side of the other car, or that something was negligently al-

lowed to protrude from the front end of the Moosic Lake car and come into contact with the other car and the plaintiff's arm, which is the same thing.

It seems to us that the evidence was such that reasonable men might or might not draw that conclusion therefrom. If, in the opinion of the jury, the weight of the testimony inclined to the side of establishing such a collision, then it would be a "happening in the course of the conduct of the business of the defendant out of the ordinary routine of that business, when properly conducted, upon which the presumption of negligence would rest," throwing upon the defendant the burden of making some explanation of the same that would rebut that presumption. *Irvine v. D., L. & W. R. R. Co.*, 184 Fed. 664, 669, 106 C. C. A. 600.

From the evidence thus summarized, we think the learned judge of the court below was in error in granting a compulsory non-suit. The judgment of the court below is therefore reversed, with an order for a venire de novo.

In re STIGER.

D. C. ANDREWS & CO. v. OSBORNE.

(Circuit Court of Appeals, Third Circuit. December 4, 1913.)

No. 1,736.

BANKRUPTCY (§ 214*)—EQUITABLE LIENS—SUFFICIENCY OF EVIDENCE TO ESTABLISH.

Claimants filed a petition with the referee, claiming a lien on bankrupt's accounts receivable under a written assignment executed within four months prior to the bankruptcy. They afterwards amended the petition asserting a lien under an oral agreement made before the four months' period. The evidence disclosed only that at that time there had been general talk of the bankrupt's securing claimants "with assigned accounts," but no specific accounts were spoken of, and no definite agreement was made by bankrupt to do so, and no notation of such an agreement was made on his books, but he continued to treat the accounts as his own and use their proceeds in his business. *Held* that, under the strict proof required by the courts of equity, such evidence was not sufficient to establish an equitable lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 320, 324-327, 343, 344; Dec. Dig. § 214.*]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

In the matter of Augustus K. Stiger, trading as the Stiger Manufacturing Company, bankrupt. From an order denying their claim to the proceeds of bankrupt's accounts receivable, D. C. Andrews & Co. appeal. Affirmed.

For opinion below, see 202 Fed. 791.

Sigmund Solomon, of New York City (David C. Myers, of New York City, of counsel, and Joseph H. Kutner, of New York City, on the brief), for appellants.

Bilder & Bilder, of Newark, N. J. (Nathan Bilder, of Newark, N. J., of counsel), for appellee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal by the petitioners, D. C. Andrews & Co., from an order of the court below, sitting in bankruptcy, reversing an order of the referee herein, which granted the prayer of the petitioners for an order on the trustee in bankruptcy to pay to the petitioners the sum of \$4,158.81 out of the funds in his hands.

The petitioners had been doing business with A. K. Stiger, the bankrupt herein, for some time prior to January, 1911. At that time, Stiger was indebted to the petitioners in excess of the sum of \$6,000.00, for goods sold and delivered, and in December, 1910, an extension of two years therefor had been given to him. In the middle of January, 1911, the question of further sales by the petitioners to Stiger came up, and conversations in regard thereto were had by one of the members of the petitioners' firm and Stiger, and also with his representative. The specific conversation relied upon by the appellants is not testified to, but Mr. Whitehouse, one of the members of the firm of D. C. Andrews & Co., the petitioners and appellants herein, testifies to what he considered a general understanding. The conversation is alleged to have been with Mr. Stiger, the bankrupt, or Mr. Thompson, his representative, and occurred on or about the 19th of January, 1911. The material parts of Mr. Whitehouse's testimony is as follows:

"Q. What was the conversation with Stiger in January, 1911?

"A. With reference to selling merchandise?

"Q. Yes.

"A. We went into the matter of supplying him with further merchandise; we told him we would sell them merchandise, but they would have to secure us against loss.

"Q. For those future sales?

"A. Yes.

"Q. Do you know the exact amount due to your firm by Stiger at that time?

"A. Not exactly, for the moment, no.

"Q. But it was upwards of \$6,000, was it not?

"A. Yes, sir; that is right.

"Q. When you and Stiger had this talk, what was done after the talk with reference to putting it in shape?

"A. I don't quite understand that question.

"Q. What was done in reference to putting the talk into the form of an agreement?

"A. When we had the merchandise ready for delivery, I drew up a form of assignment which I submitted to Stiger and Thompson, and there were some objections to its form, and they arranged to have another assignment drawn up and there was considerable talk as to that. Then an assignment was submitted to me, and I made some corrections or suggestions, and finally we had one drawn up which was mutually satisfactory.

"Q. These are the papers which are in evidence, marked Exhibits P-1 and P-2?

"A. Yes; dated February 17th.

"Q. So that the matter of actually putting into writing the agreement ran along for some time?

"A. Some weeks, yes.

* * * * *

"Q. What was the conversation in January, perhaps that is the best way to put it?

"A. I can't give the verbatim conversation, but the material points of the conversation were that we would sell them some goods if they would secure us against loss.

"Q. How?

"A. With assigned accounts.

"Q. What assigned accounts?

"A. Assigned accounts for merchandise they might well, accounts receivable created. All the accounts receivable they would create they were to secure us with, except those which they had to assign to the National Butchers' & Drovers' Bank for pay roll.

"Q. This talk was in January, 1911?

"A. Yes.

"Q. And a paper agreement to carry that out was drawn first by you?

"A. On January 19th, we confirmed a sale to them, in which we stated it was understood we were to have security.

"Q. You mean on January 19th they picked out some goods, purchased some—

"A. They didn't pick them out; we contracted for future delivery.

"Q. And on January 19th you wrote them a letter?

"A. Yes, sir."

The letter referred to is as follows:

"New York, January 19, 1911.

"Messrs. A. K. Stiger & Co. Newark, N. J.

"Gentlemen: In confirmation of 'phone conversation with your Mr. Stiger to-day, we have sold you about 30 tons of Tumaco ivory nuts at 5½ cents per lb., against your 60 days' note and as collateral security, a private assignment of sufficient outstanding accounts receivable to keep the above covered. The nuts are due sometime this month.

"We thank you for the order and remain,

Yours very truly,

[Signed] D. C. Andrews & Co."

On cross-examination, Mr. Whitehouse said, in answer to the question:

"Q. They wanted more merchandise; what did you say?

"A. That we would give them more, but inasmuch as we had allowed our past indebtedness to go on and be paid at some future time, that we did not want to be involved in any further loss and we would have to be secured for any further merchandise.

* * * * *

"What was your purpose in wanting security; afraid if you didn't you might lose?

"A. Exactly.

"Q. And you were unwilling to extend any further credit, except upon security?

"A. Yes.

"Q. Now what did Thompson and Stiger say to that?

"A. They agreed to give us security.

"Q. What kind of security was talked about?

"A. Assigned accounts.

"Q. Any specific accounts mentioned?

"A. All accounts over and above those assigned to the National Butchers' & Drovers' Bank for pay roll."

The testimony of Mr. Thompson, general manager of Stiger & Co., is as follows:

"Q. Were you present at the conversation of January, 1911, testified to by Mr. Whitehouse?

"A. Yes, the first conversation was had with me.

"Q. In January, 1911?

"A. Yes, sir.

"Q. Do you remember about the date?

"A. I should think somewhere about the 10th; between the 10th and 15th."

In answer to the question, "What was the conversation?" he said:

"A. At the time of the signing of this first agreement (whereby witness became manager for Stiger) there was no thought of any agreement of this sort being made, but they (petitioners) contended that there was being a larger credit given and they had extended their account for two years, and if they were going to give further credit to the company they thought they ought to be secured.

"Q. The first it was mentioned was in January, 1911?

"A. Yes.

"Q. At the time the nuts were to be purchased?

"A. Just about that period.

"Q. What did they say about wanting security; what was the conversation?

"A. Why they said they thought they ought to be secured, just as I told you, on account of already being in \$6,000.

* * * * *

"Q. What did you say to them when they asked for security for the purchase then to be made?

"A. I said I thought they ought to have the security, if they would carry out that agreement.

"Q. You agreed to it?

"A. Yes.

* * * * *

"Q. No matter when delivery was made, it was made in pursuance to this understanding and agreement you and Mr. Stiger had with Mr. Whitehouse on or about January 15th, 1911; is that right?

"A. I think that is my understanding."

It is upon this testimony that the appellants now rely for the establishment of an equitable assignment of the accounts or bills receivable then outstanding and afterwards accruing up to the date of the bankruptcy and to impress upon the proceeds of those accounts, or any of them in the trustee's hands not appropriated by a previous assignment, in due form, to the National Butchers' & Drovers' Bank, a lien or property right in favor of the appellants. Before discussing the efficacy of the testimony, as to what occurred between the parties on or before the 19th of January, 1911, as set forth above, to establish of itself, the equitable assignment contended for by the appellants, it is necessary to consider briefly the history of the transactions between the parties subsequent to that date, and for this purpose we quote from Judge Rellstab's summary of the case, the following:

"So far as the testimony discloses, no formal words of transfer in present were used on such occasions, nor any, that a writing formally evidencing such agreement was to be executed; but the subsequent conduct of the parties, rather than any testified-to express words, shows that a more formal agreement was contemplated by them."

The learned judge then recites the letter of January, 1911, from the petitioner to the bankrupt, which we have quoted above. He then says:

"The letter of February 7, 1911, following the last sale of merchandise, states, 'We had expected to hear from you to-day with the form of assignment agreement, and if you have not given this matter your attention we most kindly ask that you do so immediately, as we would like to have this matter put in shape in accordance with the terms of sale.' "Whitehouse, in answer to the question, what was done in reference to putting the talk into the form of an agreement, said: 'When we had the merchandise ready for delivery, I

drew up a form of assignment, which I submitted to Stiger and Thompson, and there were some objections to its form, and they arranged to have another assignment drawn up, and there was considerable talk as to that. Then an assignment was submitted to me and I made some corrections or suggestions, and finally we had one drawn up which was mutually satisfactory."

The assignment here referred to is dated the 17th day of February, 1911, and is accompanied by an agreement of the same date. It was a tripartite agreement between D. C. Andrews & Co. (the appellants), of the first part, Augustus K. Stiger, doing business under the firm name of Stiger Mfg. Co. (the bankrupt), of the second part, and Charles O. Thompson, of the third part. After prefatory recitals at considerable length, the agreement proceeds as follows:

"First: The party of the first part hereby agrees to sell and deliver to the party of the second part from time to time hereafter certain vegetable ivory nuts and raw material and to accept therefor the regular form notes duly signed by the party of the second part and countersigned by the party of the third part as manager payable sixty (60) days after date of invoices for the amount of each such invoice, and if required by the party of the second part, agrees to give an extension of thirty (30) days on each note from the maturity thereof, and interest for said thirty (30) days shall be charged by the party of the first part on each note, which interest shall be paid thereon by the party of the second part.

"Second: The party of the second part hereby agrees to give to the party of the first part his regular form notes, duly signed by him, and countersigned by the party of the third part as manager, for all vegetable ivory nuts and raw material purchased by him from time to time hereafter from the party of the first part, payable sixty (60) days after date of invoices for the amount of each such invoice, it being understood and agreed that an extension of thirty (30) days from the maturity of each note shall be given by the party of the first part, if required by the party of the second part, and that interest for said thirty (30) days shall be charged by the party of the first part on each note which interest shall be paid thereon by the party of the second part.

"Third: The party of the second part further agrees to assign, transfer and set over unto the party of the first part, from time to time, all accounts receivable created from the sale of buttons or other articles manufactured by the party of the second part as security for the promissory notes given by the party of the second part as hereinabove set forth, it being distinctly understood and agreed, however, that the assignments of such accounts receivable are to be and shall be made at all times subject to the prior assignments made by the party of the second part to the National Butchers' & Drovers' Bank for moneys advanced or to be advanced for the purposes of meeting the pay rolls for the business of the party of the second part, and, if absolutely necessary, for other purposes of the business of the party of the second part, with the approval and consent of Alfred E. Whitehouse and David H. Rowland."

Article Fourth of the agreement provides that the party of the third part shall act as the "agent and attorney for the party of the first part, for the purpose of collecting the accounts receivable assigned to the party of the first part, subject to any prior assignment thereof" to the bank, and the party of the third part agrees to become the lawful agent and attorney for the party of the first part, for the purpose aforesaid.

By the sixth article of the agreement, it is provided that the parties of the second and third parts

"shall and will, on Saturday of each week, from and after the date hereof, send to the party of the first part a statement showing the total amount of

bills receivable then on the books of the party of the second part, and of the total amount of such bills assigned to the National Butchers' & Drovers' Bank, as security for advances made to meet the pay rolls of the party of the second part, and if absolutely necessary, for other purposes of the business of the party of the second part, with the approval and consent of Alfred E. Whitehouse and David H. Rowland."

This agreement is signed and sealed as follows:

"D. C. Andrews & Co.,	
"By A. E. Whitehouse.	[L.S.]
"A. K. Stiger.	[L.S.]
"C. O. Thompson.	[L.S.]

This agreement was acknowledged by the parties thereto before a notary public on the day of its date, and duly recorded in the office of the register in the county of Essex on the 20th day of March, 1911. The assignment executed by A. K. Stiger, on the same day with and accompanying the agreement, is as follows:

"For the purpose of securing to D. C. Andrews & Co., of the borough of Manhattan, of the city, county and state of New York, the payment of a certain obligation or of certain obligations made by me, and now held by said D. C. Andrews & Co., or which may hereafter be given by me and held by said D. C. Andrews & Co., together with the renewal and renewals and extension and extensions thereof, and also in consideration of the sum of one dollar, lawful money of the United States, to me in hand paid, the receipt of which is hereby acknowledged, I, Augustus K. Stiger, doing business under the registered name or firm of A. K. Stiger & Co., and also under the registered name or firm of the Stiger Manufacturing Company, of the city of Newark, state of New Jersey, hereby sell, assign, transfer and set over to D. C. Andrews & Co. any and all claims, demands and book accounts, subject, however, to any prior assignment or assignments made by me of any or all of said claims, demands and book accounts to the National Butchers' & Drovers' Bank of the City of New York, for moneys advanced for the pay rolls for my said business, or for other purposes of my said business. It being understood that all claims, demands and book accounts now due to me, as doing business under the registered name or firm of A. K. Stiger & Co., and also under the registered name or firm of the Stiger Manufacturing Company, or which may hereafter become due, shall be and are hereby considered assigned to D. C. Andrews & Co. at all times until the full amount due to said D. C. Andrews & Co., under a certain agreement bearing date the 17th day of February, 1911, shall have been paid, but always subject to any prior assignment or assignments to said National Butchers' & Drovers' Bank, as aforesaid, and I hereby undertake, on behalf of and as agent for said D. C. Andrews & Co., to collect the said moneys and to turn over to said D. C. Andrews & Co. the moneys received from each of the said claims as collected in excess of the assignment or assignments to said National Butchers' & Drovers' Bank, until the whole of the indebtedness now due or which may hereafter become due to said D. C. Andrews & Co. under said agreement of the 17th day of February, 1911, shall have been fully paid.

"I have made the proper notation of said assignment on my books.

"In witness whereof, I have hereunto set my hand and seal this 17th day of February, 1911.

A. K. Stiger. [L.S.]

The bankrupt was so adjudicated in involuntary proceedings instituted against him on the 8th day of June, 1911. Thereafter, in a petition presented to the referee claiming such book accounts, or the proceeds thereof in the hands of the trustee, the appellants, as petitioners, based their right thereto absolutely upon the written agreement and accompanying assignment of the 17th of February, 1911,

above recited. They annex the said agreement and assignment to their petition and allege in the first paragraph thereof that, on the 17th day of February, 1911, the said agreement was entered into, whereby petitioners agreed to sell to bankrupt such merchandise as he may need, provided that the bankrupt assign to petitioners all book accounts then in existence, or thereafter to arise from sales of such merchandise.

In the fourth paragraph, they allege that, in addition to said agreement, on the same day, viz., the 17th of February, 1911, the said A. K. Stiger executed and delivered to petitioner the assignment in writing, a copy of which was set out and attached to said petition, whereby he duly assigned all his book accounts then existing and to arise from the sale of the merchandise by the petitioners to the bankrupt.

The sixth paragraph of said petition is as follows:

"Sixth: That pursuant to said agreement of February 17, 1911, and pursuant to the assignment of accounts dated February 17, 1911, and relying upon the aforementioned agreement, your petitioners did sell and deliver to said A. K. Stiger, at agreed prices certain goods, wares and merchandise amounting to three thousand eight hundred and seventy-one 80/100 (\$3,871.80) dollars, a statement of which is hereto annexed and made part and portion hereof."

The petition then alleges, upon information and belief,

"that upon the sale of such merchandise, accounts have arisen therefrom, which under the terms of said agreement and assignment of accounts, became the property of your petitioners."

They then claim in the hands of the trustee the accounts, or the proceeds thereof, referred to and assigned in the written agreement and assignment of the 17th of February, 1911.

After the filing of the trustee's answer to this petition, and on the day set for the taking of the testimony on the issues raised thereby, the petitioner sought and obtained permission to amend its petition; the petition, as amended, asserts that the assignment was made, not on the 17th day of February, 1911, the date of the said written agreement and assignment, but on or about the 19th day of January, as already mentioned; thus substituting for the legal written assignment of the 17th of February, 1911, the asserted equitable assignment on the 19th of the preceding January. It cannot escape observation that the written agreement of the 17th of February was within the four months' period, and for that reason subject to the provisions of section 67e of the Bankrupt Law (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]).

Appellants then contended before the referee in the court below, and now contend, that these agreements of February 17th confirm the oral understanding of the parties and show their course of dealing, and do not supplant the oral agreement, but that they refer to subsequent transactions to be had between the parties. The basis upon which their petition was originally presented, was abandoned, and resort is had to sustain their claim to an alleged equitable assignment made at a date that would carry it beyond the four months' period of the bankrupt law above referred to.

It is unnecessary to more than refer to the development of the equitable jurisdiction for the enforcement of nonlegal contracts, as illustrated in the decisions of courts of equity in this country and in England. The doctrine, so called, of equitable assignment, as the outgrowth of the exercise of this jurisdiction is fully discussed by all modern text writers on equitable jurisprudence, and by no one more clearly and satisfactorily than by Pomeroy. As pointed out by him, the essential elements of the contract are the same in equity as at law. There must be a clearly ascertained subject-matter, and in general the same rules prevail in both jurisdictions as to parties and their capacity to contract as to consideration and as to the assent or *aggregatio mentium*.

The very fact that courts of equity will enforce agreements between parties that lack the requirements of contracts enforceable at law, has rendered them the more strict in demanding, as a condition to such enforcement, that the intention of the parties to enter into a present contractual relation shall be clearly proved, and that there shall be no vagueness or uncertainty as to the terms and substance of the agreement.

We have already recited in full the testimony upon which an equitable assignment here is asserted. We fail to gather from it a clear, definite purpose of a present appropriation by Stiger & Co. of sufficiently specified accounts to meet the requirements of an enforceable equitable assignment. The most that can be gathered from these conversations, as to the intention of the parties, is an understanding that thereafter an assignment should be made of outstanding accounts to secure shipments of material by the appellants to the bankrupt, subject, however, to a prior assignment to the National Butchers' & Drovers' Bank, to secure advances for pay rolls and other purposes, as the same should be made by it.

The testimony of Mr. Whitehouse, a member of the appellant firm, is meager as to details and fragmentary as to the matters testified about. He says that, in a conversation with Stiger, in January, 1911, "we went into the matter of supplying him with further merchandise. We told him we would sell them merchandise, but they would have to secure us against loss."

Nothing is then said as to any agreement by Stiger, or that there was any response to what was said by Whitehouse. Further on in the examination, in answer to the question, "What was done in reference to putting the talk into the form of an agreement?" Whitehouse says:

"When we had the merchandise ready for delivery, I drew up a form of assignment, which I submitted to Stiger and Thompson, and there were some objections to its form, and they arranged to have another assignment drawn up, and there was considerable talk as to that. Then an assignment was submitted to me, and I made some corrections or suggestions, and finally we had one drawn up which was mutually satisfactory."

Nothing is testified to by Whitehouse as to anything said by Stiger.

After several palpably leading questions by his counsel, this question is put:

"What was the understanding and agreement then as set forth in these papers—I mean in January, prior to the delivery or sale of these goods?"

This was objected to, and the question was then put:

"What was the conversation in January? A. I can not give the verbatim conversation, but the material points of the conversation were, that we would sell them some goods if they would secure us against loss."

When asked how, he answered:

"With assigned accounts."

He then testifies to a sale made on January 19, 1911, and the letter written on that day, which we have quoted in full. It is only necessary to say of this letter that it is a letter written by the appellants themselves, giving their understanding of a conversation, only one side of which has been testified to.

The only other testimony by Whitehouse, referring to the giving of security, was the rather indefinite answers to questions on cross-examination, as, for instance:

"Q. Now what did Thompson and Stiger say to that?

"A. They agreed to give us security.

"Q. What kind of security was talked about?

"A. Assigned accounts. All accounts over and above those assigned to the National Butchers' & Drovers' Bank for pay rolls."

His whole testimony is of this indefinite character, and relates only to what he understood was the result of the conversation with Stiger, without stating what that conversation was. It is true that Thompson, the manager for Stiger & Co., said in a general way, that it was his understanding that security was to be given by assigning outstanding accounts. This testimony not only fails to give any clear and positive language by Stiger, evidencing an intention of a present appropriation of specific accounts, as security for merchandise thereafter to be delivered, but fails to give anything said by Stiger at all, or by any one in his behalf. Not only this, but all that is said by Whitehouse himself in his testimony, as to the understanding had by him with Stiger & Co., clearly points to some agreement in the nature of an assignment thereafter to be made of outstanding accounts due or to become due to Stiger & Co., as security to the appellants. Moreover, the conduct of the parties after the 19th of January, 1911, confirms this interpretation of the conversations with Stiger, as testified to by Whitehouse.

There is no ground to support a contention that an agreement and the accompanying assignment of the 17th of February, 1911, constituted a more formal embodiment in writing of what had been previously agreed to on January 19th. These papers speak for themselves, and they evidently embody all that could be relied upon as a specific assignment of the accounts referred to therein. Moreover, in neither of these papers, one of which by way of recital goes at considerable length into the history of the previous relation of the parties, is reference made, either expressly or by implication, to any previous agreement or assignment, by way of pledge or otherwise, of the accounts now in question.

Nor can the interpretation put by the parties themselves upon the situation be ignored. The fact that the appellants in their original petition relied entirely upon the written assignment of February 17th, and made no reference to any supposed agreement or assignment of the

19th of January, 1911, as now relied upon, is pregnant with meaning as to the understanding of the parties.

It is also undisputed that no notation of an assignment or other entry indicating any agreement between the parties in regard to this account was made upon the books of Stiger & Co. until after the written assignment of the 17th of February. It was only after the written assignment of that date, and in accordance with the stipulation therein contained, that any statement of the accounts outstanding was made to the appellants, and that statement, too, was a very meager one and only referred to the total amount of accounts outstanding and appropriated to the advances of the National Butchers' & Drovers' Bank. There was not only no notation upon the books prior to February 17th, but the testimony shows that Stiger & Co., between January 19th and that date, considered themselves in full control of the outstanding accounts due the firm, collecting the same and applying the proceeds to their current business.

We cannot but agree with the conclusion arrived at by the learned judge of the court below (Rellstab, J.), that there is no such evidence of a then present appropriation by Stiger & Co., on the 19th of January, 1911, of the outstanding accounts here in question, as would constitute an equitable assignment thereof.

It is unnecessary to discuss the evidence on which the court below finds that the written assignment of February 17th comes within the prohibition of section 67e of the bankrupt law, because the appellants, petitioners below, base their entire claim upon the transactions between the parties on January 19, 1911, abandoning the written instruments which they claim do not refer to the transaction now in question, but to transactions between the parties thereafter occurring. All the points in controversy have been thoroughly and ably discussed by the lower court, and its order in the premises is therefore affirmed.

STRAIT v. YAZOO & M. V. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1913.)

No. 2,363.

1. DEATH (§ 8*)—WRONGFUL DEATH—PARTIES.

A cause of action for decedent's wrongful death arose in Mississippi, where the right to sue is preserved by Laws Miss. 1908, c. 167, to decedent's mother, brothers, and sisters. The action, however, was brought in Tennessee, in which state the right of action is vested in decedent's personal representative by Code Tenn. 1896, §§ 4025-4029. *Held* that, since the administrator's relation to the beneficiaries was that of trustee only, the fact that the action was brought in Tennessee by decedent's mother, instead of by his administrator, was immaterial.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. § 8.*]

2. COURTS (§ 8*)—ACTION UNDER LAWS OF OTHER STATE—PENAL LAWS.

Code Miss. 1906, § 4053, provides that where a railroad is constructed so as to cross a highway, and it is necessary to raise or lower the high-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

way, the company shall make proper and easy grades, so that its road may be conveniently crossed, and shall keep such crossings in good order, and any company failing to comply with such provisions shall forfeit \$100 to be recovered by action in the name of the county in which the crossing is situated. *Held*, that the penalty prescribed was merely a means of official enforcement of the statutory duty, and that the statute was not so far penal that a civil liability which would be enforceable in another state, could not arise from a violation thereof.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19; Dec. Dig. § 8.*]

3. RAILROADS (§ 303*)—HIGHWAY CROSSINGS—CONSTRUCTION—STATUTORY REGULATION—VIOLATION—NEGLIGENCE PER SE.

Code Miss. 1906, § 4053, provides that, when a railroad is constructed so as to cross a highway, the company shall make proper and easy grades in the highway, and shall keep such crossings in good repair, and any company that shall fail to comply with such provisions shall forfeit \$100 to be recovered in an action in the name of the county in which the crossing is situated. *Held*, that the paramount intent of the statute was to protect members of the public against injuries from its violation, and that a failure to observe such requirements, resulting in death of a traveler using the crossing, constituted negligence per se for which the railroad company was liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 959-963, 966, 967; Dec. Dig. § 303.*]

4. RAILROADS (§ 350*)—CROSSING ACCIDENT—DEFECTIVE CROSSING—DEATH OF TRAVELER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad company for death of a traveler while driving a loaded wagon over a defective highway crossing, evidence *held* to require submission of decedent's contributory negligence to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by Viola Strait, for the use and benefit of herself and the other next of kin of Curtis Strait, deceased, against the Yazoo & Mississippi Valley Railroad Company and another. Judgment for defendants, and plaintiff brings error. Reversed, and new trial granted.

Dan F. Elliott and Bell, Terry & Bell, all of Memphis, Tenn., for plaintiff in error.

Fitzhugh & Biggs and T. A. Evans, all of Memphis, Tenn. (Chas. N. Burch, of Memphis, Tenn., of counsel), for defendants in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Plaintiff commenced her action in the circuit court of Shelby county, Tenn., for wrongful death of her son, and defendants removed the case to the court below. Under pleas of not guilty and contributory negligence, judgment was entered upon a verdict for defendants; plaintiff only having adduced evidence. The death occurred in the state of Mississippi at defendants' railroad crossing of a certain country road. While riding upon an ordinary farm wagon laden with loose cotton seed and drawn by mules, which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

he was driving, deceased was, by reason of the unsafe and dangerous condition of the crossing, as it is alleged, thrown to the ground, between the front end of the wagon and the mules, when his neck was caught and broken by the passage of one or both of the wheels of one side of the wagon. The claim of liability is based upon alleged violation of certain statutes of Mississippi. The declaration comprises two counts, which in substance are the same, except that the first contains one of the statutes mentioned and the other the second statute; and, as we understand, reliance is placed upon the first, which is section 4053 (3555), Mississippi Code of 1906, and the portion in issue is as follows:

"Where a railroad is constructed so as to cross a highway, and it be necessary to raise or lower the highway, it shall be the duty of the railroad company to make proper and easy grades in the highway, so that the railroad may be conveniently crossed, and to keep such crossings in good order; * * * and any company which shall fail to comply with these provisions shall forfeit the sum of one hundred dollars, to be recovered by action in the name of the county in which the crossing * * * is situated."

At the crossing in question it was necessary to raise the highway so as to maintain the rails at a level of five feet above the surface of the original highway. This, of course, necessitated approaches, and it is conceded that the grades of these approaches are "very steep"; one of the principal witnesses stating that the length of the approach upon which we understand the accident to have happened was 10 to 12 feet, which, if correct, signifies an obviously unusual grade; but just why these approaches were given such grades is not explained. That portion of the country (in Tallahatchie county, near Webb) is exceptionally flat, and the country road runs for some distance parallel and adjacent to the railroad on one side as far as the crossing, where it turns abruptly and passes over the railroad and continues thence in a direction perpendicular to the course of the railroad. The evidence tends to show that both approaches were out of repair at the time of the accident.

The particular features of disrepair that were dwelt upon by the witnesses were a depression caused by travel and rains at a culvert in the east approach, and a difference in level of five or six inches between the wooden plank on the outside of the rail at the top of the west approach and the approach itself, and this depression grew deeper for a short distance until it reached a ridge, called by the witnesses a "bump," which was some eight or ten inches in height and three to four feet in length, running across the southerly portion of the traveled way of the approach. The forward end gate of the wagon bed was forced from its fastenings when the front wheels of the wagon passed over the west plank of the crossing into the depression, and the deceased, who was holding his feet against this end gate, was jolted out of the wagon either as it entered the depression or struck the bump before described.

However, it is earnestly insisted, and the trial judge was impressed with the view, that the accident was due to the condition of the wagon and harness and the conduct of the deceased, rather than the defective condition of the crossing. This contention proceeds upon a theory

that is seemingly consistent with the existence of the defects pointed out in the crossing; for example, the argument is that, if the end gate had not been defectively fastened, it would not have given way, if the harness had been equipped with breeching the mules could have steadied the wagon, and if the deceased, who appears to have been familiar with the crossing, had given more attention to the team and less to people riding with him on the wagon, he could (by encroaching upon private property) have driven around the bump.

Now, despite the rule that contributory negligence might be a good defense in any aspect of the case, we are met by contention of plaintiff that the case was submitted to the jury under instructions that did not give due effect to the Mississippi statute, before quoted. The declaration is in form based upon that statute, as we have said, and the claim is that the duty it imposed upon the railroad companies respecting this crossing was in its nature and effect absolute. Whether the statute was regarded by the court below as applicable to the case and was intended to be construed by any language found in the charge does not appear; but it is certain that the duty of the companies concerning the crossing was not treated as absolute. The duty as laid down by the court was the rule of ordinary care and caution. This was excepted to, and request was made to instruct the jury that the duty prescribed by the statute is absolute, "and for the failure to perform which the railroad company is absolutely liable to any member of the public who shall be injured by" such failure. Was plaintiff entitled to the benefit of this or a similar instruction? If so, it is hard to see why she was not prejudiced by its refusal. It is certainly conceivable that under the charge given the jury believed both that the companies and the deceased were free from negligence, and yet that under an instruction similar in effect to the one refused the verdict would have been the other way.

[1] Whatever cause of action the plaintiff has arose in Mississippi. *Northern Pacific Railroad v. Babcock*, 154 U. S. 190, 199, 14 Sup. Ct. 978, 38 L. Ed. 958. A right of action was by statute of that state preserved to the mother and the brothers and sisters of the deceased, which, if the death was in truth caused by the wrongful or negligent act of the defendants, was in Mississippi enforceable by the mother. *Laws of Miss.* 1908, § 721, p. 184. It is to be observed that this statutory policy is in substantial harmony with that of Tennessee. *Tenn. Code of 1896*, §§ 4025-4029, p. 986. True, if the right of action had arisen in Tennessee, the suit, in view of the beneficiaries, would have been maintainable in that state only through a personal representative of the deceased; but since the administrator's relation to the beneficiaries, like that of the mother in the present instance, would have been simply that of a trustee, such a difference in parties plaintiff is of no consequence. *Cincinnati, H. & D. R. Co. v. Thiebaud*, 114 Fed. 918, 924, 52 C. C. A. 538 (C. C. A. 6th Cir.). It follows that, while suit in the present instance could have been maintained in Mississippi, it was open to enforcement in either the state court where it was brought, or in the court below to which it was removed. *Dennick v. Railroad Co.*, 103 U. S. 11, 21, 26 L. Ed. 439; *Texas & Pacific Ry. Co.*

v. Cox, 145 U. S. 594, 605, 12 Sup. Ct. 905, 36 L. Ed. 829; Stewart v. Baltimore & Ohio R. Co., 168 U. S. 445, 448, 449, 18 Sup. Ct. 105, 42 L. Ed. 537; Southern Pac. Co. v. De Valle Da Costa, 190 Fed. 689, 692, 111 C. C. A. 417, and citations (C. C. A. 1st Cir.); Williams v. Camden Interstate Ry. Co. (C. C.) 138 Fed. 571, affirmed in 140 Fed. 985, 72 C. C. A. 680 (C. C. A. 6th Cir.). Although the right to maintain the action in Tennessee is not questioned by counsel, we think it is helpful to a solution of the next question for consideration, to keep in mind that the cause of action had its origin in Mississippi and was enforceable in either of the courts below; for it would be an apparent contradiction to say both that the right of action could be so enforced and that there must be subtracted from the right the standard of duty resting upon defendants in that state.

[2] The important question, then, is whether defendants' liability is affected by the Mississippi statute (which in material part is set out above). Contention is made that the statute cannot in any respect be recognized or enforced, because it is an enactment of another state and is strictly penal. Counsel invoke the settled and familiar rule that "the courts of no country execute the penal laws of another." *The Antelope*, 10 Wheat. 66, 123, 125, 6 L. Ed. 268. We cannot think this rule is applicable here. The contention impliedly concedes that in Mississippi defendants would be amenable to civil liability for violation of the statutory duty. True, the statute imposes a forfeiture of \$100 for failure to comply with its provisions, but this is recoverable only "in the name of the county in which the crossing * * * is situated." This would seem to be simply a means of official enforcement of the statutory duty. The present action is not to enforce the duty, but to redress a private wrong for its violation. Official exaction of the forfeiture is palpably inadequate to compensate for such wrongs; moreover, the proceeds of forfeiture are not made applicable to such objects.

[3] The paramount intent of the statute is manifestly to protect members of the public against injuries from its violation (as also their accompanying and usual means of travel), who have occasion in the customary ways to use the crossings. While no decision of the courts of Mississippi distinctly passing upon the question of civil liability has come to our notice, it is worthy of observation that the Supreme Court of the state has affirmed the power to enact the statute and has so defined its scope as to render it applicable to streets of municipalities as well as country highways (*Hamline v. Railway Co.*, 76 Miss. 410, 417, 25 South. 295); and has also apparently recognized the right of an individual to recover civil damages for violation of the statutory duty (*Railroad Co. v. Sneed*, 84 Miss. 252, 257, 36 South. 261), for the case seemingly failed only because the injury complained of happened after the wagon carrying the plaintiff had safely passed the crossing in question, and at that point the driver had mismanaged the horse.

There are many decisions which hold that where a statute is passed requiring specific things to be done for the protection of a particular class of persons, without in terms imposing civil liability though in-

flicting a penalty for failure to observe such requirements, violation of the act constitutes negligence per se; this is settled in our court. See decisions cited in *Sterling Paper Co. v. Hamel* (C. C. A.) 207 Fed. 300, decided June 30, 1913. Such is the effect, too, in principle of well-known decisions concerning the federal safety appliance acts, in which there was also failure expressly to create civil liability for special injury, although a penalty was inflicted for violation of the statute.¹

However, these decisions alone are not determinative of the present question; this is because of a class of decisions which hold that, where a duty is imposed to protect the public generally, a particular individual suffering injury is not entitled to redress. This may be sufficiently illustrated by the decision in *Taylor v. Lake Shore & Mich. S. Ry.*, 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457, where it was held that a city ordinance requiring all persons to keep their sidewalks free from ice and to pay the city all damages that might be recovered against it for injuries occurring through neglect to comply with the ordinance, imposed a purely public duty, and did not give a right of action against an abutting property owner in favor of a person injured by slipping on the ice. See, also, *Cook v. Johnston*, 58 Mich. 437, 439, 25 N. W. 388, 55 Am. Rep. 703. Yet in *Hayes v. Michigan Central R. R. Co.*, 111 U. S. 228, 240, 4 Sup. Ct. 369, 374 (28 L. Ed. 410), it was held that damages could be recovered for special personal injury suffered through neglect of the railroad company to comply with a city ordinance adopted and accepted in pursuance of statutory authority, requiring the company to construct and maintain a fence between the railroad and a public park, though no penalty was imposed nor right of action in terms given for failure to perform the duty; Mr. Justice Matthews saying in the opinion:

"The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery."

In *Weller v. Lehigh, etc., Ry. Co.*, 81 N. J. Law, 95, 97, 79 Atl. 259, 260, under a statute imposing a particular duty respecting railroad crossings without inflicting penalty or expressly giving a right of action, the right to recover for injuries incurred by reason of a defect in a crossing was sustained; and in the opinion it was said:

"The duty imposed upon the defendant by section 26 of the General Railroad Law was 'to construct and keep in repair good and sufficient bridges and passages over, under and across the railroad or right of way where any public or other road, street or avenue now or hereafter laid shall cross the road,

¹ See *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 17, 22, 25 Sup. Ct. 158, 49 L. Ed. 363, reversing the decisions below and awarding new trial; *Schlemmer v. Buffalo, Rochester, etc., Ry.*, 205 U. S. 1, 10, 15, 27 Sup. Ct. 407, 410 (51 L. Ed. 681), where Mr. Justice Brewer, in announcing the dissenting opinion and leading up to the discussion of contributory negligence, said: "For the rule is well settled that while, in cases of this nature, a violation of the statutory obligation of the employer is negligence per se, and actionable if injuries are sustained. * * *" Also, s. c., 220 U. S. 590, 31 Sup. Ct. 561, 55 L. Ed. 596, affirming dismissal of the case on retrial on ground alone of contributory negligence.

so that public travel on the said road shall not be impeded thereby.' For the breach of such duty the defendant is liable to one of the public injured thereby while lawfully using the highway."

The same rule prevails in Indiana with respect to such crossings, under a statute which neither imposes a penalty nor expressly creates a right of action (*Lake Shore & Michigan Southern Ry. Co. v. McIntosh*, Adm'r, 140 Ind. 261, 278, 38 N. E. 476; *Southern Ind. R. Co. v. McCarrell*, 163 Ind. 469, 472, 473, 71 N. E. 156); and in Cleveland, C., C. & St. L. Ry. Co. v. Clark, 97 N. E. 822, 826, the Appellate Court of that state distinctly held that the railroad company's "failure to discharge this duty is negligence"; and the Texas Civil Courts of Appeals hold that the rule of ordinary care touching the construction and maintenance of railway crossings, under a statute similar to that of Indiana is not sufficient (*Galveston, H. & S. A. Ry. v. White*, 32 S. W. 186, 187; *T. C. R. R. Co. v. Randall*, 51 Tex. Civ. App. 249, 253, 113 S. W. 180); and in *St. Louis S. W. Ry. Co. of Texas v. Smith*, 49 Tex. Civ. App. 1, 4, 107 S. W. 638, it was held that the duty "to keep the crossing in repair is absolute."

We think it is fairly deducible from these decisions, especially from that of *Hayes v. Michigan Central R. R. Co.*, supra, that every such enactment must be examined to determine whether its intent was to impose the duty purely for the abstract public benefit, or also for the benefit of the individuals affected; and hence the evil to be remedied and the language employed for that purpose by the particular statute or instrument imposing the duty is of prime importance. For example, would it be to execute in its entirety the purpose of the Mississippi Legislature if we were to interpret its language to mean that merely an exclusively public benefit was designed, and that only the prevailing common-law duty of ordinary care respecting the changes involved in the portions of highway crossings lying within railroad rights of way was intended simply to be transposed from the state or county road officials to the railroad companies? Would not this be unduly to limit the plain intent of the specific requirements of the statute? The statute is restricted to crossings involving changes in grade; and the command is "to make proper and easy grades * * * so that the railroad may be conveniently crossed, and to keep such crossings in good order."

It results that, as respects suits maintained in that state, the duty prescribed by the Mississippi statute inures to all persons suffering special injuries through failure of railroad companies to comply with its provisions, wherever such injuries are sustained while using crossings with reasonable care; as it seems to us, rights of action in such instances are implied as plainly as if they were expressly given. The statute, then, is to be so treated; and since the duty out of which such liability grows is in form both imperative and continuing, the protection its observance would afford to travelers must be regarded as the dominant idea of the Legislature enacting the law, and the forfeiture as an incident. Such a statute cannot be strictly penal, for it is also remedial. *Johnson v. Southern Pacific Co.*, supra, 196 U. S. 17, 25 Sup. Ct. 158, 49 L. Ed. 363. True, in one sense the act may

be said to be in the nature of a penal statute, but this is not enough to defeat its enforcement in another jurisdiction. As Mr. Justice Gray said in *Huntington v. Attrill*, 146 U. S. 657, 667, 13 Sup. Ct. 224, 227 (36 L. Ed. 1123):

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal."

Attention is also directed to the opinion of Judge Putnam in *Boston & M. R. R. v. Hurd*, 108 Fed. 116, 119, 47 C. C. A. 615, 56 L. R. A. 193 (C. C. A. 1st Cir.). See, also, *Malloy v. American Hide & Leather Co.* (C. C.) 148 Fed. 482, 483. The conclusion that the penal nature of the statute is ineffective to defeat enforcement of the action is strengthened by the rule that such a forfeiture as this could be recovered by civil action. *Hepner v. United States*, 213 U. S. 103, 107, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960; *United States v. Ill. Cent. R. Co.*, 170 Fed. 542, 543, 95 C. C. A. 628 (C. C. A. 6th Cir.).

It was the right and the duty of the court below to determine how the Mississippi statute affected the suit (*Huntington v. Attrill*, supra, 146 U. S. 683, 13 Sup. Ct. 224, 36 L. Ed. 1123); and we therefore hold with respect to this accident that, if the condition of the crossing amounted to a breach of the duty imposed by the statute, such violation was negligence per se.

[4] We may properly advert to one other question. Insistence is made that the result reached below was correct, and so should not be disturbed, because the trial judge should have directed a verdict for the defendants on the ground of contributory negligence. We think it is not too much to say that fair-minded men might honestly draw different conclusions from the evidence as to the care or neglect of the deceased. It follows that the question was not one of law. *Richmond & Danville R. Co. v. Powers*, 149 U. S. 43, 45, 13 Sup. Ct. 748, 37 L. Ed. 642; *Tex. & Pac. Ry. Co. v. Harvey*, 228 U. S. 319, 324, 33 Sup. Ct. 518, 57 L. Ed. 852; *Harmon v. Flinham*, 196 Fed. 635, 639, 116 C. C. A. 309 (C. C. A. 6th Cir.).

The judgment below is reversed, with costs, and a new trial awarded.

BUSH et al. v. HUNT.

(Circuit Court of Appeals, Third Circuit. November 13, 1913.)

No. 1,759.

1. NEGLIGENCE (§ 136*)—ACTIONS FOR NEGLIGENCE—QUESTIONS FOR JURY.

In actions for negligent injury the questions of the negligence of defendant and contributory negligence of plaintiff are ordinarily questions for the jury, and courts will not interfere to declare either the one or the other as matter of law, where there is no fixed standard by which the alleged negligence may be determined, or unless there is such an obvious disre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gard of duty as amounts to misconduct. The question is always one for the jury when the measure of duty is ordinary and reasonable care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

2. MASTER AND SERVANT (§ 289*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

The question whether a plaintiff, who was injured by falling down the shaft of a freight elevator in defendants' mill, where he was employed with another in moving material loaded on trucks from one floor to another by means of such elevator, the mechanism of which was out of repair, was chargeable with contributory negligence *held*, under the evidence, one to be measured by the standard of ordinary care, and therefore one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action at law by Ernest C. Hunt against John S. Bush and Harry Terry, copartners trading as Bush & Terry. Judgment for plaintiff, and defendants bring error. Affirmed.

F. B. Bracken and W. W. Porter, both of Philadelphia, Pa. (Porter, Foulkrod & McCullagh, of Philadelphia, Pa., on the brief), for plaintiffs in error.

B. J. O'Connell, of Philadelphia, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. The defendant in error, hereinafter called the plaintiff, brought his action of trespass in the court below against the plaintiffs in error, hereinafter called the defendants, to recover for personal injuries received by plaintiff from a fall down an elevator shaft at defendants' factory while at work as an employé, alleging that said fall was occasioned by the negligence of the defendants.

The plaintiff had been employed by the defendants as a carpet passer for 31½ years at their mill, his duties being to get the work from the setting room on the third floor and take it to the weaving room on the fourth floor, on trucks wheeled into a freight elevator. The trucks used were five or six feet long, the same height, and about two feet wide. They rested on good-sized rollers or castors, and moved easily. When loaded with spools placed in racks, they weighed about 600 pounds. Two men handled a truck,—one in front to pull and the other in the rear to push it on and off the elevator at the different floors.

Defendants' elevator was in a shaft running from the basement to the fourth floor, with openings upon each floor. At each floor of the elevator shaft was an open wicket gate, sliding vertically in two grooves at each end, and was raised by the operator, on reaching the proper floor, by his hands, and when so raised rested on automatic catches which prevented the gate from coming down again while the elevator remained at that particular floor. The elevator was semi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

automatic and was operated by means of a controller rope and steel cables that ran from the lower floors up through the elevators and down again, about one foot apart. Between these cables was a hempen rope attached to a brake, used for the purpose of stopping the elevator at any exact spot, without the operator being required to make use of the steel cable controller. The gates at the several floors were raised with the aid of counterweights. When the elevator was moved from the floor a matter of a few inches, the clutches would automatically release the gate, which would then drop to the floor of its own weight and bar the entrance to the shaft.

There was also placed in the shaft at each floor, under the directions of the Bureau of Elevator Inspection, what was known as a floor lock, by means of which the cable operating the car was fastened, so that the car could not be moved by those on another floor without the knowledge and consent of the workmen on or about it. There was no regular operator, it being operated by those who used it from time to time, and it could be raised and lowered to a floor where it was required by any one reaching into the shaft and operating the controller cables. The floor lock of the third floor at and before the time of this accident was broken, and had been so for a year, necessitating the use of a makeshift devised by one of the employés. The makeshift was the taking the so-called hempen rope and tying it to the broken floor lock or wrapping it around one of the controller cables.

The plaintiff testified that about two weeks before the accident, he was riding up on the elevator with Mr. Bush, one of the defendants, and that the gate stuck in its elevated position on the third floor as they passed; that he called Mr. Bush's attention to it and said that some one would meet with a severe accident some day through the condition of those gates, and that Mr. Bush replied that he would have it attended to. Plaintiff testified that it never was attended to, to his knowledge, and there was direct evidence by one of the employés in the mill, whose duty it was to inspect the elevator when any such complaint was made, that nothing was done to rectify the sticking of the gate prior to the accident. Plaintiff also testified that, in the two weeks or more elapsing between his thus notifying one of the defendants and the accident, he knew the gate on the floor in question had stuck about three times, but he also testified that he used that elevator between those floors on an average of 7 or 8 times, or perhaps 12 times, a day for many weeks immediately preceding the accident. Mr. Bush, one of the defendants, denies this conversation with the plaintiff, but does not deny knowledge of the liability of the gate to stick, and of the fact that the automatic floor lock on the floor in question was broken and had been incapable of being used for a long time prior to the accident.

It was in testimony that, in moving trucks between the third and fourth floor, it was usual for two men to be employed, the one pulling and the other pushing, so that, in loading the elevator on the fourth floor to go to the third, the one who pulled would, when the elevator was loaded, have his back towards the rear thereof, and the one who pushed would be in the front of the elevator at the doorway, and he

was the one who, from his position near the cables, would naturally operate the elevator, as he usually did. Plaintiff also testified that, as the hempen rope for stopping the elevator was between the operating cables and near the hand of the one operating the elevator, he naturally applied the makeshift device of fastening the elevator with the hempen rope after the automatic floor lock had been broken.

There was little controversy as to what happened on the day of the accident in question. On the evening of March 15, 1912, it became necessary for the plaintiff, Hunt, and a fellow workman by the name of Grunsky, to take some trucks loaded with spools from the fourth to the third floor and bring back other trucks in their place. It was necessary, as usual, for two men to handle them, one pushing and the other pulling and guiding. The two men had made one trip and were on their second trip when the accident happened. On this second trip, Hunt pulled the truck on to the elevator on the fourth floor and Grunsky pushed it. This put the plaintiff at the back of the elevator and left Grunsky at the front, next to the cable which he operated, lowering the elevator to the third floor, where he stopped it and raised the gate. Grunsky then pulled the truck off the elevator, going backwards, with Hunt pushing. They placed the truck to one side of the elevator shaft, about seven or eight feet therefrom, on the third floor. Plaintiff then passed over from that side to the other side of the shaft, to bring back another truck which was about eight feet distant from the elevator. The plaintiff testified:

"In this case, we had a light truck to push off, which left the elevator in perfect condition to pull the other on. I looked to see that that was all right as I crossed from the left to the right to pull the truck in. When I got toward the elevator I looked over my shoulder to see if the gate was all right and I assumed the elevator was there."

He afterwards says that he was about a foot and a half away from the elevator when he looked over his shoulder. The gate was up. There is some confusion in his testimony as to whether he saw anything but the raised gate, which would indicate that the elevator was in proper position. For at one time he says that as he looked over his shoulder, the floor of the elevator had just gone up, but it was too late, with the loaded truck being pushed against him, to save himself from falling into the shaft.

It turned out afterwards that the foreman on the fourth floor, without notice to either of the workmen on the third floor, had reached out into the shaft and, by means of the cable, removed the elevator from the third floor, as Grunsky, the one who operated the elevator, had not, as it was the usual custom of the operator to do, secured the elevator at the third floor by means of the hempen rope. The removal of the elevator should have caused the gate to drop and thus have barred the entrance to the shaft, but, owing to the fact that the grooves or runways of the gate were worn, the gate stuck and did not descend.

The negligence attributed by the plaintiff to the defendants, as the cause of his injuries, was the defendants failing to provide a safely working gate and a proper floor lock,—that is, a safe working place; and that while they knew, or ought to have known, that both were

so defective as to make the elevator dangerous to those using it, the defendants made no endeavor to remedy such defects. This primary negligence of the defendants made possible the intervening negligence of the foreman on the fourth floor, in moving the elevator without notice to those using it on the third, and the negligence of the plaintiff's fellow workman in neglecting to fasten the elevator at the third floor with the hempen rope.

The Pennsylvania statute of June 10, 1907 (P. L. 523), provides that:

"The negligence of a fellow servant * * * shall not be a defense, where the injury was caused or contributed to by * * * any defect in the works, plant, or machinery, of which the employer could have had knowledge by the exercise of ordinary care."

Under the facts of this case, then, the defendants cannot avail themselves of the defense that the accident was attributable to the negligence of the plaintiff's two fellow servants.

Upon the facts of which the foregoing is a summary, the learned judge of the court below submitted the case to the jury with a charge that was not directly excepted to; the only exception disclosed by the record being to the refusal by the court to direct a verdict in favor of the defendants, under all the evidence in the case. The jury having found a verdict in favor of the plaintiff, the defendants sued out this writ of error to the judgment entered thereon. There are only two assignments of error; one founded upon the exception above referred to, and the other upon the refusal of defendants' motion to enter judgment non obstante veredicto upon the whole record. The latter assignment, for obvious reasons, is not pressed.

It must be admitted that, upon the evidence the question as to the negligence of the defendants was properly submitted to the jury, unless the undisputed facts in the case were such as to convince the court that the plaintiff was guilty of contributory negligence. Indeed, defendants' counsel in their brief state the only question involved, as follows:

"Under all the evidence, was the accident so plainly due to plaintiff's contributory negligence that the court below should have given binding instructions for defendants?"

We turn, therefore, to the evidence, so far as it touches upon this question. Defendants' argument is confined to the contention that plaintiff contributed to the accident by his negligence in two particulars:

"(a) In failure to approach the elevator shaft in such a way as to avoid falling in, he having knowledge that the elevator might be moved away, leaving the hatchway open, due to the alleged defect in the automatic drop gate; and

"(b) In failing to use the device available for holding the elevator at the floor in such a way as to prevent its being moved while he was engaged in loading the truck."

The salient features of the testimony, as to the conduct of the plaintiff from the time he removed from the elevator the truck brought down from the fourth floor, up to the time he met with the accident in attempting to load the other truck on the elevator, must be again referred to.

There was evidence tending to show that, on arriving at the third floor, the plaintiff, who was at the back of the truck, pushed while his fellow workman pulled the truck off the elevator to a distance of from seven to eight feet therefrom, and somewhat to the left. The plaintiff says:

"My actions in pushing the truck off the elevator, we pushed that away to the left, and as we pushed that truck to the left I looked at the elevator floor to see that it was level with the floor level, to bring the second truck on, I took hold of the truck to pull it in. I of course was walking backwards. When I got close to the elevator, my natural instinct, as always was the case, I looked to see if it was in position and the gate was there.

* * * * *

"The second time when I looked for that elevator, I was about a foot and a half away, as I looked over my shoulder that way [illustrating], and the gate was in position all right, and the elevator floor was just disappearing, but I was so close it was impossible to stop myself, owing to the momentum of the truck.

* * * * *

"When I looked the second time, understand distinctly, I looked and saw that elevator twice. The second time I looked for the purpose of seeing if it was right to pull the other truck on. Sometimes we had to work the elevator. If a heavy truck went off the elevator it kind of sprung, and the result was that we would have to go back and bring it level with the floor again. In this case we had a light truck to push off, which left the elevator in perfect condition to pull the other one on. I looked to see that that was all right, as I crossed from the left to the right to pull the truck in. When I got toward the elevator I looked over my shoulder to see if the gate was all right, and it was all right, and I assumed the elevator was there."

"Q. How far away was the end of the truck that you took hold of from the elevator shaft when you went to put it on? A. When we took hold of it? Q. Yes. A. About seven or eight feet. Q. You got hold of it with your hands and pulled it backwards? A. Pulled it backwards, yes, sir."

Upon this testimony, defendants mainly rely to justify their contention as to plaintiff being guilty of contributory negligence.

Premising that the plaintiff testified that the elevator gate was out of repair and that he had notified one of the defendants of that fact two weeks before the accident, and that he knew that the floor lock to hold the elevator in place had been broken, and that the hempen brake rope had been used as a makeshift to secure the elevator when brought to the floor level, the defendants' counsel contend that the conduct of the plaintiff, as described in his own testimony as above quoted, evidenced such reckless disregard of his own safety under the circumstances, as required the court below to instruct the jury, as a matter of law, that plaintiff was guilty of contributory negligence, and was therefore not entitled to recover for the negligence of the defendants.

[1] Questions as to the negligence of the defendants or contributory negligence of the plaintiff are ordinarily questions of fact for the determination of the jury. Courts will not interfere to declare either the one or the other as matter of law, where there is no fixed standard by which the alleged negligence may be determined, "unless there is such an obvious disregard of duty as amounts to negligence." The plaintiff, as properly said by the court below, was bound in this case to exercise that degree of care to protect himself from the dangers of the situation which an ordinarily prudent person would exer-

cise under the circumstances. But what an ordinarily prudent person would do under the circumstances, is not for the court, but for the jury, to say. The jury, not the court, stands in the place of the typical ordinarily prudent person, whose supposed conduct under the circumstances is the standard by which the negligence, whether of the plaintiff or defendant, is to be determined. The general rule in this respect is so well settled, that it is hardly necessary to cite authority in its support, but the principle upon which it is founded was so well stated by the Supreme Court of Pennsylvania, as long ago as 1871, in *R. R. Co. v. McElwee*, 67 Pa. 311, a case referred to by counsel for plaintiff, that we quote the following language therefrom:

"The law is well settled that what is and what is not negligence in a particular case is generally a question for the jury and not for the court. It is always a question for the jury when the measure of duty is ordinary and reasonable care. In such cases the standard of duty is not fixed but variable. Under some circumstances a higher degree of care is demanded than under others. And when the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as matter of law, and must be submitted to the jury to determine what it is, and whether it has been complied with. But when the standard is fixed, when the measure of duty is defined by law, and is the same under all circumstances, its omission is negligence, and may be so declared by the court. And so, when there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence as matter of law. But where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others; where both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved."

[2] We do not think that the above-quoted testimony of the plaintiff, upon which counsel for the defendants rely in support of their contention, would have justified the court below in declaring, as matter of law, that the plaintiff was guilty of contributory negligence. The evidence clearly shows that the plaintiff was in the zealous performance of his duty to his employer. There was apparently some mishap on the fourth floor requiring prompt action on the part of the plaintiff in moving these trucks between the floors. The gate, which occasionally stuck in its grooves and did not automatically drop when it should have done so, usually operated as it was intended to operate, the plaintiff testifying that during the two weeks intervening between his notice to the defendant and the happening of the accident, although he was using the elevator from 8 to 12 times every day, the gate had only stuck two or three times.

Plaintiff's testimony also tended to show that it was customary, in handling these trucks between the floors, for the one who remained at the front or door of the elevator after the truck was pushed in, to operate the same, and also, upon the arrival of the elevator at the floor to which it was destined, to secure it, in the absence of the floor lock, with the hempen brake rope. Grunsky recognized that this was his duty, when he said that when he raised the gate up, he thought they were to merely push the truck off and were not going to put another one on, and therefore did not use the precaution of fastening the rope, and, according to this testimony, it was his negligence that the hempen rope was not used to secure the elevator, and not that of the plaintiff.

The evidence also tends to show that plaintiff did not know that Grunsky had failed in the matter of using the hempen rope as a fastening, though he did not endeavor to ascertain whether this duty had been performed by Grunsky, or not. This being the testimony bearing on the plaintiff's state of mind and knowledge as to the situation immediately preceding the accident, we turn to the testimony as to the conduct of the plaintiff, upon which, by reason of the premises, the charge of contributory negligence on the part of the plaintiff is founded.

The evidence tends to show that, as plaintiff left the elevator, pushing the truck, he looked to see that it was flush with the floor and all right for bringing the other truck on. It also tends to show that, as plaintiff crossed from left to right, to bring the second truck on to the elevator, he was in a position to look directly into the door of the elevator; that he did so and saw that the gate was still up and the floor of the elevator in proper position. The evidence is sufficient to support the inference that, from the time he thus looked until he was within a foot and a half of the elevator, walking backwards and pulling the second truck, could only have been an interval of a few seconds, as it was only necessary for the second truck to be pulled and pushed over the intervening space of 7 or 8 feet to the elevator, or a distance of $5\frac{1}{2}$ or $6\frac{1}{2}$ feet to the point where he actually did look, though too late to save himself. There is also evidence tending to support the suggestion that, but for the momentum of the heavily laden truck, increased by the push of his fellow workman, he might even at that distance have recovered himself.

Are we to say, as a matter of law, that it was negligence not to have taken into account the momentum and push of the truck, or that it was reckless disregard of his own safety not to have looked over his shoulder when 2 or 3 feet distant, instead of $1\frac{1}{2}$? The fact, if it be a fact (and the plaintiff's testimony tended to show it), that he looked as he crossed from one truck to the other, and found the situation all right for his work, might or might not in the opinion of a jury excuse the plaintiff from expecting a change in the short interval of time required, after he had looked, to pull the truck over the intervening space of 7 or 8 feet which separated it from the elevator. We cannot agree that what plaintiff did shows such an obvious disregard of duty and safety as amounts to misconduct, which the court may declare to be negligence as matter of law. "The duty and extent of its performance are to be ascertained as facts" by the jury.

It is unnecessary to prolong this discussion of the testimony, as it is apparent that, in order to have complied with the defendants' motion for peremptory instructions on account of contributory negligence, it would have been necessary for the court to have established in its own mind a standard by which to test the alleged negligence of the plaintiff. The real standard being what an ordinarily prudent man would have done under the circumstances, it could only be fixed by the jury, and the court properly submitted the fixing of that standard to its determination.

The judgment of the court below is therefore affirmed.

In re SEE.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 22.

1. TRUSTS (§ 358*)—FOLLOWING TRUST FUNDS—IDENTIFICATION.

A trust fund can be followed and recovered in equity only when it can be clearly traced and identified as some specific fund or property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 523, 553; Dec. Dig. § 358.*]

Following trust property converted by trustee as dependent on its identification, see note to In re T. A. McIntyre & Co., 108 C. C. A. 545.]

2. TRUSTS (§ 358*)—FOLLOWING TRUST FUNDS—ASSETS—PREFERRED LIEN.

Claimant and a bankrupt agreed that the former should purchase and sell goods in the bankrupt's name, he to receive 5 per cent. on the gross sales and all money collected by claimant and pay all bills for goods purchased. To protect the bankrupt from loss, claimant deposited \$800 with him to be returned on termination of the agreement. This money was deposited by the bankrupt in a bank, and, about a week prior to the bankrupt's failure, the balance of his deposit account amounting to \$1,500 was paid to the bank to take up a note owing to it. *Held* that, since claimant's deposit could not be traced into funds of the bankrupt that came into the possession of his trustee, claimant was not entitled to a lien on the bankrupt's assets therefor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 523, 553; Dec. Dig. § 358.*]

Petition and Appeal from the District Court of the United States for the Southern District of New York.

In the matter of bankruptcy proceedings of J. Albert See. From a decree awarding Henry H. Meeker, a creditor, a lien on the assets of the bankrupt for the payment of money deposited with him as security, Joseph Steinberg, as trustee of the bankrupt, appeals. Reversed.

Frank H. Reuman, of New York City, for appellant.

C. Elmer Spedick, of Brooklyn, N. Y., for respondent.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. In October, 1911, J. Albert See and Henry H. Meeker entered into an agreement which provided that Meeker should be permitted to carry on the business of buying and selling goods in the name of See. The latter was to receive 5 per cent. on the gross sales; was to receive all moneys collected by Meeker and pay all bills for goods purchased by him. In order to protect See from any losses which might occur through the sale of goods by Meeker, the latter deposited the sum of \$800 with See as security to be returned on the termination of the agreement. Meeker carried on the business until January 10, 1912, when a petition in involuntary bankruptcy was filed against See, and Joseph Steinberg, the petitioner, was appointed receiver and subsequently trustee in bankruptcy. After the appointment of the petitioner, Meeker collected for goods sold by him certain sums of money amounting approximately to \$519. He

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was required to show cause why he should not turn this amount over to the receiver. He admitted the collection of this money, but asserted the right to retain that sum on account of having a lien against the same for the \$800 which he had deposited with See by way of security. It was admitted that See had deposited the \$800 which he received in the Aetna National Bank, and that when the bankruptcy petition was filed there was very little, if anything, in the bank to See's credit, because of the fact that the main balance that had been in the bank was paid to the Aetna National Bank to take up a \$1,500 note within a week prior to the failure. An order was made by the district judge requiring the respondent Meeker to pay to the receiver the \$519 which he had collected and the question was referred to a special master as to whether the \$800 deposited by the respondent Meeker with the bankrupt See was a lien upon such moneys as might be collected on the accounts due under the agreement between them. At the same time the receiver or trustee was directed to set aside out of the assets in his possession the sum of \$1,000, the same to be held until it should be determined whether the claimant Meeker had any lien thereon. The master reported against the existence of the lien. The district judge refused to confirm the master's report and ordered that the claim of respondent Meeker should be declared a lien upon the sum of \$1,000 in the hands of the trustee, who was directed to pay to Meeker \$690.71; it having been ascertained that this was the amount due from See to Meeker. The trustee in bankruptcy has appealed from this order and filed a petition for review.

It is admitted that no part of the \$800 has been traced into the funds of the bankrupt or reached the hands of the trustee in bankruptcy. The question which this court has to decide, therefore, is whether one who entrusts money to another to be held as security has a preferred claim on the assets which come into the possession of a trustee in bankruptcy of that other in case the latter wrongfully appropriates the funds held in security to the payment of certain of his creditors, or whether he must come in and share *pari passu* with the general creditors.

The respondent insists that his claim is to be preferred on the ground that the security fund was wrongfully used by the bankrupt to diminish his debts and that by the payment of the note to the Aetna Bank, the bankrupt's estate was by so much enriched. The argument is that the presumption should be indulged that this wrongful application of the security fund had contributed to the benefit of the bankrupt's estate in the proportion that it had lessened the volume of the general claims against the estate and that on that account the special creditor, in this case the respondent Meeker, is to be given the same preference over the general creditors that he would have had if the security fund had not been wrongfully appropriated but had come into the hands of the trustee in bankruptcy.

On the other hand, the petitioner, the trustee in bankruptcy, insists that as the security fund was dissipated by the bankrupt and never reached the petitioner's hands as a specific fund and cannot be traced into the assets of the bankrupt's estate, the respondent is not entitled to any preference over the general creditors.

[1] There is no doubt that See held the \$800 deposited by Meeker as a trust fund. If the fund had remained in its integrity in See's hands—Meeker would have been entitled to claim the entire amount in preference to the general creditors. And if in perversion of his trust See misappropriated the money, Meeker was entitled in equity to pursue the trust fund into any form of property into which it could be shown See had converted it. But if a trustee wrongfully converts a trust fund and it cannot be traced into any specific fund then the question arises whether the cestui que trust can assert a preference against general creditors. It is well known that there is some conflict of authority upon the question whether the trust fund can be followed only when the specific subject-matter can be clearly traced and identified, or whether it will be sufficient if it can be shown that it has found its way into the assets although it cannot be identified in any particular fund or property. The better doctrine and that sustained by the weight of authority is that a trust fund can be followed and recovered in equity only when it can be clearly traced and identified in some specific fund or property. *Board of Commissioners v. Strawn*, 157 Fed. 49, 84 C. C. A. 553 (see note to same case in 15 L. R. A. [N. S.] 1100); *In re Hicks*, 170 N. Y. 195, 63 N. E. 276; *Bank Commissioners v. Security Co.*, 70 N. H. 536, 49 Atl. 113; *Bryne v. McGrath*, 130 Cal. 316, 62 Pac. 559, 80 Am. St. Rep. 127; 39 Cyc. 530.

As said in *Hewitt v. Hayes*, 205 Mass. 356, 362, 91 N. E. 332, 137 Am. St. Rep. 448, the cestui que trust is not given a charge upon the general estate of the trustee on the ground that that estate has been enriched at his expense, but is merely allowed to hold a charge upon the specific account or fund into which his money has gone, and in which equity can presume that it still remains. In *Lowe v. Jones*, 192 Mass. 94, 78 N. E. 402, 6 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225, 7 Ann. Cas. 551, it was sought to establish a trust in the general assets of an insolvent estate upon the ground that the proceeds of trust property wrongfully disposed of had gone into those general assets, and thus increased the amount of the estate. But the court said that, while there was some authority for that contention, it had never adopted it and it was not disposed to do so.

In *Spokane County v. First National Bank*, 16 C. C. A. 81, 68 Fed. 979, a question similar in principle was before the court in the Ninth circuit. That court said:

"We are unable to assent to the proposition that, because a trust fund has been used by the insolvent in the course of his business, the general creditors of the estate are by that amount benefited, and that therefore equitable considerations require that the owner of the trust fund be paid out of the estate to their postponement or exclusion. If the trust fund has been dissipated in the transaction of the business before insolvency, it will be impossible to demonstrate that the estate has been thereby increased or better prepared to meet the demands of creditors, and, even if it is proven that the trust fund has been but recently disbursed, and has been used to pay debts that otherwise would be claims against the estate, there would be manifest inequity in requiring that the money so paid out should be refunded out of the assets, for in so doing the general creditors whose demands remain unpaid are in effect contributing to the payment of the creditors whose demands have been extinguished by the trust fund. Both the settled principles of equity and the

weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant."

The question was elaborately considered in *Metropolitan National Bank of Kansas City, Mo., v. Campbell Commissioner Co., Gregory, Intervener* (C. C.) 77 Fed. 705, and a like conclusion was reached.

In an article on *Following Misappropriated Property*, which appeared in 19 *Harvard Law Review* 511 (1906), the particular question now under consideration was discussed by the late Prof. Ames. He said:

"In a few jurisdictions the true owner is given a preference over the general creditors of the wrongdoer upon the mere proof that the latter had the benefit of the misappropriated res, even though it is impossible to prove that the fund for distribution among the general creditors is, at the time of the preference allowed, larger than it would have been but for the misappropriation. But the allowance of a preference under such conditions is unjust to the general creditors. If the product of the true owner's res is still traceable in the assets of the wrongdoer, in the form of land, chattels, a bank deposit, or the money of a bank, its surrender to the true owner is eminently just. The creditors are left just where they would be if there had been no misappropriation. If the true owner's res was used in paying one of the creditors, the true owner may fairly claim to be subrogated to that creditor's claim, in which case, also, the dividends of the other creditors would not be affected by the misappropriation. The same result is reached if, without subrogation, the true owner is allowed to prove ratably with the other creditors. But to go further and give the true owner a preference over all the general creditors means an unfair reduction of the dividend of the other creditors. If the true owner's res has been squandered, the dividend of the other creditors must be less because of the right of the true owner to prove his claim. But here, too, it would be gross injustice to pay the true owner in full, and thereby diminish still further the dividend of the general creditors. The authorities are nearly unanimous against this unjust preference."

In *Perry on Trusts*, vol. 2, note p. 1361 (6th Ed.), it is said that it is well settled that the mere misappropriation of trust funds does not give the beneficial owner any rights against the general estate of the misappropriating trustee in preference to the latter's general creditors. And see *Lewin on Trusts* (12th Ed.) p. 1155.

[2] In view of the authorities and for the reasons therein given, we are of the opinion that the report of the master recommending that an order be entered denying the claimant Meeker any lien on the \$1,000 ordered deposited by the court, should have been confirmed by the district judge. His finding that the claim of Henry H. Meeker for \$690.71 was a priority claim and lien on the special fund in the hands of the trustee and his direction that the said trustee pay the said claim out of the said special fund were erroneous, and the order and decree are reversed and the case is remanded to the district judge for further proceedings in accordance with his opinion. The appellant will recover his costs.

CENTRAL R. CO. OF NEW JERSEY v. HUDSON.

(Circuit Court of Appeals, Third Circuit. November 13, 1913.)

No. 1,750.

1. RAILROADS (§ 316*)—ACCIDENTS AT CROSSINGS—SPEED OF TRAIN—SAFETY GATES.

A train may safely, and in the exercise of due care, use a higher rate of speed at a crossing guarded by safety gates than at one at which no such safeguard exists.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1006–1008, 1011, 1012; Dec. Dig. § 316.*]

2. RAILROADS (§ 351*)—ACTION FOR INJURY AT CROSSING—INSTRUCTIONS.

Plaintiff, while passing over a street crossing in the evening, was struck and injured by a freight car which was being pushed along a side track by an engine of defendant railroad company, and brought an action for damages, alleging negligence in moving the car at too great speed, in failing to carry a light thereon, and in not ringing the engine bell. Contributory negligence was also an issue. There were safety gates at the crossing, maintained and operated by another company, which owned the road, and whose tracks defendant was using. There was testimony from several witnesses that the gates were closed before the car reached the crossing, and there were warning bells or gongs which rang as the gates were lowered. *Held*, that whether or not the gates were closed was a most important factor on the issues of negligent speed and contributory negligence, without regard to whose duty it was to operate them, and that it was error to refuse to so charge, and to ignore the question in the instructions given.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193–1211, 1213–1215; Dec. Dig. § 351.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action at law by George Hudson against the Central Railroad Company of New Jersey. Judgment for plaintiff, and defendant brings error. Reversed.

A. G. Dickson, of Philadelphia, Pa., for plaintiff in error.

George Demming, of Philadelphia, Pa. (Edgar W. Lank, of Philadelphia, Pa., on the brief), for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. The plaintiff sued for injuries sustained near a grade crossing at South Bethlehem, Pennsylvania, on the evening of May 27, 1912. Birch street, a somewhat narrow street in that city running in an easterly and westerly direction, crosses the tracks of the Reading Railway Company, which runs in a northerly and southerly direction. These tracks consisted of two main tracks and some sidings east and west of them, which also crossed Birch street. No one other than the plaintiff saw the accident itself, by which he was injured.

The plaintiff testifies that he was proceeding on the sidewalk of the southerly side of Birch street, from the easterly side of the railroad tracks towards the westerly side, and was struck by a box car

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that was coming in a southerly direction on a side track, which was the first track he stepped upon in attempting to cross the railroad. This side track was used by the defendant company for its own purposes on that evening, as upon many previous evenings, presumably pursuant to an understanding for track privileges with the Reading Railway Company. The main lines of the Reading Railway cross Birch street between the sidings, east and west, referred to, and the siding on which the accident happened is the one which Birch street first crosses from east to west. The plaintiff testifies that when he stepped upon this track, he suddenly became aware of a box car moving in a southerly direction, so near that he was compelled to catch hold of it and endeavor to save himself, and was dragged some distance before he fell beneath the wheels and suffered the injuries complained of. He testifies that there was no light upon the box car, that no whistle was blown, no bell was ringing, and that it was coming at a high rate of speed.

There was testimony on behalf of the defendant that on the evening in question, at the time of the accident, defendant's shifting engine, with one box car ahead of it, was pushing the same in a southerly direction on this siding across Birch street; that the car was being pushed at a reasonably slow rate of from four to six or seven miles an hour; that the engine bell was continuously rung as it approached and went over the crossing of Birch street; that the conductor and brakeman were sitting on the top of the car nearest the engine, with a lantern. This was the testimony of the engineer, fireman, the conductor and the brakeman on the car, who stated positively that the bell was ringing as the crossing was approached, and that the safety gates were down as they made the crossing. There was also independent testimony from two witnesses, that the gates were down when the car was pushed over the siding; also from the gatekeeper in the employ of the Reading Railway Company, whose tower was on the opposite side of the railway.

There was the not unusual conflict of testimony as to the ringing of the bell, the speed of the train, and the gates being down. There was also circumstantial evidence tending to support the inference that the plaintiff had crossed, not from the pavement on the left hand or southerly side of Birch street, but from a point a number of feet to the south thereof, and not on the crossing. There was the testimony also of four witnesses who saw plaintiff as he came down Birch street toward the railway, and only a short distance therefrom, that he was behaving and staggering like a drunken man. The plaintiff denies that he was drunk, or that he had had more than two glasses of beer that evening. These witnesses testified, and the plaintiff also admitted, that when he came to the corner of Birch street and the railway, he turned to the left, around a large building situated on the corner and about five feet from the siding in question. These witnesses testified that they did not see him return, but the plaintiff testified that he did return to the sidewalk on Birch street before he attempted to cross the track. The point where he was found lying after his injuries was on this siding, about forty feet from the crossing.

The safety gates were owned and operated by the Reading Railway, and were used for the protection of this Birch street crossing, as to the movement of trains on all tracks crossing said street, and the defendant's testimony tended to show that they were so used on the night in question, and just before the accident, to protect those using the crossing from the box car and engine that were pushed southward on the siding, and in the movement of which the accident complained of occurred.

The case was submitted to the jury on the issues of the negligence of the defendant and of the contributory negligence of the plaintiff. The jury rendered a verdict in favor of the plaintiff, and to the judgment on this verdict this writ of error has been sued out by the defendant.

The assignments of error are confined to certain exceptions taken to the charge of the court in submitting the case to the jury. Though the assignments are numerous, covering in detached portions almost the whole charge, we will refer only to those which seem to us important by reason of their direct bearing on the questions of the negligence of the defendant and the contributory negligence of the plaintiff.

The gravamen of plaintiff's charge against the defendant was, of course, its alleged negligence in the manner in which the shifting engine and box car made the crossing at Birch street. According to this charge, the negligence consisted of the alleged unreasonable high speed, the absence of any light on the box car, and failure to sound bell or whistle on approaching the crossing, or give other reasonable warning to those about to cross of the approach of the engine and car. It can hardly be said that there was any real conflict of testimony as to the speed of the train. All of those who were in a position to know and qualified to estimate the speed of a train testified to six or seven miles an hour. The only conflict with this, if conflict it be called, is the testimony of the plaintiff himself, who testified that the car, when it bore down upon him, was coming fast,—how fast, he did not attempt to say. The question, however, was submitted to the jury, whether six or seven miles was a reasonable speed at which, under the circumstances, to make the crossing. So also the questions as to whether there was a light on the car, and whether the bell was rung,—for it was admitted that no whistle was blown—were submitted to the jury. If this were all, no exception could be taken to their submission, as questions of fact, to the jury, the finding as to any or all of which would be determinative of the negligence of the defendant.

[2] Another element, however, too important to be ignored, entered into the case, and that was the position of the safety gates at this crossing on Birch street. The only conflict of testimony here again, is between that of the plaintiff, who says that the gates were not down when he attempted to cross, and that of the other witnesses on the engine and car, who declared that the gates were down as they made the crossing, and of independent witnesses who testified that the gates were down before the car touched the crossing. It was in testimony, and not contradicted, that when the gates were being lowered, warning

bells or gongs attached to the same commenced to ring and did not stop until the gates came to their position of rest across the street. It was also testified to by a girl 17 years of age, who was in her room in the third story of a building very near the railroad crossing, and the windows of which looked out upon the same, that she heard these bells ringing, indicating the lowering of the gates, before the car reached the crossing and that they were already down when the car crossed Birch street. Counsel for the plaintiff claims that certain discrepancies were shown in the testimony of this and other witnesses, in regard to the position of the gates; all of which went to the jury, but it is contended by counsel for the defendant that an instruction that clearly tended to eliminate from the minds of the jury the importance of the question, as to whether the gates were up or down when the defendant crossed Birch street, was given.

[1] That safety gates, properly operated, at railroad crossings have become the most important precaution that has been devised for the safety of those using a street or highway across railroad tracks, is a matter of common knowledge and of every day experience. The whistle or bell may not be heard or attended to. Various circumstances may prevent an approaching train from being seen or being regarded by one exposed to its danger, but the peremptory warning and physical obstruction of the safety gate prevents any but the most foolhardy from attempting to cross while they are down. Not only does the presence or absence of such safety gates in this case bear upon the primary question of the defendant's negligence, but it also has a bearing upon at least one other question in the case, viz., whether six or seven miles an hour was undue or unreasonable speed under the circumstances. It seems perfectly obvious that a train may safely and in the exercise of due care, use a higher rate of speed at a crossing guarded by safety gates, than at one at which no such safeguard exists. If, as a matter of fact, these safety gates were in their proper position to protect the crossing at the time the car propelled by the engine entered upon Birch street, and the car and engine were moving at no more than six or seven miles an hour, the jury might well conclude that the railway company was guilty of no negligence in the premises, having taken the most efficient precaution in giving warning to those about to enter upon the crossing. Of course, whether the gates were really down in time to prevent the accident, or not, was a question for the jury to determine, who would take into consideration all testimony which tended to impugn the veracity or accuracy of the witnesses, in regard to the position of these gates, but the question as to their position in due time to give warning to those about to cross the track, was as important as, if not more important than, any other in the case. The part of the charge touching this matter, to which exception is taken by the defendant, is as follows:

"Now, the testimony on the part of the defendant is that there was a safety gate there, and that it was operated by the Philadelphia & Reading Railway Company, which company employed the watchman at the tower to operate the safety gates. There is testimony on the part of the defendant's witnesses that the safety gate was down and that the bell was ringing as the train was approaching. The operation of the safety gates, so far as the testimony shows,

was no exercise of care on the part of the defendant, but if the safety gate was down and the bell was ringing as the train approached, that would be a warning to the plaintiff that a train was approaching, and if he had that warning and disregarded it, he would be guilty of contributory negligence in going upon the track."

This is the only reference in the main charge made by the court below to the safety gate. It is contended by counsel for the plaintiff that the learned judge of the court below, in saying that "if the safety gate was down *and* the bell was ringing as the train approached, that would be a warning to the plaintiff," was referring to the bells or gongs attached to the safety gate or gates, which it was testified sounded as they were being lowered. That does not seem to us to be the natural inference to be drawn from the language of the charge, as quoted. Nowhere else in the charge does the learned judge refer to the safety gates or the bells or gongs attached thereto. In fact, in the first part of his charge, stating the duty imposed upon a railroad to give notice of the approach of trains, there is this language:

"Now, the evidence in this case on behalf of the plaintiff is that there was no bell rung on that train, and that it was going at a high rate of speed, although he does not attempt to estimate the rate of speed. If that was the case, and he went lawfully upon the tracks, doing his duty, in avoiding any risk, as far as he reasonably could, then the railroad company would be guilty of negligence in the case. The duty on the part of a pedestrian, or any one crossing a railroad track, is to stop, look and listen. The plaintiff has testified that he did stop, that he looked both ways, that he did not see any train approaching, and that he listened and did not hear the sound of an approaching train, and then went upon the track. If that is true, and if the crew of the train were not giving any signals, either by a bell or by a light on the train, so that he did not have any warning, such warning as a person should have, and which you find in your judgment should have been given under the circumstances in this case, at a crossing of that sort, then the railroad company would be liable for its negligence, in causing the injury to the plaintiff."

We think, therefore, we are justified in saying that the natural impression made upon the minds of those to whom this charge was addressed, would be that the bell referred to was the one which the judge had said it was the duty of the defendant to have rung as the train was approaching, and it seems to us altogether probable that the jury should have received from the language we have quoted in regard to the safety gate, the impression that the fact that it was down could not be taken into consideration, unless the bell on the approaching engine was also rung.

At the close of the charge, the following colloquy took place between counsel for the defendant and the court:

Mr. Dickson:

"I also wish an exception to that part of the charge in which your honor stated that if the evidence of the plaintiff was believed, that no bell had been rung, and that the train was going at a high rate of speed, the defendant would be liable, in view of the fact that that omits any reference to a gate, if the gate was down. You said that, I think, on one or two occasions, in different parts of the charge."

The Court:

"Gentlemen, what I intended to state to you, and I think I did, was that if there was no warning given to this plaintiff, either by ringing the bell or

having a light on the train or some other warning of the approach of the train, if you find that under the circumstances of this particular case such warning was necessary for the safety of persons crossing the track, if you find that there was no bell rung, and no light on the train, and that that was necessary under the circumstances of this case, then the defendant would be guilty of negligence. There was no evidence in the case that the defendant had anything to do with the placing of gates there or the operation of gates. I have instructed you that if the gate was down and the bell was being rung, that that would be a warning to the plaintiff, and the plaintiff had no right to go on the track if those things existed. If he did, he would be guilty of contributory negligence. I decline to charge the jury that that would be an exercise of care on the part of the defendant, as to the operation of the gates, because there is no evidence showing that the defendant had anything to do with them."

It thus seems apparent that the court used language which might fairly be construed by the jury as instructing them that the question of the negligence of the defendant depended upon the facts, whether the engine and car were moving at a high rate of speed and without the ringing of any bell; or, in other words, that due care on the part of the defendant depended upon whether the bell was rung and the speed slackened as the engine approached the crossing. This practical elimination of the safety gate from the consideration of the jury is emphasized by the language above quoted, viz.:

"The operation of the safety gates, so far as the testimony shows, was no exercise of care on the part of the defendant, but if the safety gate was down and the bell was ringing as the train approached, that would be a sufficient warning," etc.

Unless justified, this language and that last above quoted, viz.:

"I decline to charge the jury that that would be an exercise of care on the part of the defendant as to the operation of the gates, because there is no evidence showing that the defendant had anything to do with them"

—clearly suggests to the jury that, owing to the fact of these gates being operated by the Reading Railway, and not by the defendant, their presence or absence had no bearing on the safety of the situation, for which the defendant was responsible.

Such a suggestion was clearly prejudicial to the defendant, and we think lacks justification. It certainly could make no difference as to the safety or danger of the situation at the Birch street crossing, whether the safety gates were operated by the defendant company or by the company whose tracks it was using. The only real question for the jury was, whether the defendant was using all the care that the situation demanded, and the most important factor in that situation was the presence or absence of a safety gate in its proper position to give due warning to those about to cross the railroad.

For these reasons, it seems clear that there was harmful error in those portions of the charge to which we have referred, and that the judgment below must therefore be reversed and a venire de novo awarded. And it is so ordered.

LIDDLE v. COOK et al.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1913.)

No. 3,896.

1. QUIETING TITLE (§ 3*)—DEFENSES—ENFORCEMENT OF FORFEITURE.

A complainant held not entitled to a decree quieting his title to land, where it involved enforcing the forfeiture of a contract by which he had agreed to sell the land and had received part payment therefor, as against assignees of the contract who had paid a large advance in price therefor and had been at all times willing and able to pay the entire amount due on the contract, and had made default in payment of the installment on which the forfeiture was claimed in reliance on the representations of complainant's agents that the complainant would soon be ready to accept payment in full and execute a deed.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. EQUITY (§ 24*)—RIGHT TO RELIEF—ENFORCEMENT OF FORFEITURE.

While in a case otherwise properly cognizable in equity there is no insuperable objection to the enforcement of a forfeiture, in order to entitle a complainant to such relief the case made must be one the equity of which is strong enough to overcome the general indisposition of courts of chancery to aid in the enforcement of forfeitures.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 69-76; Dec. Dig. § 24.*]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Wm. H. Pope, and John A. Riner, Judges.

Suit in equity by Thomas R. Liddle against Clyde C. Cook and A. L. Cook. Decree for defendants, and complainant appeals. Affirmed.

October 26, 1906, appellant entered into a contract with C. F. Parker and B. D. Parker of Julesburg, Colo., partners, doing abstract work under the name of Parker Bros., and a real estate business under the name of the Julesburg Land Company, for the sale of a considerable body of land in the county of Sedgwick and state of Colorado. By this contract appellant provided that the "parties of the second part should have the right, from and after this date, to sell and dispose of any of said lands to purchasers at such sums and amounts as they may be able to obtain, and upon any such sale or sales being made, the party of the first part agrees to convey said lands so sold as aforesaid upon payment to him, the said Liddle, of one dollar in cash per acre and five dollars per acre in the contracts of sale taken upon the sale of said lands, said second parties to have and reserve all the remaining part of said consideration." Further, "that said Liddle shall make conveyances of said lands to the said parties of the second part, and their assigns as fast as purchase price of any quarter section either in money, or in money and contracts, as above provided, shall be tendered." Further, "that the said party of the first part (Liddle) shall furnish contracts for any and all of said lands, when sold as aforesaid, or shall make conveyance by warranty deed, as the case may be and shall also furnish abstracts of title when called for as aforesaid." At the time of the ensembling and delivery of the contract, the parties of the second part were to deposit \$1,000 in the First National Bank of Julesburg, Colo.; and it was agreed between the parties "that in case the said parties of the second part, or their assigns, fail or neglect until June 1, 1907, to comply with the terms of this contract and to complete the purchase of said lands that then and in that case the said sum of one thousand (\$1,000) dollars deposited with the First National Bank, Julesburg, Colorado, as aforesaid, shall

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be paid over to the said Liddle as liquidated damages" for such failure to perform.

On the 13th of December, 1906, following, Parker Bros. sold the S. E. $\frac{1}{4}$ of section 24, township 10 N., range 44 W., in Sedgwick county, Colo., to one John Detmer for \$1,280; \$480 to be paid in cash and the balance in five annual deferred payments, with accrued interest, to be made respectively on the 13th day of December in the years 1907 to 1911, inclusive; and, under his agreement with the Parkers, Liddle entered into a contract with Detmer, whereby he agreed to make to the latter a good and sufficient warranty deed upon performance of all the covenants and agreements therein contained. In this contract, among other things, it was provided that upon default in the performance of any of the covenants and agreements to be performed by Detmer, including the making of the payments aforesaid, when the same should fall due, Detmer should be deemed to have been from the beginning the tenant of Liddle and his tenancy should thereupon cease and determine without notice.

On the same date a transaction similar in all respects was consummated whereby the S. W. $\frac{1}{4}$ of the same section, township, and range was contracted to be sold to George Spurl and Margaret Spurl.

June 10, 1908, the Parkers, in the name of the Julesburg Land Company, entered into a contract with the appellee Clyde C. Cook, which contract was in the following terms:

"Articles of agreement, made this 10th day of June, A. D. 1908, between Julesburg Land Company of the county of Sedgwick and state of Colorado, of the first part, and Clyde C. Cook of Arlington, Nebraska, of the second part.

"Witnesseth: That if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part hereby covenants and agrees, subject to the present owner's approval, to furnish abstract showing clear title, and to convey to the said party of the second part in fee simple by good and sufficient warranty deed the following described real estate:

"The south half (S. $\frac{1}{2}$) of section twenty-four (24), township ten (10) north, range forty-four (44) west of the 6th P. M. and the said party of the second part hereby covenants and agrees to pay to the said party of the first part the sum of forty-three hundred twenty (\$4,320.00) dollars in the manner following: Three hundred six (\$306.00) dollars cash, receipt whereof is hereby acknowledged; twenty-seven hundred thirty-four (\$2,734.00) dollars when contract now on said land has been properly assigned and sent to the Arlington State Bank, Arlington, Neb.; and the balance, which is twelve hundred eighty (\$1,280.00) dollars, by the assuming of the balance now due on said land contract.

"It is understood that second party is to have an option until June 16, 1908, of purchasing the northwest quarter (N. W. $\frac{1}{4}$) of section eleven (11), township ten (10) north, range forty-four (44) west of the (6—) P. M. at thirteen dollars and fifty cents (\$13.50) per acre. Should this quarter be purchased by second party (of) his assigns, the papers are to be sent to the Arlington State Bank and the purchase price of said quarter sent to first parties as soon as papers are approved. If second party does not notify first party that he will take said quarter section by June 16th, then the option here given shall be null and void.

"In case of failure of the said party of the second part to make either of the payments or perform any of the covenants on his part, this contract shall be forfeited and all payments shall be retained by the said party of the first part in liquidation of damages, and if the party of the first part shall fail to furnish warranty deed and abstract showing clear title, all payments are to be refunded to the party of the second part.

"The Julesburg Land Co., by C. F. Parker.

"Clyde C. Cook."

These were the same lands theretofore contracted to be sold to Detmer and the Spurls. The appellee Alfred L. Cook was a joint purchaser, although his name does not appear in the contract.

Respecting his preliminary negotiations with the Parkers for the purchase of these lands, the appellee Clyde C. Cook testified:

"I told them that I did not want to take the land under any contracts and did not care to make any contracts and would not take it unless I could get an abstract showing a good title, and a deed in a short time as I had the money and wanted to pay out on it and get my land. They told me that there would be no trouble about that; that they would see Mr. Liddle, the man who owned the land; and that they would have Mr. Liddle, who owned the land, to come in and make out the deed and abstract in a short time."

This testimony stands without substantial contradiction. The next succeeding steps in the transaction are disclosed by correspondence:

"Arlington, Nebr., June 15, '08.

"Parker Bros., Julesburg, Colo.—Dear Gentlemen: I have decided not to try to buy the 160 acres on which I had an option until June 16th. When you send the abstract and deed for 320 acres, for which I have contract, have it made out jointly to Clyde C. Cook and A. L. Cook, Arlington, Nebr. Please send deed and abstract to Arlington State Bank as soon as possible, and money for the whole amount (\$4,014) will be ready for you.

"Yours truly,

Clyde C. Cook."

"Arlington-State Bank.

"Yours business solicited.

"Arlington, Neb., June 29, 1908.

"The First Natl. Bank, Julesburg, Colo.—Gentlemen: We received your letter of the 26th inst. inclosing two contracts for land to be delivered to Clyde C. Cook upon payment of (of) \$2,734.00. Mr. Cook is ready to pay the money over if the deed and abstract show perfect title, which he says was the understanding that as his contract reads he should have abstract with (privilege) of examining same, which he says should be sent to this bank.

"Yours Respy.

H. W. Schoettger, Cas."

"The Julesburg Land Company.

C. F. Parker

"First National Bank Block.

B. D. Parker, Jr.

"Julesburg, Colorado, July 1, 1908.

"Arlington State Bank, Arlington, Neb.—Gentlemen: Yours of the 29th at hand. The situation on the land in the Clyde C. Cook deal is just as follows:

"This half section was a part of Mr. Liddle's large cattle ranch which we sold out for him last year. In the sale of this land he had a uniform price with a uniform cash payment and a uniform amount left back to be paid in annual payments. He did not wish to be bothered with making mortgages and taking separate mortgage on each piece of land. He, therefore, used the general land contracts, two of which we sent Mr. Cook. Now Mr. Liddle does not want to be bothered with changes in his deals until some time this fall when he says he will take up matters, rearrange them and give deeds to those who are ready to cash out. Nor does he wish to go into the granting of abstracts until the time that he takes up the whole proposition. I think that we told Mr. Cook when he made the deal that there was a question whether or not we could get Mr. Liddle to execute his deeds at the present time and if you will notice Mr. Cook's contract, we simply agreed with him that he was to pay so much cash, so much when the contract on said land was delivered and assume the Liddle contract for \$1,280.00.

"We have taken up the matter with Mr. Liddle, as we promised Mr. Cook that we would, but he does not want to change his general regulations and says he has not time to open up the whole proposition now, but that this fall he will be ready to give warranty deeds as stated above. As you or Mr. Cook can ascertain by writing to either of the banks here, Mr. Liddle is personally responsible for a good many quarter sections of land at the price which Mr. Cook paid. Mr. Cook also has his contract with us which we shall allow him to keep until he gets his deed and abstract and we shall be very glad to have him look up our financial responsibility. There can then be no possibility of a loss to Mr. Cook by his taking over the contract now, as it was held by Mr. Spori and Mr. Detmer. When they bought the land they were satisfied that they were secure and many others to whom we have sold the Liddle land

have taken the land on his regular contract and are waiting for their deeds until the whole matter can be closed.

"This is in general the explanation of the situation and we trust that Mr. Cook will see fit to close up on the contract at once and take his deed this fall. Of course, Mr. Spori and Mr. Detmer feel that the matter ought to be closed up. After making our contract with Mr. Cook, we told them that we had sold their land to a man who would assume their contract and they, of course, can see no cause for delay. Of course, prices are going up all the time and we presume that Mr. Spori and Mr. Detmer are not very glad that they sold. Like everybody else at the present time, they feel that they might have secured a better price and have just had a letter from one of them wanting us to close the matter at once or send back his contract. You will see the position that we are in and we trust that Mr. Cook will see it and also understand that he is running no risk in taking the general land contract and waiting for his deed and abstract.

"Trust that the whole thing may be closed up soon, for if it cannot be, Mr. Spori and Mr. Detmer will soon be demanding their papers back.

"(Your-) truly,

B. D. Parker, Jr."

Upon the faith of this last letter, and shortly thereafter, appellees paid to the Julesburg Land Company the \$2,734 provided in the contract, and stood ready to pay the balance of \$1,280 as soon as they should be advised by the Parkers that Liddle was ready to deliver to them the abstracts and deed. The record is not clear whether the contracts made by Detmer and the Sporis were assigned and delivered to appellees. Presumably, however, they are the two contracts referred to in the letter of June 29, 1908, herein set forth. The next payments under the terms of these contracts matured December 13, 1908. Appellees, having already paid over \$3,000 under their contract with the Julesburg Land Company, and relying upon the representations of the Parkers that the abstracts and deed from Liddle would be forthcoming, paid no attention to the terms of these prior contracts, and no additional payments were made on the 13th of December following. March 15, 1909, Liddle executed and filed with the county clerk of Sedgwick county, Colo., two notices of forfeiture of the Detmer and Spori contracts, thereafter refused all tenders of the balance due under the terms thereof, and on the 15th day of February, 1911, filed in the state court a bill against appellees, the Sporis, and their unknown grantees and assignees, to quiet the title in him to the S. W. $\frac{1}{4}$ of section 24 aforesaid. The case was removed to the federal court for the district of Colorado, and thereafter appellees filed answer and cross-complaint setting out that the Parkers, as the Julesburg Land Company, were the agents of Liddle in the sale of both quarter sections to the appellees; that appellees were at all times ready to perform the contract as made; and that plaintiff was contriving to cheat and defraud appellees in the declaration of the forfeiture aforesaid. They tendered payment of the balance due appellant and prayed affirmative relief. To this appellant filed replication, and, after hearing, the court found the issues thus framed in favor of the appellees, and decreed that, upon the payment or tender to appellant by appellees of all sums found to be due, appellant should execute a warranty deed conveying to appellees the S. $\frac{1}{2}$ of section 24 aforesaid. From this decree appellant prosecutes this appeal.

Charles L. Allen, of Denver, Colo. (Allen & Webster, of Denver, Colo., on the brief), for appellant.

Joseph C. Cook, of Fremont, Neb. (Dana & Blount, of Denver, Colo., on the brief), for appellees.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge (after stating the facts as above). [1] From the record we are convinced that while their con-

tract with Liddle was ostensibly to terminate on or about July 1, 1907, nevertheless the Parkers continued as his agents in the sale of these lands to whomsoever desired to purchase them. Some of them were resold as many as three or four times. The testimony of appellees is corroborated by that of other witnesses and is sustained by the facts and circumstances surrounding the entire transaction. It appears in testimony that the agency and authority of the Parkers was repeatedly admitted, not only by them, but by Liddle himself. While B. D. Parker denies this agency, and claims, in contracting with Cook, to have been acting for Detmer and the Sporks, he does not deny the truth of the statements made in his letter, nor does he substantially contradict the testimony of other witnesses. From such testimony it appears that in August, 1908, B. D. Parker stated:

"That they had taken the (Cook) matter up with Mr. Liddle, and Mr. Liddle said just as soon as he had time he would execute the deed and that they would then notify the Cook boys that their deeds were ready and they could make the final payment. Mr. Parker said Mr. Liddle told him that he was too busy just at that time to execute the deeds, that he had so much to do, but he would do it at his earliest opportunity. Mr. Parker said that they represented Mr. Liddle in the sale of all of his land, that they did all of his business for him in that regard, and this matter would be attended to as soon as it could be reached."

That after the forfeiture Parker said:

"That they were never more surprised in their lives when they heard that Liddle had declared a forfeiture of this contract; that it was an outrage and that it would never hold, as he had agreed to notify us when he was ready to take up this matter and furnish abstract and deed; that they were satisfied now that his delay was simply for the purpose of being able to claim a forfeiture, as he had done the same thing in other cases."

It further appears that the land was increasing in value, and that Liddle declared it to be his purpose to insist upon the forfeiture, and to "get some easy money." As a witness in his own behalf, Liddle does deny the agency, all privity between himself and appellees, and all knowledge of the representations made by the Parkers. However, the issues of fact were resolved against him by the chancellor upon substantial evidence ample to sustain the finding. The testimony of Liddle and Parker fails to satisfy or convince; both are evasive and betray an unworthy indifference and want of moral responsibility. Appellees seek to establish no naked legal right; they were frank, sincere, and honest from the outset; they knew that they were buying at an advanced price; they have never sought to obtain anything for less than its value; they are still willing to pay in full all that they contracted and agreed to pay. In view of the size of the enterprise, they advanced a large amount of money, which will be wholly lost to them if this forfeiture should be upheld. On the other hand, appellant is getting in full all that he contracted to receive. It would be unconscionable, under the circumstances of this case, to permit him to profit at such serious disadvantage to the appellees.

[2] It is urged that while equity will not ordinarily enforce a forfeiture, this is a suit to quiet title, and in such a suit contractual rights will be enforced, even though the effect be indirectly to enforce a for-

feiture. The same argument was made in *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213; but this court, speaking through Judge (now Justice) Van Devanter, held:

"It has been said of a suit like this that it is not one to aid in the enforcement of a forfeiture. *Harper v. Tidholm* [155 Ill. 370], 40 N. E. 575; *Mott v. Danville Seminary* [129 Ill. 403], 21 N. E. 927; *Pendill v. Union Mining Co.* [64 Mich. 172], 31 N. W. 100. But we think it is essentially of that character. Its primary and only purpose is to establish a forfeiture as matter of record and to obtain the cancellation of the thing forfeited. This constitutes enforcement in the only sense in which that term is applicable to a forfeiture, which is that of giving effect to it after its incurrence, just as a statute is enforced after its enactment."

The rule was there announced that because forfeitures are usually harsh and oppressive, and because they can ordinarily be enforced at law, courts of equity generally refuse to aid in their enforcement. Nevertheless, that in cases otherwise properly cognizable in equity, there is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief. Under this rule, the complainant will be entitled to relief only in the event that the case made upon the hearing shall be one the equity of which is strong enough to overcome the general indisposition of courts of chancery toward aiding in the enforcement of forfeitures.

We do not think the appellant has sustained the burden thus cast upon him. Equity, having acquired jurisdiction of the entire matter under the pleadings, may grant such relief as may be consonant with principles of right and justice, and to that end we think the decree below should be affirmed.

It is so ordered.

BICKEL v. ROCKWOOD.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 46.

CORPORATIONS (§ 121*)—SALE OF STOCK—ACTION FOR BREACH—EVIDENCE CONSIDERED.

A plaintiff *held*, on the evidence, entitled to recover on a contract by which defendant in part consideration for certain corporate stock purchased from plaintiff, agreed to pay one-half of any sum plaintiff might pay in settlement, in good faith, of a claimed lien on the stock, not exceeding a stated amount.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

In Error to the District Court of the United States for the Northern District of New York.

Action at law by Conrad C. Bickel against Nash Rockwood. Trial to court. Judgment for defendant, and plaintiff brings error. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Reprint Indexes

E. B. Boise and Arthur S. Hamlin, both of New York City, for plaintiff in error.

Charles Haldane, of New York City, and Edgar T. Brackett, of Saratoga Springs, N. Y. (L. B. McKelvey, of Saratoga Springs, N. Y., of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. In October, 1908, the defendant, Rockwood, and his partner, Scott, bought a one-half interest in 1,047 shares of the capital stock of the Provident Savings Life Assurance Society of New York, owned by the plaintiff, Bickel. They knew that one Day claimed to have a lien upon or claim against the stock by virtue of certain transactions with Bickel in connection with it. Subsequently Rockwood took over Scott's interest and began negotiations to get Bickel's interests. January 11, 1909, this resulted in a formal bill of sale, whereby Bickel sold to Rockwood—

"all of his right, title, and interest of every name and nature whatsoever of, in, and to 1,047 shares of the capital stock of the Provident Savings Society, except only his right as pledgee in said 200 shares as provided in clause 4 of this agreement."

At the same time Rockwood signed the following letter, prepared by Bickel's attorney:

"In connection with the contract made this day between C. C. Bickel and myself, and as a part of the consideration for the execution by Mr. Bickel of the contract. I make the following agreement:

"I am informed that one Floyd Day is threatening to assert some sort of a claim against Mr. Bickel, which claim Mr. Bickel disputes and proposes to resist, or, if he thinks proper, to compromise it. As an inducement and a part of the consideration for signing the above agreement, I now promise that I will pay Mr. Bickel one-half of any amount which Day may recover against him, or which he may pay to Day on account of that claim, such one-half to be not over seventy-five hundred (\$7,500) dollars.

"It is, of course, understood that Mr. Bickel will in good faith resist the Day claim to the best of his ability; but if Mr. Bickel should feel that it was wisest to make some compromise with Day, rather than to litigate the matter to judgment, he has the liberty to make any compromise which he in good faith thinks he ought to make, and I will still pay one-half of any such sum that he pays to Day, whether by way of compromise or as the result of litigation, except that one-half shall not exceed the sum of seventy-five hundred (\$7,500) dollars. If Mr. Bickel has to pay more than fifteen thousand (\$15,000) dollars, he must pay all of it himself, except seventy-five hundred (\$7,500) dollars, and if he settles it for fifteen thousand (\$15,000) dollars, or less than fifteen thousand (\$15,000) dollars, then I am only to pay one-half of the total amount he may have to pay Day.

"It is agreed as a part of this letter that I have always and do now absolutely disclaim and repudiate any liability of any sort, name, or nature to Floyd Day on account of any transaction which he may have ever had with C. C. Bickel or any one else."

Rockwood subsequently acquired all the remaining shares of the Provident Company, with the intention of selling the company, but found himself embarrassed in doing so by Day's claim. He accordingly kept pressing Bickel and his attorney to settle with Day. July 21, 1910, a meeting for this purpose was held at Louisville, Ky., at which Bickel offered to pay Day \$10,000 in settlement, which Day refused,

and thereupon Bickel said that unless Day accepted his offer on or before September 1, 1910, he would never pay him anything, and that, if Rockwood wanted to make any settlement, it would be on his own account. Subsequently both Bickel and his attorney said to Rockwood from time to time that he might make any settlement he wished, but that Bickel would never pay anything in settlement.

February 18, 1911, Rockwood obtained a release from Day of all claims against Rockwood and Scott arising out of the stock transaction, but expressly reserving his claim against everyone else. It was stipulated between them that Rockwood should not inform Bickel of this settlement, so that Day might go on and get whatever settlement he could from Bickel.

March 25, 1911, Bickel's attorney wrote Rockwood a letter, concluding as follows:

"Day has been rearing around here recently again, but so far, as you know, neither you nor Mr. Bickel have had to pay anything.

"Is it still your wish to settle with Day, or do you now feel, in view of the sale of the Provident Savings, that you no longer care what Day does?"

April 3d Rockwood replied in a letter, concluding:

"As to the Day matter, can only say that I have always felt that Mr. Bickel should do something about that matter and get it out of the way finally."

Thereupon Bickel settled with Day by paying him \$6,500 in cash and surrendering a certain draft and two notes which were additional consideration moving from him to Day. The only claim against Bickel which Day released was that connected with the 1,047 shares of Provident Association stock. When Bickel called upon Rockwood for \$3,250 his half of this settlement, Rockwood refused to pay, and this action has been brought to recover the same. The parties waived a jury in writing, and the cause was decided by the District Judge, who made findings of fact and special conclusions of law.

We are at liberty to pass upon any exceptions taken during the course of the trial, and also to determine whether there was any evidence to support the findings of fact excepted to. U. S. Rev. St. § 700 (U. S. Comp. St. 1901, p. 570). In the course of the trial the District Judge admitted, over the plaintiff's objection and exception, Day's release to Rockwood and also a good deal of testimony concerning it, and among his findings of fact were:

"Seventeenth. That after the receipt of said letter dated July 25, 1910, written by the said Bullitt to the said defendant, Rockwood, the said Rockwood, during the fall and winter of the year 1910, had several conferences with the said Bullitt, in which the said Bullitt repeatedly stated, in substance, that no settlement having been made with Day of the claim mentioned in the letter contract by September 1, 1910, the date mentioned in the Louisville conference, the said Bickel would not pay anything upon the said claim, and that if the said claim were settled by Rockwood, it must be done upon his (Rockwood's) own responsibility, and that the said Bickel would have nothing to do with such settlement and would not pay any part thereof, and that the agreement between the said Bickel and the said Rockwood in regard to such settlement was considered abandoned by the said Bickel, and of no further force or effect."

"Twenty-Ninth. That the said Bickel failed to perform the terms of the letter contract on his part to be performed, in that he did not in good faith

resist the Day claim mentioned therein, and the \$6,500 paid by the said Bickel to the said Day was not paid as a compromise made in good faith by the said Bickel.

"Thirtieth. That the said Rockwood fully performed the terms and conditions and obligations of the letter contract in suit, on his part to be performed, until the period commencing September 1, 1910, at which said time, by the express declarations and representations of the said Bickel, the aforesaid letter contract and the obligations thereof were renounced, abandoned, and terminated by the said Bickel."

"Thirty-Second. That said letter was not understood by the said Bickel, or his attorney, as an acknowledgment of any obligation on the part of the said Rockwood to pay any part of any settlement to be made with Day, and the said Bickel did not in good faith, nor did his attorney, rely thereon as a promise on the part of said Rockwood to share in any settlement which said Bickel and his attorney might make with the said Day."

And among his conclusions of law were:

"First. That the plaintiff, Bickel, herein did not at any time in good faith make any compromise of the Day claim mentioned in the letter contract herein."

"Fifth. That by the acts and conduct of said Bickel and his attorney at the conference in Louisville, in July, 1910, and in subsequent conversations with the said Rockwood and his associate, Lockwood, the said plaintiff herein abandoned the letter contract in suit, and expressly renounced the obligations thereof."

"Eighth. That by reason of the acts and conduct of said Bickel and his attorney, and their declarations of an intention to abandon the said contract and to renounce the same, the said Rockwood was excused from further performance of the terms thereof, and was relieved from any obligation thereunder."

"Ninth. That the said Bickel is not legally entitled to recover from said Rockwood any portion of the sum of \$6,500 paid to Day in April, 1911, and that the same was not a compromise in good faith of the Day claim mentioned in the letter contract herein."

Accordingly he dismissed the complaint.

It seems to us quite clear that, when Rockwood bought out Bickel's remaining one-half interest in the Provident Association stock, he took the risk of Day's claim. If to disembarass himself of it he paid Day anything, he certainly could not under that instrument alone reclaim anything of Bickel. The letter of January 11, 1909, did not alter his situation to his advantage in any respect. It was dictated by Bickel's attorney and was clearly intended solely for Bickel's protection. It recites that in further consideration for the stock Rockwood would pay Bickel "half of any amount which Day may recover against him or which he may pay to Day on account of that claim, such one-half not to be over \$7,500." It was further provided that Bickel should resist the claim in good faith, but that he might compromise in good faith, if he thought it better than to litigate. Not a word in it pledges Bickel to pay anything on account of any settlement Rockwood might make with Day, nor any obligation on Bickel's part to settle Day's claim for the purpose of obliging Rockwood. Bickel did resist the claim and refused to compromise until he did so after receiving Rockwood's letter of April 3d, which was certainly calculated to induce him to settle. Rockwood says that he only meant in this letter to say that in his opinion Bickel ought to pay Day something. If so, he was liable to pay one-half of whatever Bickel paid.

We think it was error to admit the settlement between Rockwood and Day in evidence or any testimony about it. Of course Rockwood always had the right, without leave from Bickel, to disembarass himself of Day's claim against the stock. This is what he did, but Day's claim against Bickel was reserved; it being plainly understood that Day should proceed to collect it from Bickel. The settlement between Rockwood and Day in no way affected Bickel's rights or Rockwood's liability under the letter of January 11, 1909.

We think it was error to hold that Bickel's statement that, if Day did not accept \$10,000 in settlement before September 1, 1909, he would never pay him anything in settlement, was an abrogation of the letter contract. This is exactly what Bickel had a right to do under the letter. He was bound to resist, but had the privilege of settling, provided he did so in good faith. If Day had sued Bickel, and recovered and collected a judgment of \$6,500, could it be pretended that Rockwood would be relieved from paying one-half that judgment because of what Bickel had said?

We find no evidence to support the statement in the seventeenth and thirtieth findings that Bickel considered the letter contract of January 11, 1909, abandoned, or that the letter had been abrogated by the parties, nor do we discover any evidence to support the twenty-ninth finding that Bickel did not resist Day's claim in good faith and settled it in bad faith.

The judgment is reversed.

CARSON LUMBER CO. v. ST. LOUIS & S. F. R. CO.

(Circuit Court of Appeals, Eighth Circuit. November 14, 1913.)

No. 3,930.

1. APPEAL AND ERROR (§ 162*)—PERSONS ENTITLED TO REVIEW—ACCEPTANCE OF BENEFITS OF JUDGMENT.

While it is the general rule that one who accepts the benefit of a judgment is precluded from asking its review, the rule is not absolute, and does not apply to a case where the judgment is divisible, and a plaintiff in error accepts payment of the part in his favor which was not contested, and would not be affected by the reversal of the other part.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 179, 981, 982, 984-990; Dec. Dig. § 162.*]

2. CARRIERS (§ 189*)—MILLING IN TRANSIT RATES—RIGHTS OF SHIPPER.

Plaintiff shipped lumber in to a milling point on defendant's railroad, at a time when a milling in transit privilege was given by defendant's tariff schedule, but the lumber was required to be shipped out under certain specified rates then in force. Before plaintiff shipped out the lumber, such schedule of rates on intrastate shipments had been changed, and lower rates established to conform to an order of a state commission, and plaintiff shipped under such lower rates. *Held*, that not having complied with the conditions under which the special privilege was given, plaintiff was not entitled to the benefit of it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 162, 854, 855, 859-865; Dec. Dig. § 189.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Eastern District of Oklahoma; John C. Pollock, Judge.

Action at law by the Carson Lumber Company against the St. Louis & San Francisco Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 198 Fed. 311.

Plaintiff in error, a domestic corporation, doing a general wholesale and retail lumber business, with offices at Hugo in the state of Oklahoma, brought suit against the defendant railroad company to recover \$1,449.19, claimed to be due it as a refund under a milling in transit arrangement accorded by a certain published tariff of defendant in error, under which, at different dates between August 8, 1907, and February 27, 1908, plaintiff made shipments of lumber from various points in Oklahoma over defendant's line of railway into Hugo (then in the Indian Territory, now in the state of Oklahoma), amounting in the aggregate to 8,966,900 pounds, for resawing, planing and reconsigning privileges. The tariff in question was known as St. Louis and San Francisco No. 25—D. Item 17 thereof prescribed the scale of rates which governed when reference was made thereto. Item 20 concerned the application of such milling in transit rates, and provided that: "These rates apply only when shipments of lumber to be rehandled are billed into milling or stop-over points at local tariff rates; the difference between local rates and the above rates will be refunded when lumber is reshipped via the Frisco, the weight of lumber reshipped to be sixty-five per cent. of the inbound weight." It is upon this item that plaintiff in error founds its claim.

June 26, 1907, defendant in error filed and made effective amendment No. 11 to said tariff 25—D, which made the following modification of that tariff: "The rates named herein unless otherwise specified, will only apply on shipments of forest products, car loads, which move into milling, resawing, reconsigning or concentrating points, and when the manufactured products or shipments that have received concentrating privilege are reshipped via the St. Louis & San Francisco Railroad from such milling, resawing, reconsigning or concentrating points to destinations named in and under rates covered by tariffs Nos. 186, 200, 368, 546, 599, 900 and 904 Series, but will not apply on shipments moving between points within the state of Arkansas or between points within the state of Missouri."

It will be seen that this amendment was in effect when plaintiff in error made its inbound shipments as aforesaid. The local rates paid by plaintiff in error were those established by defendant's tariff known as 856—B, I. C. C. 5130. Reference to Frisco Tariff 904—A, which is the only tariff mentioned in the numbers set out in amendment No. 11, above quoted, that is applicable to these shipments, discloses the following provision: "Rates named herein for any given point from stations located in any particular group are to be the maximum rates which will apply from points in the group figuring to such point of destination and are not intended to be maximum rates to apply from point named within such group where rates from point of origin can be made lower than that named in the tariff by use of the Local Distance Tariff 856 Series, I. C. C. Series 5130."

The effect of these various provisions of the tariffs and amendments thereto, which were in force at the time plaintiff in error made its inbound shipments, was that the shipper was permitted to avail himself of the milling in transit privilege accorded, provided he shipped into Hugo at local tariff rates and reshipped to the extent required via the Frisco under rates named in Tariff 904 Series or 856—B at his option.

November 16, 1907, Oklahoma and the Indian Territory were admitted as the present state of Oklahoma. The tariffs to which reference has been made remained in force until March 2, 1908. Up to this time plaintiff in error had made no outbound shipments from Hugo, and on that day the Corporation Commission of the State of Oklahoma promulgated and put in force a schedule of rates known as Leland's Lumber Tariff No. 1, Frisco 557—D. These rates were lower than such outbound rates would have been under the tariffs

in force when the inbound shipments were made, to wit: 904 Series and 856—B. In obedience to an order of the Oklahoma Corporation Commission, by which it was required to enforce the rates named in said Leland's Lumber Tariff, defendant in error published a certain tariff known as Oklahoma Lumber Tariff No. 1, effective March 2, 1908, and canceled all previous milling in transit privileges applicable to shipments within the state of Oklahoma. Plaintiff in error did not begin the reshipments involved in this controversy until March 4, 1908. It paid on such outbound shipments the rates fixed by said Oklahoma Corporation Commission, and did not pay the rates in force on such outbound shipments at the time the inbound shipments were made. With the specific rates named in these various tariffs we are not concerned. The following clause in the agreed statement of facts, upon which the case was tried, furnishes a sufficient basis for our discussion in that respect: "It is further agreed that the Corporation Commission rates paid by the plaintiff on said outbound shipments were lower than the outbound rates that were in force when inbound shipments were made; and it is further agreed that all of the said inbound shipments were made into Hugo prior to the taking effect of the Corporation Commission rates, and that all of the said outbound shipments were made after the taking effect of said Corporation Commission rates."

The local tariff rates paid by plaintiff in error on said inbound shipments amounted to \$6,193.14. The flat rate named in item 17 on such shipments amounts to \$1,700.78, making a difference of \$4,449.19, which is the amount of refund claimed. Of this, \$386.61 arose upon eight interstate shipments; the balance, \$4,062.48, concerned shipments wholly within the state of Oklahoma. In the fifth paragraph of the agreed statement of facts "defendant recognizes its liability upon those cars mentioned in plaintiff's petition, and which moved to interstate points, there being eight of such shipments." The court below held that except as to such interstate shipments plaintiff could not recover. Judgment was entered accordingly.

L. L. Wood, of Dallas, Tex., Howe & Stanley, of Hugo, Okl. (Wood & Wood, of Dallas, Tex., on the brief), for plaintiff in error.

Fred E. Suits, of Oklahoma City, Okl. (W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, of Oklahoma City, Okl., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge (after stating the facts as above). [1] At the threshold of the case we encounter the following disclosure made by the record:

"Comes now the Carson Lumber Company, plaintiff in the above-entitled action, and hereby enters satisfaction of judgment in the above-entitled case in accordance with the fifth paragraph of the agreed statement of facts covering rebate on eight interstate shipments amounting to \$386.61, for which judgment was rendered in its favor on June 1, 1912."

And the suggestion is made that plaintiff in error is estopped to prosecute this writ to the reversal of the decree below with respect to the refund on intrastate shipments. It is undoubtedly the general rule that a party who obtains the benefit of an order or judgment, and accepts the benefit or receives the advantage, shall be afterwards precluded from asking that the order or judgment be reviewed. Nevertheless, this rule is not absolute where the judgment or decree is not so indivisible that it must be sustained or reversed as a whole. It has no application to cases where the appellant is shown to be so absolutely entitled to the sum collected upon the judgment that the reversal

of it will not affect his right to the amount accepted (*Reynes v. Dumont*, 130 U. S. 354-394, 9 Sup. Ct. 486, 32 L. Ed. 934), especially where there is not present conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review (*Embry v. Palmer*, 107 U. S. 3-8, 2 Sup. Ct. 25, 27 L. Ed. 346; *Merriam v. Haas*, 3 Wall. 687, 18 L. Ed. 29; *United States v. Dashiell*, 3 Wall. 688, 18 L. Ed. 268). The defendant in error did not contest the refund claimed on interstate shipments. Its liability therefor was recognized in the agreed statement of facts. The amount awarded, paid, and accepted constitutes no part of what is in controversy.

[2] The serious difficulty which confronts plaintiff in error is that it seeks strict enforcement of an alleged contract whose conditions it has itself obviously failed to perform. As was said by the trial judge:

"A milling in transit rate is an entirety, and must be accepted and carried out in its entirety, or not at all."

It is applicable only when all its substantial terms and provisions are observed. The railroad, in tendering such a privilege, undoubtedly relies upon the revenues which it expects will accrue from such a traffic arrangement. These depend upon the terms and conditions of the tariffs then in force. An inspection of those in effect when these inbound shipments moved, make it apparent that, to entitle a shipper to refund, he must not only pay the existing local tariff rates upon inbound shipments, but must thereafter bill out under prescribed outbound rates. If the shipper pays less than the outbound rate in force when his inbound shipment was made, he has not complied with the express terms of the tariff, nor has the carrier received the full rate which induced it to concede the milling in transit privilege. It is agreed that the outbound rates named in tariff 904 Series and 856—B, I. C. C. Series 5130, were in force when these inbound shipments were made. It is also conceded that plaintiff in error did not pay those rates, but did pay the lower rates established by the Oklahoma Corporation Commission. Therefore it has not complied, either in letter or in spirit, with the terms and conditions of the tariffs upon which its cause of action is based.

We have no occasion to consider the legal aspect of a case where the carrier has arbitrarily changed its outbound rate after the inbound shipments have been made and the shipper has tendered the former outbound rate and demanded the refund. Such a situation is not here presented. It would appear that the railroad company was obliged to put in force a new and lower rate as to intrastate shipments as ordered by the Corporation Commission of the new state of Oklahoma. It had been compelled to cancel and had canceled its former tariffs applicable to such shipments. It would have been unlawful for it to charge or receive rates other than those established—not only so, but plaintiff in error voluntarily paid the lower rate, and in so doing failed to bring itself within the terms of the former milling in transit privilege. Within the confines of its own jurisdiction the action of the Oklahoma Commission was the exercise of paramount rate-making power, and, as

such, superseded prior arrangements as to rates upon which it operated.

Our conclusion is that plaintiff in error did not make its outbound shipments upon such terms and conditions as entitled it to the benefit of the previously existing milling in transit privilege. Moreover, the tariffs in which that privilege was tendered were no longer in effect. The allowance of this claim would operate as a departure from rates and schedules filed, published and effective at the time the outbound shipments were made. It would pave the way for the return of those special concessions, discriminations, and advantages which it is the policy of the law to discountenance and prevent. *New Haven R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515; *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681.

For the reasons stated the judgment below must be affirmed.

In re NEWBURY & DUNHAM.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 28.

1. BANKRUPTCY (§ 409*)—DISCHARGE—APPLICATION—FAILURE TO KEEP BOOKS.

Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as originally passed, provided that a bankrupt might be discharged unless he had with the fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his financial condition might be ascertained. By the amendment of Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1496), the word "fraudulent" before the word "intent," and the word "true" before the word "financial," and the words "and in contemplation of bankruptcy" before the word "destroy," were eliminated. *Held* that, under the act as amended, it is enough to prevent a bankrupt's discharge that he has, with intent to conceal his financial condition, failed to keep books of account from which such condition might be ascertained, so that if the books failed to show his financial condition, and were kept with that intent, a discharge cannot be obtained.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.*]

2. BANKRUPTCY (§ 409*)—DISCHARGE—FAILURE TO KEEP BOOKS.

The bankrupts at the time of their failure were doing a business of considerable magnitude; their pay roll amounting to between \$14,000 and \$15,000 a year, and their bank account showing that for the year ending September 13, 1907, they had deposited and checked out \$57,000. The only books found by the trustee from which anything definite could be ascertained were a few checkbooks giving a false statement of the condition of the bank account. It was admitted that one of the bankrupts at various times had added \$5,000 to the balance on the stubs of such books. *Held*, that such facts were sufficient to show that the bankrupts had, with intent to conceal their financial condition, failed to keep books of account and records from which such condition might be ascertained, and were therefore not entitled to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of bankruptcy proceedings of Newbury & Dunham. From an order affirming the report of a Special Master sustaining exceptions to an application for the bankrupts' discharge and denying the same, they appeal. Affirmed.

Charles E. Travis and Henry B. Singer, both of New York City, for appellants.

Patrick J. Rooney and Isador Niner, both of New York City, for trustee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. [1] The law applicable to the present controversy is found in section 14b of the Bankruptcy Act, as amended in 1903. It provides, inter alia, that the judge shall hear the application "and discharge the applicant unless he has * * * (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained." The act as originally passed contained the word "fraudulent" before the word "intent," the word "true" before the word "financial," and the words "and in contemplation of bankruptcy" before the word "destroyed." So that under the act as it now reads it is no longer necessary to prove that the bankrupt's intent was fraudulent or that his acts were done in contemplation of bankruptcy. It is enough to prevent his discharge if he has, with intent to conceal his financial condition, failed to keep books of account from which such condition might be ascertained. If, then, the books fail to show his financial condition and were kept with the intent that they should fail to show it, the bankrupt cannot be discharged.

This court, in *Re Hanna*, 168 Fed. 238, 93 C. C. A. 452, said of the amended section:

"It is intended to prevent a bankrupt from obtaining a discharge, if he, whether in contemplation of bankruptcy or not, for any reason, fraudulent or otherwise, has kept his books with intent to conceal his financial condition."

[2] Under the law, as thus construed, we see no escape from the proposition that these bankrupts have failed to keep the books or records from which their financial condition might be ascertained.

It is conceded that one of the bankrupts at various times added \$5,000 to the balance on the stubs of the checkbooks, so that any one seeing the checkbooks, which were lying about on the office desks, would naturally believe that the bankrupts had \$5,000 more in the bank than they actually had. We do not see how this admitted altering of the books can be overlooked. It was done with a purpose and the only object must have been to mislead the persons who saw the untrue entries. It was not done for mere amusement or caprice and the only motive for the alterations must have been to deceive and mislead those dealing with the firm. If the bankrupts wished to keep their balance in the bank a secret, they only had to lock up the checkbooks or keep them in some secluded place.

The bankrupts were doing a business of considerable magnitude.

Their pay roll showed an expenditure of from \$14,000 to \$15,000 per annum. Their account with the Riverside bank showed that for the year ending September 13, 1907, they had deposited and checked out \$57,000. It is manifest that such a business could not be carried on without some system of bookkeeping and yet the evidence shows that nothing was left by the bankrupts which enabled the trustee to ascertain the most necessary details of the business. The only books found by the trustee from which anything definite could be ascertained were a few checkbooks and these gave a false statement of the condition of the bank account. It will not do to ignore such proof. The books were in fact false and gave an untrue statement of the balance in the bank. It is not necessary to show that creditors have actually been deceived. Certainly those who saw the entries must have been deceived. They must have thought that the bankrupts had \$5,000 more in the bank than they actually had. At least they must have thought that the bankrupts were doing a thriving business with so substantial a balance on hand. It is said that these additions were made so that no one but the bankrupts would know what their balance was. That if any meddlesome person picked up the checkbook he would not know what the balance was. The difficulty with this contention is that while it might deceive an impertinent interloper, it might also deceive a creditor or one expecting to become a creditor. The burden was on the bankrupts to explain these admittedly false statements and they have failed to do so. The policy of the law is to deny a discharge to a bankrupt who entirely fails to comply with its requirements. When a trader doing a large business fails to keep books or records from which his financial condition can be ascertained, the law, in the absence of any reasonable explanation, will presume an intent to conceal. No other inference can justly be drawn. The order refusing a discharge is affirmed.

PHILADELPHIA & READING COAL & IRON CO. v. KESLUSKY.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 57.

1. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Where plaintiff, a miner employed in defendant's coal mine, in obeying an order of the foreman, who under the state statute represented defendant, was obliged to stoop to pass under the roof timbers of a tunnel in which the foreman had bored a hole and placed therein a stick of dynamite with a fuse attached, had a lighted lamp in his cap, but was not warned of the presence of the dynamite until immediately before the explosion by which he was injured, it was a question for the jury whether, if the foreman had performed his duty by giving plaintiff timely warning of the danger, the injury would not have been prevented, although there was no direct evidence as to the cause of the explosion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. § 286.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COURTS (§ 23*)—FEDERAL COURTS—JURISDICTION ON REMOVAL—CONSENT OF PARTIES.

Where a federal court has jurisdiction of a cause on removal by consent of the parties, the act of the defendant in removing the cause and of the plaintiff in proceeding to trial without objection amounts to such consent and confers jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 75, 75½, 81; Dec. Dig. § 23.*]

In Error to the District Court of the United States for the Eastern District of New York.

Action at law by Anthony Keslusky against the Philadelphia & Reading Coal & Iron Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On writ of error to review a judgment entered in favor of the plaintiff for the sum of \$2,533.85. The judgment is based upon the verdict of a jury in the sum of \$2,500 damages for injuries received by plaintiff while in the employ of the defendant in a coal mine known as the "Tunnel Ridge Colliery" located in Schuylkill county, Pa.

Pierre M. Brown and William F. Purdy, both of New York City, for plaintiff in error.

Moses Feltenstein and Baltrus S. Yankaus, both of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. [1] At the time of the accident the plaintiff was in the employ of the defendant as a miner in the defendant's coal mine at Tunnel Ridge, Pa., under the direction of Adam Schalick, who was foreman. At about noon on February 1, 1911, Schalick had bored some holes in the cross pieces of the U-shaped timbers which held up the roof of the tunnel, intending to blow it up and secure what coal remained in the roof. While the plaintiff was engaged in eating his dinner, some 45 feet from Schalick, the latter called to him through the intervening darkness to bring him a tamping stick. The plaintiff brought an iron stick and was informed that a wooden one was needed. Whereupon the plaintiff went back and was returning with a wooden stick and was in the act of handing it to Schalick when the latter exclaimed, "Watch yourself, there is a squib there," and immediately there was an explosion which caused the serious and permanent injuries of which the plaintiff complains.

We are of the opinion that the case was properly submitted to the jury. Under the Pennsylvania Act of June 10, 1907 (P. L. 523), Schalick was the foreman representing the defendant and for his negligence the defendant is liable. The jury were justified in finding that Schalick had bored holes in the overhead timbers for the insertion of dynamite intended to blow up the timbers in the gangway in question. The plaintiff knew that the foreman had bored holes for this purpose but did not know that the foreman had inserted a stick of dynamite in one of the holes with a fuse attached. When ordered to get the tamping stick, the plaintiff had his miner's lamp in his cap.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

He was a tall man and it was necessary for him to stoop in order to pass under the timbers where the dynamite and the squib were located, with the danger of an explosion if the lamp came in contact with the squib. In such circumstances, it was the duty of the foreman to warn the plaintiff of the fact that the squib was there, but no timely warning was given. The jury were justified in finding that the light in the plaintiff's cap had caused the explosion and that the accident would not have happened if the proper warning had been given. Not to give it was negligence which, through its alter ego, is directly attributable to the defendant.

As to the alleged contributory negligence of the plaintiff, it suffices to say that in the courts of the United States the burden is upon the defendant to show that the plaintiff was negligent and that his negligence contributed to the injury. Even if negligent, a recovery will not be prevented if the defendant might, by exercising reasonable care and prudence, have avoided the consequences of the plaintiff's negligence. *Inland & S. C. Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270.

The defendant has not proved any negligence on the part of the plaintiff. On the contrary, it contends that the cause of the accident is inscrutable. The assertion that the precise cause of the accident is unknown, and that "how this accident happened has been left to a guess," is hardly consistent with the theory that it was due solely to the fault of the plaintiff.

[2] Upon the question of jurisdiction we are of the opinion that *Odhner v. Northern Pac. R. Co.* (C. C.) 188 Fed. 507, does not require a dismissal of the cause for lack of jurisdiction, for the reason that the District Court had jurisdiction and could retain the action if both parties consented. We think both parties did so consent, the defendant by filing the petition for removal and the plaintiff by proceeding with the trial of the cause, and at no time objecting to the jurisdiction.

The questions of negligence were fairly presented to the jury and their verdict, an exceedingly small one considering the extent of the injury, should not be disturbed.

The judgment is affirmed with costs.

THE PRINCETON.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 25.

1. COLLISION (§ 56*)—OVERTAKING STEAM VESSELS—LATERAL THRUST CAUSED BY MOVING STEAMER.

The theory that a moving steamer exerts a pushing force on the water displaced, causing it to move to port and starboard, finds no recognition in standard books on navigation, and cannot be accepted by a court, against the weight of testimony of experienced mariners, as the cause of the sheer of an overtaken vessel, which brought about a collision with the overtaking vessel.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 56.*

Collision, overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COLLISION (§ 53*)—OVERTAKING STEAM VESSELS—CAUSE OF SHEER.

The sheer of an overtaken steamer, which caused a collision with the overtaking steamer, *held*, on the evidence, to have been due to her individual eccentricity, and the overtaking steamer *held* not in fault.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 53.*]

Appeal from the District Court of the United States for the Western District of New York.

This cause comes here upon appeal from a decree of the District Court, Western District of New York, which held the respondent solely in fault for a collision between its steamer Princeton and libellant's steamer Glidden. The collision took place in that part of the Detroit river, known as "Ballard's Reef Channel." The Princeton was overtaking and passing the Glidden. The opinion of the District Judge will be found in 196 Fed. 65.

H. A. Kelley, of Cleveland, Ohio (Hoyt, Dustin, Kelley, McKeehan & Andrews and George W. Cottrell, all of Cleveland, Ohio, of counsel), for appellant.

F. S. Masten and H. D. Goulder, both of Cleveland, Ohio, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The locality, the movements of the vessels and the contentions of the respective parties are set forth very fully in Judge Hazel's opinion and need not be repeated here.

The crux of the case is the answer to the question, "What caused the Glidden's bow to sheer in towards the Princeton's?"

There are three possible answers:

- (1) That her navigator steered her so that her head would swing in.
- (2) That through individual eccentricity she swung herself in, contrary to the attempted guidance of her navigator.
- (3) That some force emanating from the Princeton either sucked the bow in or forced the stern out.

1. The first answer may be disregarded. The navigator testifies that he did not steer her into collision, and it is inconceivable that he should.

2. There is sufficient evidence to warrant a finding that the Glidden had in the past taken similar sheers without visible cause. Therefore the inference is warranted that she may have done so on this occasion.

[1] 3. We do not understand there is any contention that the movement of the Princeton "sucked" the bow in, since her stern had not yet come near enough to the Glidden's bow to exert any suction on it. The sole contention is that there is a pushing force exerted by the water displaced as a vessel's bow moves through it. The theory is that, since the displaced water must go somewhere, it must run off to port and starboard. There is no judicial acceptance of such theory, except, possibly the deliverance of a Canadian trial judge. *Cadwell v. Ship Bielman*, 10 Exchequer Rep. Canada, 155. It would seem that if such a phenomenon were known it would find place in standard books on navigation, and the able and experienced counsel who tried and argued

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the cause would have submitted excerpts therefrom for our consideration. Under these circumstances we cannot take judicial notice that there is such a force. No text-book tells of it; no such phenomenon has come within our individual observation; we do not know it to be "a fact in nature." The theory advanced that because water is displaced at the bow it will be pushed off either side, because there is nowhere else for it to go, we do not find persuasive. There is displacement only because the vessel moves forward; she moves forward only because the screw behind her is pushing the water back; it seems to us more reasonable to suppose that the displaced particles of water take the shortest possible course, some along the sides of the ship, some along her bottom, to the place where room has been made for them by the movement of the screw and the consequent backward movement of the particles of water which the screw has kicked. Possibly this theory of what will happen may be incorrect; but certainly we cannot accept the theory advanced on the brief unless the weight of testimony supports it. But the weight of testimony is the other way. The master and mate of the Glidden say they have seen such action, the master of the Princeton apparently agrees that it exists in the case of a loaded boat—what difference a load would make as to direction of displaced water we cannot conceive—but this testimony is completely overborne by the multitude of disinterested witnesses of large experience who have testified the other way. If this force pushing out from the bows of a moving vessel is exerted, it seems to us inconceivable that none of these witnesses, who for many years have been navigating steam vessels, large and small, ever observed a movement of objects away from the moving vessel which such force would necessarily produce.

[2] Our conclusion therefore is that the second answer above suggested is the true one, and for that reason the decree is reversed, with costs of this appeal, and cause remitted, with instructions to decree in conformity with this opinion.

LAWRENCE WARD'S ISLAND REALTY CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 18.

1. DISMISSAL AND NONSUIT (§ 12*)—DISCONTINUANCE—RIGHT TO DISCONTINUE.

In general, plaintiff may discontinue his action on payment of costs, except that when discontinuance will prejudice defendant's present rights, it is within the discretion of the court to refuse permission to discontinue or grant it on terms.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 27; Dec. Dig. § 12.*]

2. EMINENT DOMAIN (§ 246*)—PROCEEDINGS—DISCONTINUANCE—ABUSE OF DISCRETION.

Proceedings having been instituted by the United States to condemn a site on Ward's Island for a light and fog signal station, the court entered an order of condemnation on making compensation and appointed com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

missioners of appraisal. The United States attorney thereafter, believing that the government had a paramount right to take the premises without compensation because of their location between high and low water line in East River, moved to discontinue, and his motion was granted. *Held*, that the order granting discontinuance was not an abuse of discretion in so far as it set aside the order of condemnation on making compensation, on the theory that without such order the landowner could obtain no relief except by an application to Congress for legislation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 647-657; Dec. Dig. § 246.*]

In Error to the District Court of the United States for the Southern District of New York.

Proceeding by the United States to condemn certain premises at Ward's Island for a light and fog signal station. From so much of an order granting complainant's application for a discontinuance of the proceeding as dismissed an order of condemnation on the United States making compensation for the property taken, the Lawrence Ward's Island Realty Company brings error. Affirmed.

George W. Ellis, of New York City, for plaintiff in error.

H. Snowden Marshall, U. S. Atty., of New York City (Addison S. Pratt, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. September 13, 1911, the United States attorney for the Southern district of New York presented a petition to the Circuit Court for the condemnation of certain premises at Ward's Island in the city of New York for a site for a light and fog signal station. The petition alleged that the owners of the premises were the state of New York, the city of New York, and the Lawrence Ward's Island Realty Company.

Upon the same day the latter company appeared and answered, and the Circuit Court entered an order that the United States was entitled to condemn the premises for public use upon making compensation therefor and appointing commissioners of appraisal.

May 7, 1913, the United States attorney moved for an order discontinuing the proceeding on the ground that the government has a paramount right to take the premises without compensation for the purposes of navigation; they lying between high and low water line in the East River, which is a navigable stream.

June 28, 1912, the District Court, after hearing both parties, entered an order of which the material part is:

"Ordered, that the above-entitled proceeding be and the same is hereby discontinued, and the order and judgment entered herein on the 13th day of September, 1911, authorizing the condemnation of the real property described in the petition aforesaid and appointing commissioners of appraisal, be and the same is hereby vacated and set aside."

The landowner does not complain of the discontinuance of the proceeding, but only of that provision of the order which vacates the order of September 13, 1911. Its contention is that it can ob-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tain no relief except by application to Congress for legislation, if the government hereafter take the premises under claim of right.

[1] The general rule certainly is that the plaintiff may discontinue his action upon payment of costs. When, however, discontinuance will prejudice the defendant's present rights, the court has a discretion to refuse permission to discontinue or to grant it on terms. Such action of the court, in the absence of an abuse of discretion, is not reviewable. *Pullman Co. v. Transportation Co.*, 171 U. S. 138, 146, 18 Sup. Ct. 808, 43 L. Ed. 103.

[2] We discover no abuse of discretion. The provision vacating the original order of September 13, 1911, was unnecessary and immaterial. The mere discontinuance of the proceeding extinguished that order as effectually as if it had never been made. If the landowner is right in thinking that it can only have relief from Congress in case the government hereafter seizes the premises under a claim of right, the order of condemnation would not give this court jurisdiction to grant relief, even if it had not been expressly vacated.

The order is affirmed, without costs to either party.

LA SAVOIE.
THE OLYMPIA.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 37.

COLLISION (§ 105*)—STEAMER AND TOW MEETING—EVIDENCE OF FAULT.

A finding by a trial court, which heard the witnesses, that a libellant had failed to sustain allegations of fault against a steamship passing up New York Harbor to her dock, in the evening, for a collision with the tow of a tug passing down, affirmed.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 105.*]

Collision with or between towing vessel and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Goodwin Sand & Gravel Company against the steamship *La Savoie* and the tug *Olympia*, impleaded under admiralty rule 57. Decree for respondent, and libellant appeals. Affirmed.

On appeal from a decree of the District Court of the United States for the Southern District of New York dismissing the libel filed against the steamship *La Savoie* to recover damages sustained by tow of the steam tug *Olympia*, by reason of a collision with *La Savoie* in the North River on the evening of October 8, 1910.

John F. Foley and Frank A. Spencer, Jr., both of New York City, for appellant.

Joseph P. Nolan and John M. Nolan, both of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

COXE, Circuit Judge. The collision occurred between the Battery and Castle William at about 6:30 p. m., October 8, 1910. The night was clear and dark. A light south wind was blowing. There was nothing in the elements to disturb navigation or make it difficult for the vessels in question to reach their respective destinations. La Savoie was bound for her pier at West Tenth street, North River, and the Olympia for Kirkham's Basin, South Brooklyn. The Olympia had four deck scows in tow on a hawser about 160 feet in length. The scows were all light, were fastened close together, and each was 110 feet in length. They carried bow and stern lights only.

La Savoie is a twin screw ocean steamer. Her master was a sailor of wide experience and had frequently been in the port of New York. She was at the time in the charge of a Sandy Hook pilot of 47 years' experience.

This is peculiarly a case where, in order to get a correct view of the situation, it is necessary to see and hear the witnesses. A statement which sounds plausible when read may come from a witness whose appearance on the stand casts grave doubt upon his honesty and intelligence. The District Judge heard all the witnesses and his finding upon disputed questions of fact should not be disturbed unless we are clearly satisfied that he is in error. If we are in doubt we should resolve the doubt in favor of the decree. We think the District Judge was right in his conclusions. The preponderance of proof is to the effect that when the vessels were far enough apart to avoid collision, the Olympia was showing her green light to La Savoie's red and green. In other words, the Olympia was crossing with La Savoie on her starboard hand. It was then the duty of La Savoie to keep her course and the duty of the Olympia to keep out of the way. This the latter did not do. Again, we agree with the District Judge in thinking that there is a presumption in favor of a large steamer in the hands of an experienced master with a licensed pilot on board and all her machinery in working order. That such a steamer, having agreed upon a passing convention, should suddenly violate it and sheer across the path which she had agreed to leave open is most improbable and should require cogent proof to support it. It is enough that the burden is on the libellant to establish fault on the part of La Savoie and that it has failed to sustain it. It is true that there is the usual, if not more than the usual, amount of disagreement between the witnesses, but upon disputed questions of fact we must accept the findings of the trial court, unless clearly satisfied that the court was in error. We are not so satisfied in the present case.

The decree of the District Court is affirmed with costs.

TEXAS & I. RY. CO. v. ROSBOROUGH et al.

(Circuit Court of Appeals, Fifth Circuit. December 9, 1913.)

No. 2,520.

1. TRIAL (§ 67*)—RECEPTION OF EVIDENCE—ORDER OF INTRODUCTION.

The admission of evidence on behalf of a plaintiff after he has rested and evidence has been introduced by the defendant is within the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 157; Dec. Dig. § 67.*]

2. TRIAL (§ 62*)—ACTION FOR CAUSING FIRE—EVIDENCE.

Where the evidence of defendant in an action against a railroad company to recover damages caused by a fire tended to show that its engines were all equipped with standard spark arresters, kept in order and well handled, further evidence tending to show that the fire was caused by one of three certain engines did not render inadmissible evidence in rebuttal to show the action and handling of another and different engine of defendant two days after the fire.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.*]

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action at law by W. J. Rosborough and others against the Texas & Pacific Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

W. L. Hall, of Dallas, Tex., F. H. Prendergast, of Marshall, Tex., and John J. King, of Texarkana, Tex., for plaintiff in error.

S. P. Jones and P. O. Beard, both of Marshall, Tex., for defendants in error.

Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. [1] Under the issues presented by the fifth and seventh paragraphs of the first amended answer of the Texas & Pacific Railway Company, the evidence of Edwards set forth and complained of in the first assignment of error was admissible on behalf of the plaintiff. Its admission over objection after plaintiff "had rested," and after the defending railway company had offered perhaps all of its evidence, was within the discretion of the trial judge. Ency. Pl. & Pr. vol. 8, p. 132.

[2] Under the issues made by the pleadings, and considering the evidence offered by the defendant more or less tending to show that its locomotives were all equipped with a standard spark arrester, kept in order and well handled, the evidence of Edwards complained of was not irrelevant nor immaterial. That it was somewhat remote goes to its effect. Because the evidence of the defendant showed that the fire was started by one of three certain engines, Nos. 359, 140, and 202, and Edwards' evidence related to the action and the handling of another and different engine two days after the fire, did not warrant striking the evidence of Edwards from the record.

All issues in the case affecting the railway company's liability were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the jury, and the jury was not bound to accept the explanation tendered by the evidence of the railway company as to which particular engine started the fire and how that engine was equipped and handled.

None of the other assignments of error were much insisted upon, and from examination we find none of them well taken.

The judgment of the District Court is affirmed.

ARCHER et al. v. IMPERIAL MACH. CO.

(Circuit Court of Appeals, Second Circuit. August 5, 1913.)

No. 251.

On motion for reargument. Denied.

See 207 Fed. 81.

Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. One of the judges who concurred in majority opinion resigned before motion was made for reargument. The remaining judges being divided in opinion, as they were on original argument, motion for reargument is denied.

ASSETS COLLECTING CO. v. BARNES-KING DEVELOPMENT CO.

(Circuit Court of Appeals, Second Circuit. October 16, 1913.)

APPEAL AND ERROR (§ 99*)—ORDERS REVIEWABLE—DISCRETION—SECURITY FOR ATTACHMENT—INCREASE.

An order vacating an attachment, unless plaintiff increased the existing security from \$1,000 to \$2,500, was in no sense final, but purely discretionary, and not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 661-669; Dec. Dig. § 99.*]

In Error to the District Court of the United States for the Southern District of New York; E. Henry Lacombe, Judge.

Action by the Assets Collecting Company against the Barnes-King Development Company. From an order vacating an attachment, unless plaintiff increased the security to \$2,500, it brings error. Dismissed.

R. S. Harvey and F. E. M. Bullowa, both of New York City, for plaintiff in error.

Chadbourn & Shores, of New York City (H. J. Wolff, of New York City, of counsel), for defendant in error.

Before COXE and ROGERS, Circuit Judges, and HAZEL, District Judge.

PER CURIAM. This is a motion to quash a writ of error to review an order of the United States District Court for the Southern District of New York, dated July 22, 1913, which order provided that the attachment heretofore granted be vacated unless the plaintiff increase the existing security from \$1,000 to \$2,500. The plaintiff has failed to increase the security as required and now sues out a writ of error to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

review the order requiring it. The court below, being of the opinion that the existing security was insufficient, was certainly justified in increasing it. Its action was in no sense final, but was purely discretionary, and intended only to give the defendant additional security covering the fees and costs incurred by it subsequent to the order of March 4, 1911. Such an order is not reviewable on writ of error. *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73; *Leitensdorfer v. Webb*, 20 How. 176, 15 L. Ed. 891; *Atlantic Lumber Co. v. L. Bucki, etc., Co.*, 92 Fed. 864, 35 C. C. A. 59.

The motion to dismiss the writ of error is granted.

BARRY et al. v. HARPOON CASTOR MFG. CO.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 55.

PATENTS (§ 328*)—VALIDITY AND INVENTION—FURNITURE TIP.

The Alleyn patent, No. 995,758, for an anti-friction tip for furniture to take the place of castors, consisting of a convex disk of heavy metal plate with an upturned strengthening rim provided with prongs to be driven into the bottom of chair legs, etc., was not anticipated by similar shaped nail heads and other devices of the prior art, most of which were used for different purposes, and discloses invention, especially shown by its commercial success, due to its simplicity, cheapness, and utility; also *held* infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Charles D. Barry, Frederick W. Lincoln, and John R. Bradlee, copartners trading under the name of Henry W. Peabody & Co., against the Harpoon Castor Manufacturing Company. Decree for defendant, and complainants appeal. Reversed.

For opinion below, see 201 Fed. 686.

On appeal from a decree of the United States District Court for the Southern District of New York, holding invalid letters patent No. 995,758 granted June 20, 1911, to Henry M. Alleyn for an "anti-friction tip for furniture," and assigned to the complainants. The bill was dismissed with costs.

Frederic W. Hinrichs and Alfred E. Hinrichs, both of New York City, for appellants.

Charles S. Champion, of New York City, and Henry N. Paul, Jr., and Joseph C. Fraley, both of Philadelphia, Pa., for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The patent in controversy is for an exceedingly simple anti-friction device designed to take the place of castors previously used on the legs of tables, chairs and other similar pieces of furniture.

The object of the inventor was to provide a cheap anti-friction bearing device which can be readily and securely attached to any piece of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

furniture and permits it to slide easily over the surface of a rug, carpet or floor. The tip consists of a drawn sheet metal disk having a smooth, polished, convex surface and an upturned strengthening rim provided with a plurality of integral pointed prongs, adapted to be driven into the leg, or like support, of the piece of furniture in question. The disk, at its perimeter, is bent to form a strengthening rim upon which the leg of the chair or table rests after the prongs have been driven into position by three or four blows of a hammer. The rim tends to prevent the blows from fracturing or distorting the continuously curved convex surface of the device. The tips must be made of extremely stiff metal so that there will be no flattening, bending or malformation when they are driven into place by any ordinary hammer. They are much cheaper than the castors in use at the date of the invention, they can be quickly applied by any one having sense enough to drive a nail and they permit the moving of the article of furniture in any direction without injuring the carpet, rug or floor on which it rests. The tips are invisible after being applied and do not perceptibly increase the height of the furniture to which they are attached. The patent has a single claim which sufficiently describes the invention and renders further description thereof unnecessary. It is as follows:

"In an article of manufacture, a tip for supporting wooden chairs and the like, adapted for contact with a support therefor, consisting of a continuously curved convex portion of smooth sheet metal having an upturned rim continuously connected to said convex portion around its perimeter, and prongs of said sheet metal integral with said rim, projecting substantially in the plane thereof at the point of attachment, and adapted to be driven by the blows of a hammer into the wood of the article to be supported, said convex portion, rim and prongs, having a resisting power to the blows of said hammer sufficient to substantially prevent the flattening or breaking thereof, whereby said tips may be attached without malformation or fracture."

The main attack upon the Alleyn patent is based upon the proposition that if the defendant has succeeded in proving that the Alleyn tip is found in the prior art, though in different environment, and applied to entirely different uses, the patent is anticipated or rendered invalid for lack of invention.

The prior art shows similar constructions but none of them capable of being used as a castor for furniture. Similar devices, though smaller, lighter and with a much more pronounced "dome," were used as "spots" or ornaments for Mexican saddles, harness and other like purposes. Coffin nails were similarly constructed and "spots" were used on the bottom of traveling bags to keep them from being soiled when set down upon a wet or dirty station platform. None of these things could be used to do the work of the "Domes of Silence," by which euphonic but somewhat ambitious name the owners of the Alleyn patent designate their product. No one ever attempted, prior to Alleyn, to use such a structure as a substitute for castors. Of course, in making this statement, we do not overlook the "Thonet Furniture Tip," which consisted of a nail with a smooth round head and a long central shaft adapted to be driven into the legs of the chair or table like an ordinary large headed nail. This device was never commercially successful and if, as the defendant contends, it be equally

serviceable as that of the patent in suit the question at once arises, why does not the defendant use it? The fact that the defendant persists in using the Alleyn device and is willing to take the very serious risk of being adjudged an infringer is persuasive testimony of the advantages of the "Domes of Silence" over the Thonet big headed nails.

The record is largely devoted to the attempt to establish the proposition that in view of the saddle and harness ornaments and the coffin nails of the prior art there could be no invention in adapting these devices as substitutes for castors. We think, in view of the hard metal, the short prongs, the strengthening rim and the depressed contour of the dome of the Alleyn tips, invention can be found even if the ornamental devices of the prior art were used as substitutes for castors. But they were not so used and their adaptation for use as castors required the exercise of inventive skill. In order to test the question let us assume that the exact structure shown in the patent to Alleyn was taken from the shield of a Scottish Highlander or the war bonnet of a North American Indian 300 years ago and was on exhibition in some museum here. Would it not involve invention to put it to use as a substitute for the elaborate, clumsy and expensive castors now in use? We think it would. In *Consolidated Co. v. Littauer Co.*, 84 Fed. 164, 28 C. C. A. 133, this court held that it required invention to produce in a glove fastener a depressed "dome" or support. In *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294, the Supreme Court sustained a patent for a telegraph key where the new feature was the substitution of a tortional spring for the trunnions or pivots upon which the lever vibrates. In *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586, the Supreme Court sustained a patent for a machine for attaching stays to the corners of boxes in the same manner that the work had previously been done by hand. In *Krementz v. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, the court sustained a patent for a collar button for the reason that the skilled mechanic with his attention specially drawn to the subject, had failed to see, what *Krementz* afterwards saw, that a button might be made of one continuous sheet of metal, of an improved shape, of increased strength, requiring less material and entirely dispensing with solder. In the *Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154, the court upheld a patent for a twisted fence wire having the barb "bent at its middle portion about one of the wire strands and clamped in position and place by the other wire strand twisted upon its fellow."

In each of these cases the invention was based upon the finding of a new use or function for structures found in the prior art. Domes, tortional springs, stays for box corners, pasting machines, collar buttons and barbs for fence wires were all old, but those who found a new place for the old devices whereby alone, or in combination with other structures, entirely new results were produced, received the rewards of the inventor. We think, therefore, that even if it be assumed that the "Domes of Silence" were found in the prior art, as coffin nails or ornaments, that it required an exercise of the inventive faculty to use them as substitutes for castors. It is most unsafe to refuse to rec-

ognize invention because the device or combination is simple, for such a rule would destroy some of the most meritorious patents ever issued. The device in question is exceedingly simple, it is a hard metal cylindrical dome with smooth exterior and prongs extending from the encircling rim adapted to be driven into hard wood by the blows of an ordinary hammer. Attempts along similar lines have been made, but they were all failures. A possible exception may be made of Thonet's large headed nail, but, as we have seen, his device was not commercially successful and has, apparently, gone out of use. It requires no expert knowledge to perceive that his long shaft might split a slender chair leg and, unless driven with great care and precision, that the periphery of the large head might rest unevenly upon the wood.

Alleyn, in our judgment, has made a meritorious invention, he has done what no other worker in the art succeeded in accomplishing. He has produced a castor which departs radically from the old lines. It has no disks like Thonet's with a single central shaft, no swivels, no wheels, no glass bearing surface, no screws, no nails, no metal sockets, no elaborate machinery of any kind. Chair legs no longer split, screws no longer drop out, and the services of the cabinet maker are no longer needed. All this is accomplished by a simple hard metal disk with a re-enforcing rim and prongs which can be driven in place by the most inexperienced person. The device is almost negligible as to cost and never breaks down or wears out. We cannot resist the conclusion that to accomplish this result required invention. If additional evidence were needed of the popularity and immediate success of Alleyn's invisible castors it is found in the immediate and phenomenal success which attended them. The counsel for the complainant estimates that in the two years prior to October, 1911, the combined sales of the complainant and defendant aggregated 40,000,000 pieces. Such immediate and extensive popularity would, in a doubtful case, be sufficient to turn the scales in favor of invention.

The decree is reversed with costs and the cause is remanded to the District Court with instruction to enter a decree sustaining the Alleyn patent and granting an injunction and an accounting.

WM. B. SCAIFE & SONS CO. v. FALLS CITY WOOLEN MILLS.

(Circuit Court of Appeals, Sixth Circuit. November 4, 1913.)

No. 2,309.

1. PATENTS (§ 165*)—INFRINGEMENT—ANTICIPATION.

Where the broader view of a claim is necessary to make out infringement, the proof of anticipation must be considered from the same point of view.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

2. PATENTS (§ 165*)—CONSTRUCTION—READING LIMITATION INTO CLAIM.

Where a patentee has made an improvement entitled to protection, and in the claim directed to that feature it is described in terms which are capable of a broad construction, rendering the claim invalid in view of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the prior art, or of a narrower construction which will preserve to it the validity which it should have had, the courts will give it that narrow construction and so sustain the patent; but where from the specification or history of the application or the language of the claim it is clear that the patentee intended to claim, and the Patent Office to grant, the broader monopoly, which turns out to be invalid, the courts will not, for the arbitrary purpose of saving the claim, read into it a limitation which it does not have.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

3. PATENTS (§ 165*)—CONSTRUCTION—DIFFERENTIATION OF CLAIMS.

The propriety of the rule that proper construction and effect can be given to each claim of a patent only by differentiating it from the other claims, in a normal case where it can be clearly applied, is not affected by the fact that in many cases it is difficult to make such differentiation because of repetition and confusion.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

4. PATENTS (§ 165*)—CONSTRUCTION—DIFFERENTIATION OF CLAIMS.

When satisfied that a particular claim had for its dominant purpose to secure one particular feature, we should not construe it as specific also in its calls for other elements.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

5. PATENTS (§ 165*)—CLAIMS—CONSTRUCTION.

In construing a claim in that respect ambiguous, a given element should be implied, if its presence was necessary to distinguish from the prior art or from the other claims; otherwise, it should not operate as a limitation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

6. PATENTS (§ 165*)—EFFECT OF PATENT OFFICE PROCEEDINGS.

A statement by the solicitor that the claim was to be confined to the "exact form" held not an estoppel because imitation was not required, and not a persuasive admission because of the context.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

7. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WATER PURIFYING APPARATUS.

The Greth patent, No. 775,901, for a water purifying apparatus, claim 11, as differentiated from most of the other claims, is not limited to a combination calling for separate compartments in which the lime treatment and the soda treatment are carried on, but has for its principal element the specific battery of independent unit filters described, each of which can be cut off for cleaning without affecting the others, used in combination with a settling compartment and a chemical treating compartment, broadly specified, which may or may not be subdivided. As so construed, the claim was not anticipated and discloses patentable invention; also, held infringed.

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Suit in equity by the Wm. B. Scaife & Sons Company against the Falls City Woolen Mills. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 194 Fed. 139.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

F. W. H. Clay, of Pittsburgh, Pa., for appellant.
A. M. Hood, of Indianapolis, Ind. (Bodley & Baskin, of Louisville, Ky., of counsel), for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Appellant filed, in the court below, the usual infringement bill based upon patent No. 775,901, issued to Greth, November 22, 1904. It planted its *prima facie* case on claims 9, 10, 11, and 12. Later, it withdrew claims 9 and 12, and went to final hearing on claims 10 and 11 only. The District Court dismissed the bill and filed an elaborate opinion which so fully discloses the facts involved that we shall need to make thereto only brief additional references. The opinion below is reported in 194 Fed. 139.

In construing claims 10 and 11 (quoted in margin)¹ to determine either validity or infringement, the important underlying situation is this: Greth's patent was upon an apparatus, and not a process. His drawing showed and his specification described a structure embodying four parts through which successively water continuously flowed. These were a tank or chamber in which the water received lime and in which the resultant chemical reaction took place; a tank or chamber in which soda was added and the chemical reaction therefrom followed; a tank or chamber where, after the chemical treatment, the water entered at the bottom and overflowed from the top and in which sedimentation occurred; and a filter through which passed the water overflowing from the top of the settling tank. The structure in which these parts were embodied, as illustrated by Greth, may be described in general terms as a vertical cylindrical all inclosing tank (8) divided into two main compartments by a segmental vertical partition reaching from the top nearly to the bottom. One of these is the settling tank; the other is subdivided by a horizontal partition having a flow opening; the upper subdivision being the lime and the lower the soda compartment. The defendant's device had these same parts, thus generally described, excepting that the two main chambers were formed by an inner concentric vertical partition, and both the lime treatment and reaction and the soda treatment and reaction occurred in one chamber (the inner) which had no physical partition between its upper and lower parts.

¹ "Claim 10. In water purifying apparatus the combination in a single tank 8 of the various compartments for lime treatment and soda treatment and water settling, the settling tank being fed directly from the treatment tank and having an inclined bottom therein below the opening from the treatment tank, and having a filter at the top of the settling tank fed by overflow from said tank, substantially as described.

"Claim 11. In continuous flow water purifying apparatus, the combination with a single tank containing the chemical reacting compartment, and an upward flow settling compartment, of a series of independent gravity filters carried on the top of the tank, fed by overflow from the settling compartment, and each having means for washing the filter and a valve to close communication with the settling compartment, whereby any one of said filters may be isolated and washed, while the flow continues through the others from said supporting tank."

[1] Keeping this situation in mind, when we scrutinize claim 10, we see that it calls distinctly for the element filter and for the element settling tank and, apparently, also for the two elements lime tank and soda tank. It is the patentee's theory that these two latter are really one element or that one treatment tank for both reactions is the equivalent of the two; while it is the defendant's position that the claim calls for four elements, and is therefore not infringed by a device having only three. Obviously, the former or broader view of the claim is necessary to make out infringement, and so the proof of anticipation must be considered from the same point of view, viz., that the claim was for a chemical treatment tank, a settlement tank, and a filter, arranged in the specified mutual relation.² So considered, it is anticipated. The English patent to Patterson, mentioned in the opinion below, discloses these three elements in the same substantial form, operating in the same succession and in substantially the same way. Claim 10, with this construction, which it must have in order to be infringed, reads perfectly upon Patterson.

[2] It is suggested that the phrase "having a filter at the top of the settling tank fed by the overflow from the said tank substantially as described" should be construed as calling for the specific kind of filter shown and described, viz., a filter divided into several units, each one of which can be independently cleaned, and that, if the call in the claim for "a filter" is so construed, the invention is not anticipated. Where it appears that the patentee had made an improvement upon which he was entitled to receive protection, and that in the claim which was directed to that feature of his invention it is described in terms which are capable of a broad construction rendering the claim invalid in view of the prior art, or of a narrower construction which will preserve to it the validity which it should have had, the courts will give it that narrow construction, and so sustain the patent; but where, from the specification or the history of the application or the language of the claim it is clear that the patentee intended to claim and the Patent Office intended to grant the broader monopoly which turns out to be invalid, the courts will not, for the arbitrary purpose of saving the claim, read into it a limitation which it does not have.³ Resorting to all these means of interpretation, including a comparison of the several claims, we are satisfied that claim 10 will not bear this narrow construction; and not the least of the considerations compelling this result is the fact that this peculiar form of filter is the dominant thought of another claim.

² For instances of the general rule that which infringes if later anticipates if earlier, see *Miller v. Eagle*, 151 U. S. 186, 203, 14 Sup. Ct. 310, 38 L. Ed. 121; *Wells v. Curtis* (C. C. A. 6) 66 Fed. 318, 324, 13 C. C. A. 494; *Eames v. Worcester* (C. C. A. 6) 123 Fed. 67, 72, 60 C. C. A. 37; *Grever v. Hoffman* (C. C. A. 6) 202 Fed. 923, 926, 121 C. C. A. 281.

³ That an ambiguous claim will be read in the more limited sense when necessary to sustain its validity, see *Lamb Co. v. Lamb Co.* (C. C. A. 6) 120 Fed. 267, 269, 56 C. C. A. 547. That a limiting element cannot be read into a clear claim to save it from invalidity, see *McCarty v. Railroad*, 160 U. S. 110, 116, 16 Sup. Ct. 240, 40 L. Ed. 358; *Stearns v. Russell* (C. C. A. 6) 85 Fed. 218, 224, 29 C. C. A. 121.

Coming now to examine claim 11 from the same general point of view, we see at once that the claim is ambiguous in respect to whether it calls for the three or the four main elements. It refers to the tank "containing the chemical reacting compartment." If by this is meant the compartment shown and described, and in its specific form, it means a compartment having two chambers with a nearly closed partition between them; but if it intends to refer to the structure more generally, it designates that portion on the treatment side of the main partition, and is satisfied by one chemical treatment compartment. The latter construction spells infringement; the former, escape.

[3] This patent is one having a series of twelve claims. It is sometimes said that in such case each claim should be considered as a separate patent. This statement, accurate enough for some purposes, is misleading, if followed too far; but we must at least say that, usually, proper construction and effect can be given to each claim only by differentiating it from the other claims. Each claim should be capable of such differentiation, else it has no right to exist; and the difficulty often found in doing so, caused by repetition and confusion, does not affect the propriety of this rule of construction in a normal case where it can be clearly applied.⁴ Each claim should be directed at some function, step, or advantage to give it individuality; it should have a characterizing thought or point by which it can be identified; and, if the court which is to construe the claim can find this dominant thought, its task will be simplified. We may make this concrete by supposing that elements A, B, and C are each old in several specific forms, but are operative only in the combination A, B, C. An inventor perfects new and useful specific forms of each, a, b, c. The most desirable form of his invention is the combination a, b, c, and this the inventor considers his perfect work; but he may use and is entitled to monopolize one or two of the old forms in combination with two or one of his new forms. He may have, and the proper drafting of his patent will secure for him, a series of combination claims like this (capitals representing generic, lower case, his new specific forms): (1) a, b, c; (2) a, b, C; (3) a, B, c; (4) a, B, C; (5) A, b, c; (6) A, B, c; (7) A, b, C. In this series, claim 3, for example, we assume is intended to secure the new specific forms, a, c, united with any form, new or old, of the well-known element B; and claim 7 protects the exclusive use of the new form, b, with any variety or equivalent, new or old, of the elements A, C. In practice, however, the claim elements often cannot be effectively labeled "generic" or "specific"; terms are used capable of either construction; and here is the interpretative usefulness of claim differentiation. If, in claim 7, A and C were recited in ambiguous words which might import only the species shown and described, a or c, or might refer to the genus, A or C, comparison of the claims shows that the former narrower monopoly has been variantly and fully

⁴ *Anderson v. Potts* (C. C. A. 7) 108 Fed. 379, 383, 384, 47 C. C. A. 409; *Lamson v. Hillman* (C. C. A. 7) 123 Fed. 416, 419, 59 C. C. A. 510; *Duncan v. Cincinnati Co.* (C. C. A. 6) 171 Fed. 656, 663, 96 C. C. A. 400; *O'Rourke v. McMullen* (C. C. A. 2) 160 Fed. 933, 939, 940, 88 C. C. A. 115; *Thomson-Houston Electric Co. v. Union R. Co.* (C. C. A. 2) 86 Fed. 636, 638, 30 C. C. A. 313.

granted by claims 1, 2, and 5. Hence claim 7 either has the effect above assumed or it is a useless and inoperative repetition of one of the others. Obviously the former alternative should be accepted, and we solve our problem by concluding that the fullest attainable protection of the presence in this combination of the new specific form, b, is the identifying point or characterizing thought of this claim.

[4] We may solve this same problem by more rough and ready methods of claim comparison, since few cases admit of such accurate analysis as our illustration. In practice, the claims rarely show with certainty whether their reference to the named element is generic or specific; they may use or omit reference letters; they may employ the definite or indefinite article; they may or may not say "substantially as described." These things are usually of little help in construction—often none at all.⁵ But if we can be satisfied from the specification and a comparison of the claims that a particular claim was intended and had for its dominant purpose to secure and protect the use, in the combination, of one particular feature, we should give its fullest permissible effect for that purpose, and should not construe it as specific also in its calls for other elements—unless some other rule of construction requires us to do so.

In the present case, the specification describes the progress of the water through the lime chamber and the soda chamber and the settlement tank, giving full descriptions of each. Greth not only describes the two treatment tanks, but says:

"I regard the separate and distinct treatment of the lime in one tank and the soda in another as important."

He then takes up and describes the filter, explaining the division of the filter into sections or units, and the means employed for reversing the flow of water through and cleaning any one unit without disturbing the settlement tank and without interfering with the operation in any other filter unit, whereby a continuous flow of filtered water is secured without interruption by the necessary, frequent cleaning. In each of the first 8 or 9 claims there is an express requirement for a lime tank and a soda treatment tank, separate and distinct from each other; for example, claim 1 says "a separate soda treatment tank"; claim 2, "an independent tank for treatment by a second chemical"; claim 3, "a soda treatment tank being below and entirely separate from the lime treatment tank"; claim 8, "each of which compartments is separate from the rest," etc.

These eight or nine claims make up various combinations and sub-combinations to which we assume the patentee was entitled; each one expressly stating or implying that there were to be two independent and separate chemical treatment tanks. In only part of these nine claims is the filter mentioned at all, and then only in general terms as "a filter," etc. In claim 10, the language is "the combination in a single tank (8) of the various compartments for lime treatment and soda treatment and water settling." The fact that the two chemical treatment tanks are separate is not here emphasized as it has been be-

⁵ *Houser v. Starr* (C. C. A. 6) 203 Fed. 264, 269, 270, 121 C. C. A. 462.

fore, although perhaps it is implied. When, however, we come to claim 11, we find less ambiguity. The language is "the combination of a single tank containing the chemical reacting compartment and an upward flow settling compartment with a series of independent gravity filters," which filters are then specifically described, and their function is pointed out. The question then is: Should this claim, because it refers to "the compartment," be confined to the specific form of compartment which has been made the subject of previous claims, and is here not mentioned? We are satisfied that the patentee thought he had invented a new improvement in filters which would be especially useful in connection with his complete apparatus, but was also useful in combination with any treatment and settlement tanks, and that he intended by his claim to protect the right to use his form of filter in combination with his general type of apparatus. The reference to the filter is and must be considered as specific; the reference to the treatment tank is apt and suitable to be and should be considered as generic. The claim and the structure it fairly imports ought not to be sacrificed to the words found in other parts of the grant.

[5] Another analogous consideration leads to the same result. It is only applying to a patent the ordinary rules of construction applied to other grants, to say that, in determining whether a given element should be considered as present with a limiting effect in a claim in that respect ambiguous, we should observe the occasion or the necessity for its introduction by the claim draftsman. If its presence was necessary to distinguish the claim in point of patentability from the prior art or in point of effect from the other claims, it should be implied; but if it can be of no use in either of these particulars, it should not operate as a limitation.⁶ Of course, we are speaking only of ambiguous claims and not of those where the claim language requires the limitation.⁷ Applying this formula, claim 11 must be treated as calling only broadly for the chemical treating compartment as a unit, distinguished from the settling compartment; the characterizing thought of the claim had to do with the presence in this general combination of Greth's particular improvements in filters. The filter received its water from the top of the settling tank; the settling tank received its water from the bottom of the treatment tank, and, necessarily, from the last treatment tank, if there was more than one; the treatment tank, broadly considered, was a proper element of the combination, because thereby the water was given ultimate character affecting its conduct in the settlement tank; but there could be neither inventive thought nor patentable novelty in adding to this combination one or two or ten tanks in which the water had been treated before it came to the treatment tank from which it passed to the settlement tank. There was therefore no occasion for Greth to include in this claim the preliminary, separate lime treatment tank; ev-

⁶ *Ryder v. Schlichter* (C. C. A. 3) 126 Fed. 487, 491, 492, 61 C. C. A. 469; *Wagner v. Wyckoff* (C. C. A. 2) 151 Fed. 585, 591, 81 C. C. A. 129.

⁷ *Keystone v. Phoenix*, 95 U. S. 274, 278, 24 L. Ed. 344; *Cimiotti v. American*, 198 U. S. 399, 415, 25 Sup. Ct. 697, 49 L. Ed. 1100.

ery presumption must be that he did not unnecessarily limit his claim; and such presumption must prevail where, as here, the selected language is not at all inconsistent with the broader interpretation.

Still further confirmatory of this construction is what happened in the Patent Office. Claim 11 is the evolution of original claim 16, which was drawn merely to the combination of a tank and Greth's battery of independent unit filters with means for separately cleaning each. This was rejected, because anticipated by separately operating filters in connection with the pond or river used for a city water supply. Greth then amended by identifying his tank as "a single tank containing the chemical reacting compartment and an upward flow settlement compartment," and the claim was then allowed. There is here no intimation that the examiner required Greth, or that Greth intended, to confine his claim to a device having two separate chemical reacting compartments. It is true, he said, in making this amendment:

"The two claims [10 and 11] as now drawn, are confined to the exact structure and are different from the prior art in the following particulars: The washing of the filters does not interrupt the flow through the tank, and all the filters are fed only from the top overflow from the tank and not under variable pressure; the filters are independent and are carried on the tank itself, which is necessary to the unity and simplicity of the apparatus aimed at. The filter per se is not supposed to be new, but it has a peculiar function as modified and adapted to co-operate with this tank and other filters of a series in a continuous flow single tank system."

[6] This statement that the claim was confined to the "exact form" falls distinctly short of making either an estoppel or a conclusive admission as to the meaning of the claim in the respect now under discussion. It is not an estoppel, because Greth was not required to put the two separate treatment tanks into this claim in order to get his patent allowed;⁸ it is not a conclusive or at all persuasive admission because the whole context shows he did not have this point in his mind. The claim was confined to the (comparatively) exact form and distinguished from the prior art in all the various particulars which he proceeds to enumerate, but none of them have anything to do with the question of one treatment tank or two.⁹

[7] There remains only the question whether claim 11 discloses patentable invention as compared with the prior art. We have construed this claim as calling, somewhat broadly, for the combination in one continuous flow structure of the chemical treatment (downward flow) compartment, the upward flow settling tank and Greth's battery of overflow filters. So construed, its only distinction from the Patterson English patent or the De la Coux device described in a French publication in 1900, is in the form and operation of the filter. Each of these devices had a single filter at the top of the tank and fed by overflow from the tank. Patterson had a sand filter bed through which

⁸ *Bundy v. Detroit* (C. C. A. 6) 94 Fed. 524, 543, 36 C. C. A. 375; *Wayne v. Benbow* (C. C. A. 8) 168 Fed. 271, 279, 93 C. C. A. 573; *Sly v. Russell* (C. C. A. 6) 189 Fed. 61, 110 C. C. A. 625.

⁹ *Vrooman v. Penhallow* (C. C. A. 6) 179 Fed. 296, 102 C. C. A. 484.

the water passed downwardly. De la Coux had a filter bed through which the water passed upwardly, being first carried in a passageway from the top of the tank to the bottom of the filter. Neither of these disclosed any means of cleaning the filter bed, except by stopping the operation of the entire structure. The idea of a group of filters, each of which could be cut out independently without affecting the work of the others was broadly old, but had been applied nowhere except in city water supply systems or for analogous uses where the lake, river, or pond was the settlement basin and the water was brought therefrom in conduits to the filters. It had never been applied as a part of a unitary structure in the treatment of water to produce a comparatively small continuous flow for industrial purposes. When so united with such a structure, in a compact, unitary, well-designed, and effective form, it makes a new combination, and it produces a result different from what had before been accomplished. It seems now a simple thing to substitute the battery of independently cleanable filters for the single filter; if it had been a common expedient in analogous situations to substitute one for the other, we would have a different question; but this substitution involved both the thought and considerable necessary structural adaptation. The patent has been granted, the defendant by adoption has certified its usefulness, and the lack of anything more than mechanical skill is not clear enough to justify us in saying that there was lack of invention.¹⁰ Our only difficulty in reaching this conclusion arises because De la Coux, in the French publication, in 1909, and referring to his upward-flow filter, said:

"A filter formed of an annular space concentric with the outer wall of the center may be divided into two parts to facilitate the cleaning, without stopping the purification."

This was a suggestion of the very thing which Greth did, and it was in connection with the otherwise complete combination used by Greth; but we think it only a suggestion. Neither drawing nor description told how to do it. Such matter as this must be either a full disclosure equivalent to a full anticipation, or else it is properly classifiable as a suggestion. Greth adapted and combined together the treatment and settlement tanks of De la Coux, the separable unit idea of the city water systems, and the cleaning by reverse flow idea found in other filters. To do this, he devised suitable forms and arrangement for the entire unitary structure, and for the filtering apparatus, gates, and inlet and outlet pipes necessary. All had to be adapted to the combination. The fact that De la Coux suggested it might be done is not enough. It was no more efficient than the suggestion which, in *Herman v. Youngstown Co.*, 191 Fed. 579, 112 C. C. A. 185, we thought not enough to negative invention.

The defendant is using the structure of claim 11, as we interpret that claim. Its structure embodies, just as Greth's device does, a gate

¹⁰ For illustrations of rule that adding an element to an existing structure may or may not be invention, see *Kellogg v. Dean* (C. C. A. 6) 182 Fed. 991, 996, 105 C. C. A. 545; *Houser v. Starr* (C. C. A. 6) 203 Fed. 264, 272, 121 C. C. A. 462. See, also, *Sly v. Russell* (C. C. A. 6) 189 Fed. 61, 66, 110 C. C. 625.

shutting the filter off from the settling compartment, a discharge pipe carrying away to the sewer the overflow from the top of the filter when it is washed, and the ordinary outlet pipe from the bottom of the filter, usually carrying away clear water, but which, by suitable connection, could be made to receive the washing water and force it up from the bottom of the filter bed. That the only time when its operation was observed by witnesses, defendant was cleaning one filter at a time, cut out from the settling tank, by washing the same with a hose instead of by water reversed through the discharge pipe, and considering that the defendant had the complete device capable of use, just as contemplated, by turning a valve or adding the water connection, is not vital. We think it did not escape infringement if it did in fact use the device only in a less perfect and more awkward way. The claim does not specify nor necessarily imply the precise method of cleaning.

The decree must be reversed and the record remanded, with instructions to enter the usual decree for injunction and accounting on claim 11, provided that, within 30 days after the filing of the mandate, complainant has made disclaimer under claim 10 according to the practice established in this circuit.¹¹ The appellant will recover costs of this court, but not, up to this point, in the court below.¹²

¹¹ *Herman v. Youngstown* (C. C. A. 6) 191 Fed. 579, 583, 112 C. C. A. 185.

¹² *Houser v. Starr* (C. C. A. 6) 203 Fed. 264, 275, 121 C. C. A. 462.

VACUUM ENGINEERING CO. v. DUNN.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 42.

1. PATENTS (§ 283*)—SUIT FOR INFRINGEMENT—DEFENSES.

A patentee cannot defend against a suit for infringement brought by his assignee on the ground that he was induced to part with the patent by unfair representations.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448–450, 452; Dec. Dig. § 283.*]

2. PATENTS (§ 64*)—CONSTRUCTION AND SCOPE—PRIOR ART—FOREIGN INVENTION.

Under Rev. St. § 4923 (U. S. Comp. St. 1901, p. 3396), which provides that a patent issued to one who at the time of his application believed himself to be the original and first inventor of the thing patented shall not be held void on account of the invention having been previously known or used in a foreign country, if it had not been patented or described in a printed publication, a United States patent issued to a foreigner for an invention made in a foreign country, but not patented there nor described in a printed publication, cannot be considered in the prior art to limit a patent granted later, but on an application filed while the application for the foreign invention was pending.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 79; Dec. Dig. § 64.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 328*)—INFRINGEMENT—VACUUM CLEANING APPARATUS.

The Locke & Dunn patent, No. 893,853, for an apparatus for removing dust by pneumatic action, and No. 919,369, for suction apparatus for pneumatic cleaning systems, construed, and *held* infringed, except as to claims 2, 3, 4, and 5 of the second patent.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding that defendant has infringed two United States letters patent and granting the relief usual in such cases. The patents in question are No. 893,853, issued July 21, 1908, to William Locke and Elias B. Dunn (the defendant here) for an "apparatus for removing dust by pneumatic action," and also No. 919,369, issued April 27, 1909, to the same persons, for "suction apparatus for pneumatic cleaning systems." The opinion of the District Court will be found in 202 Fed. 967.

See, also, 189 Fed. 634.

E. J. Prindle, of New York City, for appellant.

L. F. H. Betts, of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] Infringement is the only substantial matter in controversy, and the questions mainly discussed are whether certain other patents require such a construction of the claims relied upon that defendant's device will avoid infringement. Defendant was one of the patentees and his interest passed by proper assignments to complainant company in which he became a stockholder. He asserts that he was unfairly treated by his associates and "frozen out" of the company; for any such injury he has his remedy in some appropriate action. He cannot defend a suit for infringement brought by the legal owner of the patent on the ground that he was induced to part with title to the patents by unfair representations. Nor can he dispute the validity of the patents. Therefore his defense has been directed to an effort to show that the claims are narrow in their scope. The patents mainly relied on by him are Schiodt, 854,670 (U. S.) and Kenney, 807,283 and 847,948 (U. S.).

[2] As to the Schiodt patent we agree with Judge Holt that it cannot be considered as part of the prior art. Briefly the facts are these: Schiodt lived in England and made his invention there; it was not patented or published prior to date of the Locke-Dunn patent. Schiodt filed application with United States Patent Office May 3, 1905, Locke & Dunn's application was filed March 9, 1906, and patent issued to them July 21, 1908. Schiodt's patent was granted May 21, 1907. Under section 4923, U. S. Rev. St. (U. S. Comp. St. 1901, p. 3396), Locke & Dunn, original inventors, could not be defeated by knowledge of the invention in a foreign country, when not patented or published there. It makes no difference that the person in the foreign country having such knowledge was also an inventor. Appellant seeks to avoid the statute on the theory that the foreign inventor "gave the *American*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

public a knowledge of his invention through the Patent Office" when he filed his application. But in reality by that act he gave the American public nothing. His application was confidential; the *public* could not see it or be informed of its contents until patent issued upon it. Before that date came Locke & Dunn with their application. Under these circumstances we do not see how the Schiodt patent can be considered "prior art." See our opinion in *Westinghouse M. Company v. General Electric Company* (C. C. A.) 207 Fed. 75, filed June 14, 1913. Even if it were in the prior art we concur with Judge Holt in the conclusion that it does not affect the claims of the patents in suit.

The patents principally relied upon, and the only ones that need be considered are the Kenney patents. Comparing them with the device of complainant's two patents it seems quite plain that, although the various elements are individually old—as they nearly always are in an art which has made any progress, Locke & Dunn effected a radical departure from the cumbrous old system as exemplified in Kenney with separate containers connected by hose or piping. They created a unitary structure, compact and efficient; so far as we can see, a meritorious invention. Of course it does not lie in the mouth of this defendant, himself one of the patentees, to deny that it was an invention sufficiently meritorious to receive a patent. But since he, no longer owning the patent, is making and marketing a unitary vacuum cleaner, which bears a very close resemblance to the structure shown in the second Locke & Dunn patent, differing only in some few structural changes which enable him to escape any charge of Chinese copying, he undertakes, as patentees generally do when sued for infringement by their assignees, to cut down the scope of their claims, so as to make of the combination of the patent, a mere trivial detail of improvement on the older art. Of course a patentee, under such circumstances, is free to argue for a narrow construction of the claims which he framed originally to be broad enough to cover the full scope of his real improvement, but when, after a study of the record, the court reaches the conclusion that the prior art does not require the claims to be cut down as far as he contends they should be, it is not necessary to extend the opinion by any discussion of minute details of structure. It will be sufficient therefore to indicate our conclusions.

[3] The first claim of the earlier Locke & Dunn patent includes "outlet orifices" for discharging what the machine has taken in. The word "orifices" is in the plural, because the Patent Office insisted that it should be plural. But in defendant's machine what goes into the machine comes out again through three orifices; that one of these must be closed while the machine is running seems to us unimportant. In defendant's as in the patentee's machine, there are "means for controlling the flow through these orifices." Two of them are not automatic, but although the description of the patented device indicates that its two orifices are automatic, the claim does not say that they are and the prior art does not require them to be so. Claims 2, 3 and 4 of the earlier Locke & Dunn patent include as an element the connection between "saturating chamber" and "piston chamber" stating it as fol-

lows: Claim 2, saturating chamber "opening into" piston chamber; claim 3, saturating chamber "communicating with" piston chamber; claim 4, saturating chamber "communicating directly" with piston chamber. Defendant contends that, although in his machine the two chambers are brought together into a unitary structure, his two chambers do not communicate directly, because the path followed by the flowing dust and water is not straight, but tortuous with a valve interposed. Comparison, however, of the patent with the Kenney structure which Locke & Dunn undertook to improve, shows very clearly what the passages quoted above from claims 2, 3 and 4 really mean. In Kenney's apparatus the piston chamber and all its appurtenances were in one containing receptacle—in one movable barrel, we might say. The saturating chamber and its appurtenances were in a separate containing receptacle, another barrel.

These two barrels were connected by a flexible hose, so that they might stand upon the floor one foot or ten feet apart, depending on the length of the hose. Locke & Dunn's advance over Kenney was to bring all these parts together in a common receptacle, a marked improvement on Kenney's cumbersome apparatus, and the language quoted from the claims indicates the effecting of this unitary reorganization. We find nothing in the record which requires the quoted words to be taken as narrowing the claims, as defendant contends they should be.

In the later Locke & Dunn patent claim one enumerates as one element a "passage forming direct communication between" piston chamber and operating chamber. Claim 6 enumerates "a passage forming a direct communication" between suction chamber and saturating chamber. The contention that defendant's tortuous passage with a valve differentiates his device is disposed of by what has been already written.

Claims 2, 3, 4 and 5, however, introduce a new element into the combination—quite an efficient one apparently, increasing the application of the pump's suction power. Claim 2 says that the communicating passage enters the piston chamber "intermediate its ends"; claims 3 and 4 say that the passage opens into the piston chamber "midway its ends"; claim 5 describes the passage as being between the saturating chamber and "the central portion of said piston chamber."

Complainant seeks to avoid the effect of these limitations in claims 2, 3, 4, and 5 by contending that the words "piston chamber" as used in those claims do not mean the "piston cylinder," in which the piston is chambered, but the piston cylinder and its appurtenances; in other words, all parts of the machine which are not properly described as saturating chamber. We cannot concur in this construction of the patent. In claim 4 reference is made to one element as the "outlet valves for discharging from said piston chamber." Reference to specifications and drawings shows that these are the outlet valves *12* from the two ends of the piston cylinder. Manifestly the draughtsman of the patent used the words "piston chamber" and "piston cylinder" interchangeably as meaning the same thing. In defendant's structure the dust-laden water is not brought into the piston cylinder midway its

ends, but alternately at either end. It does not infringe these restricted claims of the later patent (2, 3, 4, and 5) and to that extent the decree of the court below should be modified.

Although defendant has prevailed on this appeal as to these four claims, the result is so unimportant and he has been defeated as to so many other claims that no costs of appeal are awarded to either side and the decree in the court below should not be modified as to costs.

Decreed accordingly.

DOMINICK & HAFF v. R. WALLACE & SONS MFG. CO.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 114.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DESIGN FOR SPOONS AND FORKS.

The Crowell design patents, Nos. 40,124, 40,832, and 40,833, for designs for spoons, forks, or similar articles, *held* valid and infringed.

2. PATENTS (§ 252*)—INFRINGEMENT OF DESIGN PATENT—USE OF CHEAPER MATERIAL.

That the owner of a patent for a design for spoons and forks makes them only in sterling silver does not relieve one who copies the design in plated ware from infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 394-396; Dec. Dig. § 252.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Dominick & Haff against the R. Wallace & Sons Manufacturing Company. From orders granting preliminary injunction and denying a motion to vacate the same, defendant appeals. Affirmed.

On appeal from two orders of the District Court for the Southern District of New York. The first order granted a preliminary injunction restraining the defendant from manufacturing or selling or causing to be manufactured or sold table silver flat ware, either in plated or solid silver of patterns known as "Alamo" and "The Mission," and also from manufacturing or selling solid or plated ware in imitation of the complainant's "Queen Anne" pattern or shape. The second order denied a motion to vacate the first order.

John P. Bartlett and R. C. Mitchell, both of New York City, for appellant.

Alan M. Johnson, of New York City, for appellees.

Before COXE and ROGERS, Circuit Judges, and HAZEL, District Judge.

COXE, Circuit Judge. [1] We think the orders should be affirmed, but prefer to rest our decision mainly upon the proposition that the complainant's design patents Nos. 40,124, 40,832 and 40,833 for spoons and forks are valid and infringed. A design patent must of course disclose invention. It must show a novel design, but a very different set of faculties are brought into play from those required in producing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a new machine or a chemical or electrical combination. In each case there must be novelty, but the design need not be useful in the popular sense; it must be beautiful or ornamental, it must appeal to the eye. The policy which protects a design is akin to that which protects the works of an artist, a sculptor or a photographer by copyright. It requires but little invention, in the sense above referred to, to paint a pleasing picture, and yet the picture is protected, because it exhibits the personal characteristics of the artist, and because it is his. So with a design. To produce a graceful pattern for the handle of a spoon or fork requires an exercise by the inventor of "the intuitive faculty of the mind," but in a different sense from that exercised by the inventor of such epoch-making inventions as the safety lamp, the locomotive and the telephone. A design patent necessarily must relate to subject matter comparatively trivial and the courts have looked with greater leniency upon design patents than patents for other inventions. The object of the law is to encourage those who have the industry and genius to originate objects which give pleasure through the sense of sight.

We think the case of *Gorham v. White*, 14 Wall. 511, 20 L. Ed. 731, directly in point. The Supreme Court there sustained a design patent for handles for spoons and forks very similar to the design in question and held as infringements spoons and forks which were not so near the design as those of the defendant in this case. The court said:

"It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense. The appearance may be the result of peculiarity of configuration, or of ornament alone, or of both conjointly, but, in whatever way produced, it is the new thing, or product, which the patent law regards. To speak of the invention as a combination or process, or to treat it as such, is to overlook its peculiarities."

We are referred by defendant to the cuts of other handles for spoons, knives and forks contained in the *Daniel Low Year Book*, in evidence, to prove want of invention, but we think there is a clear dissimilarity in the appearance of such illustrated designs and the appearance of complainant's so-called coffin shaped handle with its threads or grooves around the edges. It makes no difference that the outline of the handle separately was old or that handles of other shapes had grooves or ridges extending along the edges. These features in combination were new and on comparison with prior designs are thought to give to complainant's silver ware a distinctive appearance readily discernible.

It is contended by defendant that diversity of origin arises from the fact that complainant's goods were stamped with the names of different jobbers or retail dealers, but as complainant's trade mark is also stamped thereon, thus indicating origin, the right to protection was not lost, or impaired.

We think, therefore, that the design patent should be sustained and that under the *Gorham* decision the claims are infringed.

[2] The defendant seeks to distinguish this case because it manu-

factures its designs only in plated ware, while the complainant uses sterling silver. The patents, however, make no such restriction and we think that any one who uses the design for spoons and forks infringes. If relief were based solely upon unfair competition it is possible that a different rule might obtain, but in any view, we think we are bound by our recent decision in *Graff, Washbourne & Dunn v. Webster*, 195 Fed. 522, 115 C. C. A. 432. At the bottom of page 524 of 195 Fed., page 434 of 115 C. C. A., we said:

"The defendants' infringement is aggravated by the fact that they use the design on plated ware, whereas the complainant uses it only on sterling silver. The purchaser is thus enabled to secure the design for about one-fifth of its cost, when sold by the complainant."

A purchaser attracted by the Queen Anne pattern would be more apt to purchase from the defendant than the complainant if he could procure the pattern for one-third of the price. The person so selling it would secure the profit without incurring any expense as to the design. If the contention of the defendant be adopted, an infringer will be safe to wait until the sterling silver makers, who employ designers at large salaries, put out their designs and then appropriate them with impunity.

The orders appealed from are affirmed with costs.

FISCHER v. AUTOMOBILE SUPPLY MFG. CO., Inc.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 51.

PATENTS (§ 328*)—INVENTION—FLEXIBLE SHAFT.

The Schmidt & Grundmann patent, No. 969,660, for a flexible shaft, *held* void for lack of patentable invention, in view of the Almond patent, No. 434,748, for a flexible tube.

In Error to the District Court of the United States for the Eastern District of New York.

Action at law by Charles Fischer against the Automobile Supply Manufacturing Company, Incorporated. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 201 Fed. 543.

On writ of error to the District Court for the Eastern District of New York to review a judgment dismissing the amended complaint with costs.

The original complaint alleged infringement of the Schmidt & Grundmann patent No. 969,660 and demanded judgment for damages in the sum of \$6,000. The defendant moved to make the complaint more definite and certain, which motion was granted (199 Fed. 191) and an amended complaint was served which, in paragraph numbered "Tenth," alleges as follows:

"That plaintiff further alleges that the infringement complained of is not by the manufacture of flexible shafts such as shown and illustrated in the Al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mond patent No. 434,748, granted August 19, 1890, or in the Scognamiglio patent No. 785,523 granted March 21, 1905."

Claim 2 of the Almond patent is as follows:

"2. The flexible tube composed of the inner coil *D*, combined with the outer coil *A*, of triangular cross-section, having concave faces *a*, the coil *D* having curved faces *b* corresponding to the concave faces *a* of the coil *A*, the convolutions of the coil *A* being interposed between the convolutions of the coil *D*, so that the concave faces *a a* are in contact with the convex-faces *b*, substantially as herein shown and described."

Claims 1, 3 and 4 of the Schmidt & Grundmann patent are as follows:

"1. A flexible hollow shaft, comprising in combination a spirally coiled wire of circular cross-section, and a spirally coiled body having concave lateral faces abutting against each turn or convolution of said wire."

"3. A flexible hollow shaft comprising in combination a spirally coiled wire of circular cross-section, and a spirally coiled body having concave lateral faces between the turns or convolutions of said wire and abutting against the outside of each turn or convolution of the wire, as set forth.

"4. In a flexible hollow shaft comprising in combination a spirally coiled wire of circular cross-section, and a spirally coiled wire having two concave lateral faces receiving the adjacent sides of the wire of circular cross-section, substantially as shown, and for the purpose specified."

By a disclaimer dated October 1, 1912, the patentees disclaimed:

"The subject-matter of claims 1 and 3, except where the abutting surfaces of the two wires meet and rest against each other for a considerable area, and the radius of curves of the two abutting surfaces are of substantially the same radius.

"Also the subject-matter of claim 4, except where the two concave lateral surfaces are of substantially the same radius."

Thereafter the defendant filed a demurrer to the amended complaint, as further amended by the disclaimer, alleging that it appears upon the face of the complaint that the said patent is invalid, so far as the said claims are concerned, for lack of novelty and invention and that whatever, if anything, is new in the combinations of said claims, respectively, was not the alleged invention of the patentees and that the said combinations are not definitely distinguishable from the parts admitted to have been claimed without right and that what is now claimed is not a material part of the flexible shaft originally patented. Claim 2 of the patent is not relied on.

The opinion of the District Court is reported in 201 Fed. 543.

F. Warren Wright and Fred Francis Weiss, both of New York City, for plaintiff in error.

C. A. L. Massie and Ralph Lane Scott, both of New York City, for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). The question to be determined is whether, in view of the disclosures of the prior patent to Almond of August 19, 1890, the claims in controversy can be sustained. Both patentees had in mind the accomplishment of the same result. Twenty years before the date of the patent in

suit for a "flexible shaft" Almond had obtained a patent for a "flexible tube." The Almond patent expired prior to the date of the commencement of this action, leaving the public free to use the tube described and claimed therein. Although the question arises upon demurrer to the amended complaint, we are permitted to consider the Almond patent because it is specifically referred to in the amended bill. It is manifestly in the interests of both parties that the question of validity should be decided in limine rather than at the end of a long and expensive trial.

The principal argument upon which patentability rests is that the plaintiff's device is lighter and cheaper than that of the defendant. Invention cannot be predicated of cheapness and lightness alone unless these advantages are produced by the exercises of inventive skill. We are unable to find in the patent in suit any change from the Almond construction which is beyond the capacity of the skilled mechanic. The disclaimer does not aid the plaintiff for it will be seen that, even when the claims are limited to a structure where the abutting surfaces of the two wires meet and rest against each other and the radius of the curves of the two abutting surfaces are substantially the same, nothing is disclosed which is not substantially shown by Almond. In his specification he says:

"This curved or concave triangle in contact with the inner coil *D* is shown in Fig. 3 and has the advantage of giving a still greater contact-face and of producing a tighter joint when the tube is bent; but Fig. 5 shows a still better form in that the inner coil *D* has contact-faces *b* on the same curve as the contact-faces *a* of the concave triangles *A*.

One way of making this improved tube is to first place around a mandrel *B* the coil *D* and then to force between the convolutions of that coil the triangular coil *A*, so that the wedge-like convolutions of this coil *A* will enter between the convolutions of the coil *D*, tending to spread them apart, and insuring therefore a tight joint, which will be maintained tight even when the tube is bent to a reasonable degree. In using the tube the mandrel is of course removed."

We fail to find in the patent in suit any patentable novelty, in view of the disclosures of the Almond patent.

The judgment is affirmed with costs.

PARSONS NON-SKID CO., Limited, et al. v. E. J. WILLIS CO.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 12.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CHAIN ARMOR FOR PNEUMATIC TIRES.

The Parsons patent, No. 723,299, for armor for pneumatic tires, *held* not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Parsons Non-Skid Company, Limited, the Weed Chain Tire Grip Company, and Harry D. Weed against the E. J.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Willis Company. Decree for complainants, and defendant appeals. Affirmed.

For opinion below, see 190 Fed. 333.

On appeal from a final decree in equity, holding valid and infringed letters patent to Harry Parsons, No. 723,299, dated March 24, 1903, for armor for pneumatic tires.

The patent has been in general and continuous litigation for the last three years and has been sustained and infringement found in twenty-four instances. Appeals have been taken in at least five of these cases, resulting in each case in an affirmance of the decree of the lower court finding validity and infringement of the patent. These decisions are by the Circuit Court of Appeals of the Sixth, Seventh and Second Circuits and will be found in 192 Fed. 35, 113 C. C. A. 1; 192 Fed. 41, 113 C. C. A. 14; 196 Fed. 951, 118 C. C. A. 105; 203 Fed. 862, 122 C. C. A. 173.

The decision of this court holding the patent valid and infringed is reported in 198 Fed. 399.

Emery, Booth, Janney & Varney, of New York City (Lucius E. Varney, of New York City, of counsel), for appellant.

Duncan & Duncan, of New York City (Frederick S. Duncan, of New York City, of counsel), for appellees.

Before COXE, HUNT, and ROGERS, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). If it be possible in a patent cause to reach a stage where everything that has the remotest bearing on the issue has been said and where every question relating to the validity of the patent has been decided, this would seem to be such a case. All the important questions have been decided over and over again by the unanimous judgments of twenty-four tribunals, six of them being courts of appeal. We have been unable to find a single vital proposition advanced at this hearing which has not been decided against the defendants over and over again.

To enter upon a general discussion of all the propositions argued would involve a repetition of what we have said in the Atlas Case and what was said by the Court of Appeals of the Seventh Circuit in the Excelsior Supply Case. We have looked in vain to find any new defense which injuriously affects the patent.

It can hardly be expected, with such an unbroken current of authority in favor of the patent, that this court will discard its former decision and hold the Parsons patent invalid unless new and cogent proof is presented which convinces us that the long array of prior decisions has been erroneous. No such proof has been presented. We are asked to consider letters patent No. 768,495, granted August 23, 1904, application filed February, 1904, "not to establish that Weed was a prior inventor, but as an aid to a completer understanding of the nature of Parsons' discovery and to establish the entire subordination of this discovery to a question of structure." In view of the fact that Parsons' application was filed December 17, 1902, and his patent issued March 24, 1903, over ten months before the Weed patent was applied for, we are unable to perceive what legitimate bearing the latter patent has upon the present issue. The Parsons patent is not difficult to comprehend and we think it can be clearly

understood without resort to the art as it existed nearly a year after the patent was issued.

The Clark English patent for an "improved non-slipping band or appliance for pneumatic tires of bicycles" was fully considered by Judge Sanborn in *Weed Chain Co. v. Excelsior Co.* (C. C.) 179 Fed. 232. He says at page 235:

"The Clark-Wertheim-Rosenberg patents represent the same invention patented in different countries. In the specification of each and all of them it is said that the device (which was made for bicycle tires) is so embedded in the rubber of the tire casing that it cannot change its position as a whole. By making some changes disclosed by the Parsons invention it is now possible to obtain fair results from its use although it rapidly wears out. The Clark invention was for a different combination and though not entirely inoperative possesses little utility."

The tests made of this device make it clear that it does not operate upon the principle of the Parsons chain grip and that it would be useless if applied to the wheels of an automobile. It is designed to fit rigidly on the tire and has no equivalent for the Parsons loosely fitting cross chains, which creep and do not pound the road and wear out the tire.

We cannot resist the conclusion that the Clark traction bands designed to fit snugly around the tire and not to slip or creep would be practically useless if applied to an automobile and in no way anticipate the claims of the Parsons patent.

The decree is affirmed with costs.

CHEATHAM ELECTRIC SWITCHING DEVICE CO. v. TRANSIT DEVELOPMENT CO. et al.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 79.

1. JUDGMENT (§ 956*)—RECORD IN PRIOR ACTION—EVIDENCE.

In a suit in equity for infringement of patents, the record in a prior action at law between the same parties for infringement of the same patents is admissible, to determine exactly what questions were rendered res judicata by the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1822-1825; Dec. Dig. § 956.*]

2. JUDGMENT (§ 739*)—SUIT FOR INFRINGEMENT—RES JUDICATA.

Where defendants in an action at law for infringement after commencement of the action installed and used other devices of the same kind as those subsequently held to infringe, which for that reason could not be recovered for therein, plaintiff may recover in a suit in equity for such infringement.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1105, 1267; Dec. Dig. § 739.*]

Appeal from the District Court of the United States for the Eastern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by the Cheatham Electric Switching Device Company against the Transit Development Company and another. Decree for complainant, and defendants appeal. Affirmed.

For opinion below, see 203 Fed. 285.

T. J. Johnston, of New York City, for appellants.

O. E. Edwards, Jr., of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an interlocutory decree, awarding an injunction and accounting for infringement of United States letters patent 612,702 and 917,541 for an automatic railway switch. The bill was filed July 14, 1911.

[1] The complainant offered in evidence what was stipulated to be a copy of the record in two actions at law begun January 4, 1911, which were tried together, against the defendants in this cause, to recover damages for infringement of the same patents. It was objected that the witnesses should be called and examined. This is not like an attempt to use the testimony of witnesses on a former trial in a subsequent trial, but simply to ascertain exactly what controversies were settled by the judgment. For this purpose it is proper to examine the record itself. *Packet Co. v. Sickles*, 5 Wall. 580, 592, 18 L. Ed. 550. The record discloses that the jury awarded damages for infringement of 8 switch-throwing mechanisms known as "Type No. 14." The judgment is, therefore, sufficiently certain to be *res adjudicata*, in this suit between the same parties, that at least one of the claims of each of the patents sued on is valid and that the defendants have infringed if they have sold or used switches like Type No. 14.

[2] It is stipulated that the defendant, the Transit Company, has purchased and installed 35 switching devices like Type No. 14. The stipulation shows that 7 of these devices have been installed since the beginning of the action at law on the line of the Nassau Railroad Company. As only damages for infringement before action brought can be recovered at law (3 Robinson on Patents, § 1058), these switches could not have been recovered for in the actions at law. Therefore, at least as to them, the Nassau Company as a user is an infringer. The Transit Company under an agreement with the Nassau Company furnishes the electric power by which through the movement of cars these switches are operated and also maintains the switches in repair. Whether this makes it a contributory infringer is a question which need not now be passed upon. It installed these switches since the beginning of the action at law, a circumstance which makes it a direct infringer. These considerations are enough to sustain the decree. The extent of the infringement will be a subject for inquiry on the accounting.

Decree affirmed, with costs.

DENISON et al. v. GIFFORD et al.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 69.

PATENTS (§ 301*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where infringement was doubtful, and the suit was not against the maker of the alleged infringing device, but against one who had sold none of them except in a single instance, when they were procured at the solicitation of an agent of complainant, a preliminary injunction was properly denied.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 489–495; Dec. Dig. § 301.*]

Grounds for denial of preliminary injunctions in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Howard P. Denison and the Metal Stamping Company against John A. Gifford and Harry H. Gifford, doing business as John A. Gifford & Son. From an order denying a motion for a preliminary injunction, complainants appeal. Affirmed.

This cause comes here upon appeal from an order denying complainants' motion for a preliminary injunction. It is the ordinary suit in equity to restrain alleged infringement of United States patent No. 591,561, issued October 12, 1897, to Moyer and others for improvement in thill couplings.

W. A. Megrath, of New York City (C. C. Billings, of New York City, of counsel), for appellants.

D. W. Cooper, of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. The question whether or not the particular device complained of infringes any claim of this patent is by no means free from doubt; it can be more satisfactorily disposed of at the trial than in advance upon affidavits. In such case it is not the practice to discuss or dispose of such question upon application for injunction pendente lite, unless some very strong case of future irreparable injury is made out. No such case is shown here. The suit is not brought against the maker of the alleged infringing device, but against a dealer who (except in one instance) has sold none of them, has never carried them in stock, nor offered them for sale, nor so far as the record discloses has any intention of selling any. In the single instance above referred to an agent of complainant asked defendant to send to the maker and get four of these thill couplings; the only sale defendant ever made of them was thus on complainant's own solicitation. There seems no danger that defendant will infringe between now and the time of trial. We see no reason to alter the disposition made of the motion in the District Court.

The order is affirmed, with costs of this appeal.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WOLLENSAK OPTICAL CO. v. ILEX OPTICAL CO.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 21.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PHOTOGRAPHIC SHUTTER.

The Wollensak patents, No. 679,134 and No. 700,878, both relating to photographic shutters, narrowly construed, as they must be in view of the prior art, *held* not infringed.

Appeal from the District Court of the United States for the Western District of New York.

Suit in equity by the Wollensak Optical Company against the Ilex Optical Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 199 Fed. 923.

This cause comes here upon appeal from a decree of the District Court, Western District of New York, which dismissed a bill for alleged infringement of two U. S. patents. The patents are Nos. 679,134 and 700,878, both granted to Andrew Wollensak and both relating to photographic shutters. The opinion of the District Judge will be found in 199 Fed. 923.

C. Schuyler Davis, of Rochester, N. Y. (Davis & Dorsey, of Rochester, N. Y., of counsel), for appellant.

H. H. Simms, of Rochester, N. Y., and J. Edgar Bull, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. It is manifest that this is a crowded art and that there can be no broad range of equivalents. All that the first patent shows is an arrangement inter sese of four operating terminals, all integral with the so-called master-lever. Assuming that patentee's arrangement was a novel one and that it accomplished sufficient improvement to sustain a patent, it is not infringed by an arrangement, which, as defendant's does, omits one of these four parts.

As to the second patent. In such a crowded art it must be confined to the details shown and embodied in the claims. We concur in Judge Hazel's disposition of the cause and see no reason to add anything to his discussion.

The decree is affirmed with costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BUSH & LANE PIANO CO. v. BECKER BROS.

(District Court, S. D. New York. November 8, 1913.)

1. PATENTS (§ 99*)—DESIGNS—DESCRIPTION.

A written description is unnecessary in a design patent, where a drawing or photograph attached clearly shows the design.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 133-135, 137-139; Dec. Dig. § 99.*]

2. PATENTS (§ 43*)—DESIGNS—COMBINATION OF OLD FEATURES.

While a design patent must involve invention, its validity is not negatived by combined features that were separately old, or by features that were separately found in other articles of the same class.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 50; Dec. Dig. § 43.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DESIGN FOR PIANO CASE.

The Lane design patent, No. 37,501, for a design for a piano case, held not anticipated, valid, and infringed.

4. PATENTS (§ 252*)—INFRINGEMENT—DESIGNS.

To constitute infringement of a design patent, it is not essential that defendant's design should be a Chinese copy of that of the patent; but it is sufficient if it imparts to the mind the same general idea of appearance and ornamentation, so that purchasers might be deceived.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 394-396; Dec. Dig. § 252.*]

In Equity. Suit by the Bush & Lane Piano Company against Becker Bros. On final hearing. Decree for complainant.

John J. O'Connell, of New York City, for complainant.

John McCormick, of New York City, for defendant.

HAZEL, District Judge. The bill is for infringement of design patent No. 37,501, dated July 25, 1905, for a piano case, and issued to Walter Lane, complainant's assignor. The principal defenses are want of invention, failure to sufficiently describe the design, and non-infringement.

[1] The file wrapper shows that the original application for patent stated that some of the features of the design were the rounded pillar-like corners of the perpendicular ends of the piano case and the round columns under the keyboard extension; but later, at the suggestion of the Patent Office, the detailed description was canceled, and simply the ornamental design for piano case as shown was disclosed, a picture being attached to the patent showing a perspective view of an upright piano embodying the design. The question of whether the substitution of a photograph or drawing attached to the patent for a verbal description avoids the patent is now well settled, for in *Dobson v. Dorman*, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. Ed. 63, it was decided in favor of the validity of the patent. The drawing of the patent in suit so clearly presents an upright piano with rounded pillars and rounded corners, with upper and lower rectangular paneling—the various elements of the design in question—that a written description

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

would seem to be wholly unnecessary. See, also, *Ashley v. Samuel C. Tatum Co.*, 186 Fed. 339, 108 C. C. A. 539.

It is contended by the defendant that according to the prior art it was common to ornament upright pianos by putting on the front thereof, at either end of the upper frame, a pilaster or engaged column, either round or square, and to panel the frame and surround it with moulding. Reference, however, to the prior patents and illustrated catalogues in evidence does not show the combination of the elements in suit. Structurally complainant's design for its piano is the same in general appearance as designs for other upright pianos; but it is undeniable that the prior art does not disclose the combination of elements of complainant's design patent, or an upright piano having the massive and attractive appearance of the design in question. On comparison with the prior art, because of the configuration of the columns, the paneling, and the substantiality thereof, it is easily distinguishable from other upright pianos.

[2] It is true enough that a design patent must involve invention; but its validity is not negated by combined features that were separately old, or by features that were separately found in other articles of this class. I think the combination was new and novel, presenting a distinctive appearance to the piano, an appearance different from that of prior upright pianos, and that the patent granted should be protected from wrongful use by rival dealers. As said by Judge Cox, writing for the Circuit Court of Appeals in *Dominick & Haff v. R. Wallace & Sons Mfg. Co.*, 209 Fed. 223, recently decided:

"The policy which protects a design is akin to that which protects the works of an artist, a sculptor, or photographer by copyright. It requires but little invention, in the sense above referred to, to paint a pleasing picture, and yet the picture is protected, because it represents the personal characteristics of the artist, and because it is his. So with a design."

And in *Untermeyer v. Freund* (C. C.) 37 Fed. 342, it was held that, where there is doubt of the patentability of a design for ornamentation, the fact that it "creates a demand for the goods of its originator, even though it be simple, and does not show a wide departure from other designs," will entitle it to protection. That complainant's design for piano case was popular, and that pianos constructed in accordance therewith sold readily, are fairly shown by the testimony found in the record.

[3] Inspection of the picture in evidence of the upright piano manufactured and sold by the defendant company compels me to conclude that the defendant's production has not only the same general appearance as the patented design, but that there is such a close simulation as to the details of construction—the rounded pilasters or columns, the upper and lower paneling, and the massiveness thereof—that a person desiring to buy an upright piano constructed in accordance with the original patented design could, because of the said similarity of appearance, be deceived into buying defendant's piano.

[4] To constitute infringement, it is not absolutely essential that the defendant's design for its piano should be a Chinese copy of complainant's; but, under the doctrine of *Gorham Co. v. White*, 14 Wall.

511, 20 L. Ed. 731, infringement is complete if the defendant's piano imparts to the mind the same general idea of ornamentation and appearance as does complainant's design.

There were other defenses presented, which have been inquired into; but they are either insufficient in law or are not borne out by the facts.

The complainant is entitled to a decree for an accounting, with costs; but, as the patent has expired, there will be no injunction.

FORD MOTOR CO. v. INTERNATIONAL AUTOMOBILE LEAGUE et al.

(District Court, W. D. New York. October 30, 1913.)

PATENTS (§ 191*) — RIGHTS OF PATENTEE — LICENSE AGREEMENT RESTRICTING PRICES.

A patentee cannot restrict the price at which the patented article may be sold in the open market by a form of license agreement between him and dealers so as to bind a good-faith purchaser from such dealers.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 268; Dec. Dig. § 191.*]

In Equity. Suit by the Ford Motor Company against the International Automobile League and others. On motion to vacate order for preliminary injunction and dismiss bill. Motion to dismiss denied. Motion to vacate injunction order granted.

Lucking, Helfman, Lucking & Hanlon, of Detroit, Mich., for complainant.

Corcoran & Corcoran, of Buffalo, N. Y., for defendant.

HAZEL, District Judge. In the month of March, 1913, this court made an order specially enjoining the defendants herein from representing or advertising that they could or would sell to their members or customers the Ford automobile with its patented parts at less than the regular prices of the Ford Motor Company, and, generally, from infringing complainant's patents and license restrictions. Subsequently the Supreme Court of the United States, in *Bauer & Cie et al. v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041 (the Sanatogen Case), held that:

"A patentee may not by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold."

And now this motion comes on to vacate the preliminary injunction and dismiss the bill.

Argument on the motion has been had and the facts and law fully considered, and I am of opinion that the case comes within the principle enunciated in the Sanatogen Case, *supra*, and in *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, which cases are not essentially different as to facts. In the Sanatogen Case the disregarded restriction was a notice on the package as to the price

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at which the article could be sold by the retailer, while in this case it was a condition of the contract by which the dealer or dealers agreed to sell the Ford automobiles at the list price currently advertised by the complainant company. It may fairly be presumed from the dealer's license and agreement to which my attention is drawn that the dealers who sold the automobiles to the defendants, or either of them, were the full owners thereof, having paid for the same in accordance with the terms of the license, and therefore were not merely in possession under the ordinary conditional contract of sale. As there was no privity of contract between the complainant company and the defendants, the latter, in my judgment, had the right to purchase the machines in question with their patented parts from dealers at a discount unless there was fraud or deceit in the transaction; but, giving effect to the doctrine of the Sanatogen Case, the full purchase price having been paid, the complainant's monopoly did not extend per se to the defendants who purchased from its dealers. Such being the fact, the complainant had parted with title to the automobiles in question, and its control over them then ceased as to third parties. To my mind, it makes no difference as to the third parties whether the complainant's restriction as to future sales prices by retailers was by notice attached to the article or directly by contract with its jobbers or retailers.

It is not improbable that the phrasing of the bill is sufficiently comprehensive to warrant granting an injunction at final hearing on the ground that the defendants had full knowledge of the license contracts restricting the resale price and fraudulently induced the licensees to break their contracts with the complainant company; but the injunction was granted upon another theory, namely, that the patentee had a right to restrict the price at which his article should be sold in the open market by a form of license agreement between the complainant company and its dealers, and I am now disinclined to continue it on such grounds.

In these circumstances I think that the preliminary injunction should be vacated; but, as the complainant may be entitled at final hearing to injunctive relief, the motion to dismiss the bill is denied.

GENERAL ELECTRIC CO. v. AMERICAN BRASS & COPPER CO.

(Circuit Court, S. D. New York. August 9, 1911.)

1. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—PLEADING.

Under the practice in the Second Circuit, complainant in a suit for infringement may declare on the patent generally and postpone the statement of the particular claims relied on until the taking of the testimony begins.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

2. PATENTS (§ 328*)—VALIDITY—INFRINGEMENT.

The Sargent patent, No. 665,582, for a lamp socket, *held* valid and *infringed* on motion for preliminary injunction.

This cause comes before the court upon a demurrer to the bill and also on motion for preliminary injunction.

Samuel Owen Edmonds, of New York City, for complainant.

Arthur P. Greeley, of Washington, D. C., for defendant.

LACOMBE, Circuit Judge. [1] The suit is for infringement of letters patent 665,582 and 751,029, and the only ground of demurrer submitted is that the bill does not state which of the claims of the two patents sued upon are alleged to be infringed. Defendant relies upon *Eastwood v. Cutter-Hammer Company* (C. C.) 148 Fed. 718.

Whatever may be the rule elsewhere, it is well settled practice in this circuit to declare upon a patent and to postpone the statement of the particular claims alleged to be infringed until the taking of the testimony begins. We see no reason to change this practice. The liberality with which applications to amend answers are treated, after the taking of complainant's *prima facie* proofs indicates his contentions, secures defendant every facility to interpose and maintain his defenses.

[2] As to the motion for preliminary injunction on patent 665,582: This patent has been adjudicated at final hearing in the district of New Jersey and the few additional patents introduced here do not add anything material to the statement of the prior art which was before Judge Cross. His decision as to the validity of the patent and the scope of claim II (the only one relied upon on this motion) will, therefore, be followed. No functional difference is apparent between the "projection" of the patent and the "groove" of defendant's structure, as a means for securing the insulating lining in place.

The failure to move against defendant while complainant was seeking to maintain the validity of his patent and to have its claims construed in the New Jersey suit cannot be charged against it as laches.

Motion for preliminary injunction is granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CRANE IRON WORKS v. UNITED STATES (INTERSTATE COMMERCE COMMISSION et al., Interveners).

(Commerce Court. June 7, 1912.)

No. 55.

1. COMMERCE (§ 95*)—INTERSTATE COMMERCE COMMISSION—ESTABLISHING JOINT RATES—DISCRETION—REVIEW.

The power conferred on the Interstate Commerce Commission by the Interstate Commerce Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384, as amended by Act June 18, 1910, c. 309, § 12, 36 Stat. 551 (U. S. Comp. St. Supp. 1911, p. 1299), to establish joint rates, is discretionary, and its refusal to establish such a rate is within its discretion, and not reviewable by the Commerce Court.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 145; Dec. Dig. § 95.*]

2. CARRIERS (§ 33*)—COMMON CARRIERS—PLANT FACILITIES.

Plant facilities in the way of railroad tracks and engines installed by an iron company and used in moving cars between different parts of the plant, and to and from an exchange track connecting on the grounds of the company with the track of an interstate railroad, did not cease to be such facilities as to the iron works by the fact that they were transferred to a separate corporation incorporated as a railroad company under the laws of the state, nor because the tracks were extended and with the equipment also used in moving cars between the exchange track and other nearby industries, in which service the company became a common carrier under the laws of the state, and the through railroad is under no legal obligation to pay such company for switching services rendered to the iron works, whose duty it is to receive and deliver its cars at the exchange track, even though the through road pays for such services when rendered to the other connecting plants.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 86-90; Dec. Dig. § 33.*]

In Equity. Suit by the Crane Iron Works, petitioner, against the United States, respondent, and the Interstate Commerce Commission and others, interveners. On motions to dismiss petition. Motions granted.

For opinions of Interstate Commerce Commission, see 15 Interst. Com. Com'n R. 248, and 17 Interst. Com. Com'n R. 514.

William A. Glasgow, Jr., of Philadelphia, Pa., and Cyrus G. Derr, of Reading, Pa. (Charles F. Diggs, of Washington, D. C., on the brief), for petitioner.

Winfred T. Denison, Asst. Atty. Gen., of Washington, D. C. (Thurlow M. Gordon, Special Asst. Atty. Gen., of Washington, D. C., on the brief), for the United States.

P. J. Farrell, of Washington, D. C., for the Interstate Commerce Commission.

Jackson E. Reynolds, of New York City, for the Central Railroad Company of New Jersey, intervener.

Before KNAPP, Presiding Judge, and ARCHBALD, CARLAND, and MACK, Associate Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

KNAPP, Presiding Judge. The petitioner in this case, the Crane Iron Works, instituted proceedings before the Interstate Commerce Commission against the Central Railroad Company of New Jersey and the Crane Railroad Company to procure an order requiring the defendant railroads to establish through routes and joint rates on certain commodities between points on the Crane Railroad and points in the state of New Jersey on the lines of the Central Railroad; and also for reparation on account of previous shipments. After full hearing, the Commission made a report (17 Interst. Com. Com'n R. 514) to the effect that petitioner was not entitled to the relief sought, and thereupon entered an order dismissing the proceedings. Thereafter this suit was brought to set aside and annul the Commission's order of dismissal on grounds which will be hereafter stated. The United States filed a motion to dismiss on the ground that the petition did not state a cause of action, and a like motion to dismiss was filed by the Commission which had intervened. On these motions the case has been argued and submitted.

There had been a previous application to the Commission for the same purpose by the Crane Railroad Company, which the Commission also dismissed, as appears by its report and order therein. 15 Interst. Com. Com'n R. 248. Both reports are attached to and made a part of the petition now before us, and from these reports and the petition itself the following facts appear:

The petitioner is a corporation organized under the laws of Pennsylvania, and located in the borough of Catasauqua, in that state. It was incorporated about the year 1895 for the purpose of acquiring the plant and property of the Crane Iron Company, which had for many years carried on the business denoted by its name. At that time the plant consisted of three blast furnaces, together with appurtenant buildings, storage bins, etc., and a private railroad connected with the works. It does not appear when this railroad was constructed, or when it was extended to connect with exchange tracks of the Central Railroad and other long-line carriers; but it does appear to have been in use for the purposes of the iron plant for more than 30 years.

In the operation of this plant, it is necessary to transport loaded cars received by rail to various points within the limits of the plant for unloading, to transport cars which have been loaded with its product from various points within the plant to the line of railway by which they are taken to destination, and also to some extent necessary to move cars from point to point within the plant itself. For these purposes, the iron works long ago laid down rails extending from a connection with the Central Railroad to the various points within its plant where cars were to be placed. The line of the Central Railroad extends through the premises of the iron works and the point where the two railroads connect is now and always has been upon the iron works' land. The iron works also provided the necessary locomotives for operating the various tracks which it had built to accommodate the needs of its plant. In actual operation loaded cars destined for the iron works were placed by the Central Railroad upon a track known as the exchange track, from which they were taken by the locomotives

of the iron works and hauled to the required point within its plant. When cars were loaded for movement out, they were taken by the same locomotives and placed upon the exchange track, where the Central Railroad received and transported them to destination. These locomotives were also used for moving cars from point to point within the plant as might be desired.

For this service the petitioner has never received, and, until the organization of the Crane Railroad, had never claimed that it should receive, compensation from the Central Railroad. Indeed, it seems to have been assumed that these tracks and engines were a necessary part of the plant of the iron works whose business could not be properly carried on without them.

In process of time a few other industries, perhaps half a dozen, were located in close proximity to the premises of the iron works, though not upon its land, and these industries were so situated that loaded cars could be transported between the tracks of the Central Railroad and the industry only over the rails of the Crane Iron Works. For the purpose of serving these industries, the Crane Iron Works extended its rails beyond its own land to these several plants. Cars for these industries were placed upon the same track with those intended for the iron works and taken by the locomotives of the iron works over the rails of that company to the several industries. For this service the iron works made a charge to the industry which seems to have been usually \$2 a car. The different railroads bringing these cars to Catasauqua, including the Central Railroad, paid to the iron works towards defraying this charge at first five cents and subsequently six cents per ton. This condition seems to have continued for many years, during which time, as above stated, the iron works neither claimed nor received any compensation for handling its own freight.

Under the statutes of Pennsylvania a private railroad cannot connect with a public railroad except for handling the business of the owners of the private railroad, and the iron works was advised that it had no lawful right to perform this switching service for the other industries. Accordingly, in 1905, the Crane Railroad Company was incorporated, and the tracks and other property used by the iron works in connection with its railroad were conveyed to the Crane Railroad Company, together with a strip of land 10 feet wide wherever its rails were laid upon the land of the iron works, and also whatever rights of way it might have in reaching the other industries in question. The capital stock of both the Crane Iron Works and the Crane Railroad Company is owned by the Empire Iron & Steel Company, and the management of the Crane Railroad Company after the incorporation continued in the same manner as before, although the operating accounts of the two companies were kept entirely separate.

Although the Crane Railroad Company was organized in 1905, it did not begin business on its own account until the following year, since which time it has charged both to the other industries and to the Crane Iron Works \$2 per car for this switching service, and it is insisted that the various railroads entering Catasauqua should absorb this switching charge. The Central Railroad has declined to make

any allowance on account of cars handled for the Crane Iron Works, but has made an allowance of six cents per ton on traffic consigned to or from the other industries.

The principal contention of petitioner appears to be that the Crane Railroad Company is a common carrier subject to the provisions of the act to regulate commerce and the jurisdiction of the Commission; that this was conclusively established by the evidence before the Commission; that the Commission in failing to find the fact accordingly and leaving it undetermined committed an error of law; that as such common carrier the Crane Railroad Company is legally entitled to compensation for the transportation service which it is alleged to perform for petitioner; and that, therefore, it was error of law for the Commission to refuse the relief which the petitioner sought to secure. Incidentally, and in support of the main contention, it is further claimed that the dismissal order was erroneous because the undisputed evidence established as matter of law unjust discrimination on the part of the Central Railroad of New Jersey, in that it pays the Crane Railroad, out of the tariff charge which it collects, for transporting cars to and from the other industries located on the tracks of the Crane Railroad, but refuses to pay anything for transporting cars to or from the Crane Iron Works.

The Crane Railroad Company is organized under the railroad law of Pennsylvania, which, among other things, declares that all railroads so organized shall be common carriers. In that state it has undoubtedly the legal status of a common carrier, with such privileges and obligations as pertain to railroad corporations in Pennsylvania. It is not necessary to discuss whether the Crane Railroad is in fact a common carrier within the meaning of that term as used in the act to regulate commerce, because we shall assume for the purposes of this case that it is a common carrier subject to the act, and the matters in dispute will be decided on that assumption.

But, granting all that is claimed in this regard, it does not follow, as we think, that petitioner is therefore entitled to have joint rates established, or that the dismissal order of the Commission is for any reason unlawful. The substantive basis of petitioner's contention is the following provision in the first section of the act (Act Feb. 4, 1887, c. 104, 24 Stat. 379, as amended by Act June 18, 1910, c. 309, § 7, 36 Stat. 544 [U. S. Comp. St. Supp. 1911, p. 1285]):

"And it shall be the duty of every carrier subject to the provisions of this act * * * to establish through routes and just and reasonable rates applicable thereto."

It will be observed that the obligation to establish "joint rates" is not imposed, but only the obligation to establish "through routes," with just and reasonable rates applicable thereto. Undoubtedly, connecting carriers are required to facilitate the movement of traffic by providing through routes, but the application of joint rates to such routes is not obligatory except as required by the Commission after notice and hearing. If through routes are voluntarily established, the rates fixed for transportation over such routes are subject to the regulating power of the Commission; and the Commission may require joint rates to

be provided, fixing the amount thereof and the divisions between the several carriers when they are unable to agree among themselves.

If the Crane Railroad be regarded as performing the service of a public carrier, a service which the shipper is not required to provide, and not a private service which the shipper must furnish at its own expense, we see no reason to doubt upon the facts now disclosed that through routes in this case have been provided and are in full operation. All the facilities of interchange and through movement are in current use, and traffic, in fact, moves freely from points on one road to points on the other. Indeed, we do not perceive that anything more or different could be done by either road to bring about the physical conditions and incidents which constitute through routes.

[1] The authority of the Commission to require joint rates is found in a paragraph in the fifteenth section of the act, which reads as follows:

"The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line."

That this invests the Commission with discretionary power, and was so intended, cannot be seriously doubted. Not only is the grant of authority permissive in form, but the entire paragraph contemplates the exercise of judgment upon the facts disclosed, and implies the right and duty of the Commission to order or decline to order joint rates, as the circumstances and conditions developed in each inquiry may seem to require. The provision for a hearing upon complaint, or the equivalent initiative of the Commission, involves the liberty and obligation of the administrative tribunal to decide a controversy of this nature upon its merits with due regard to the interests of both shippers and carriers. In short, it seems clear to us that the question of establishing joint rates or declining to do so rests in the discretion of the Commission, and it is equally clear that the refusal of the Commission in this case was a lawful and proper exercise of that discretion.

[2] But the dismissal order in question rests upon another basis, which will be briefly considered. Upon all the circumstances connected with the location, construction, and operation of the Crane Railroad, the Commission found as an ultimate fact that, as to the Crane Iron Works, it was a mere plant facility, performing services which the iron works should perform for itself if it desired such services, and that the Central Railroad was under no obligation to pay the Crane Railroad for the switching service which it performs for the iron works, and, indeed, could not lawfully do so. We see no reason to doubt the correctness of this conclusion. The Commission had previously pointed out the distinction between those operations which constitute a plant facility and the legitimate services of a common carrier (*General Electric Company v. N. Y. C. & H. R. R. R. Co. et al.*, 14

Interst. Com. Com'n R. 237; *Solvay Process Company v. D., L. & W. R. R. Co.*, 14 Interst. Com. Com'n R. 246), and the observations made in these illustrative cases seem to us to express a sound and wholesome principle. That there was substantial evidence to sustain the finding of the Commission as to the character of the services rendered is not open to reasonable question, and, this being so, the conclusion must be accepted accordingly.

But the argument is earnestly pressed that such a relation cannot as matter of law be predicated of an incorporated railroad which is declared to be a common carrier by the fundamental law of the state of its creation. In other words, it is insisted that the Crane Railroad, being in law a common carrier and performing the functions of a common carrier, cannot be a plant facility of the Crane Iron Works, but must be regarded as a common carrier for the Crane Iron Works, and entitled as a matter of legal right to a just share of the transportation charge which the Central Railroad makes and collects for carrying the traffic of the iron works; and on this theory it is argued that the finding and conclusion of the Commission involve an error of law which this court should correct.

We are constrained to reject this contention. Whether the Crane Railroad is a plant facility as to the Crane Iron Works or a common carrier of the traffic of that concern must be held to be a question of fact which is not affected by the circumstance of incorporation. We understand it to be admitted that the operations of this railroad when it was owned and operated by the iron works were the operations of a plant facility. It is contended, however, when the railroad was separately incorporated and passed from the ownership of the iron works, that its relation to the latter and the legal character of its services became immediately changed. That is to say, the mere fact of the separation of ownership and the transfer of the title and control of the railroad property to a new corporation, although there was not the slightest change in what was actually done, operated in legal effect to transform a plant facility into a common carrier and to impose obligations on the Central Railroad, as to the traffic of the iron works, which it could not theretofore have been required to assume. We cannot believe that any such result was accomplished. The rights and duties of the Central Railroad respecting the iron works could not thus be altered. If its obligations as a common carrier were fully discharged and its tariff rate earned by delivering cars to and taking them from the exchange tracks before the iron works parted with its railroad, its rights and duties respecting that concern were neither increased nor diminished by the creation of the Crane Railroad. The services rendered to the iron works continuing to be precisely the same in point of fact, this railroad continued to be utilized as the facility of the iron works' plant in the same way after as before incorporation.

Nor do we perceive any serious objection to regarding a given agency as a plant facility of a particular shipper, although a common carrier as to other shippers. Whether considered from the standpoint of law or of practical administration, it seems reasonable to hold, as

the Commission virtually held in this case, that a railroad of the kind in question may have this dual character and perform services for one concern which are not the services of a common carrier, but which that concern is bound to provide for itself, notwithstanding it occupies the relation of a common carrier to other concerns and the public generally. Concededly, the work which the Crane Railroad does in moving cars between different points in the iron works' plant has none of the incidents of common carriage, and why may not the same thing be affirmed of the work it does in switching cars for the iron works to and from the exchange track with the Central Railroad, even if the work it does for the other industries makes it as to them or the shippers of Catasauqua a common carrier?

It is unnecessary to discuss the charge of discrimination except to say that the Commission has found, upon evidence which is clearly substantial, that the refusal of the Central Railroad to pay switching charges on traffic handled for the iron works, while at the same time paying switching charges on traffic handled for the other industries, is not an undue prejudice to the one or an undue preference to the others.

In the concluding paragraph of the report upon which the dismissal order is based the Commission summarizes the situation as follows:

"The complaint attacks certain rates as unreasonable, and asks for the establishment of certain joint rates between definite points. The complainant [petitioner] does not contend that these rates are unreasonable except by the amount of this switching charge, nor does it ask for the establishment of joint rates except for the purpose of compelling the defendant [Central Railroad] to pay the Crane Railroad for the performance of this switching service. Since we hold that the delivery by the defendant [Central Railroad] is completed when cars are placed upon the interchange track and that defendant [Central Railroad] owes no duty to the complainant [petitioner] to receive loaded cars from it until they are put upon that track, there is no occasion to examine in detail the rates referred to."

Upon the whole case we are of opinion that no error of law was committed by the Commission in denying the petitioner's application. It follows that the motions to dismiss the petition should be granted, and it will be so ordered.

LOUISIANA & P. RY. CO. et al. v. UNITED STATES et al.

(Commerce Court. November 26, 1913.)

Nos. 90-93.

1. COMMERCE (§ 88*)—INTERSTATE COMMERCE COMMISSION—ORDERS.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589, and Act June 18, 1910, c. 309, § 12, 36 Stat. 557 (U. S. Comp. St. Supp. 1911, p. 1297), an interstate common carrier may perform accessorial nontransportation services for a shipper, provided this be done without unjust discrimination, but it cannot be compelled to do so; it may also permit a shipper directly or indirectly to render a service connected with transportation, and may make a just and reasonable allowance therefor, but it cannot be compelled to permit such substituted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

performance of its own obligations. Therefore an order of the Interstate Commerce Commission not only permitting but requiring a carrier to render certain services to a shipper must necessarily be based on a finding that such services are not only transportation services, but that, in performing them, the carrier acts in the capacity of an interstate carrier, in which respect alone the Commission can exercise jurisdiction.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. § 88.*]

2. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—POWERS.

A common carrier may, as to some of its work, act in a strictly private capacity, and may as to certain shippers, and particularly as to a proprietary company, be a mere plant facility and perform merely plant or industrial services, as distinguished from transportation services, and it is within the powers of the Interstate Commerce Commission to prohibit an allowance for such services in a joint tariff schedule.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

3. COMMERCE (§ 98*)—INTERSTATE COMMERCE COMMISSION—FINDINGS.

A finding by the Interstate Commerce Commission after a full hearing that a tap railroad, although an interstate common carrier as to other shippers, is as to a proprietary company a mere plant facility, and that the services rendered to such company are merely plant services, is subject to review by the courts only upon an allegation that it is not sustained by any substantial evidence or that it is arbitrary in being based upon improper distinctions and considerations.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148; Dec. Dig. § 98.*]

4. COMMERCE (§ 98*)—INTERSTATE COMMERCE COMMISSION—FINDINGS.

Arbitrary action in such case can be predicated only on a disregard by the Commission of the very criteria which it adopts to determine the ultimate question of fact or on the adoption in different cases of distinctions without real differences.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148; Dec. Dig. § 98.*]

5. COMMERCE (§ 98*)—ORDERS OF INTERSTATE COMMERCE COMMISSION—RIGHT OF REVIEW.

A tap line railroad company, which is directly affected by an order of the Interstate Commerce Commission respecting allowances made for services by the trunk line company, may have such order reviewed, although it is not directed against the tap line company but against the trunk line company.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148; Dec. Dig. § 98.*]

6. COMMERCE (§ 98*)—INTERSTATE COMMERCE COMMISSION—REVIEW—COMMERCE COURT.

That a petition in the Commerce Court to review an order of the Interstate Commerce Commission also prays for relief which the court is without jurisdiction to grant does not justify its dismissal.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148; Dec. Dig. § 98.*]

7. COMMERCE (§ 98*)—COMMERCE COURT—SUIT TO REVIEW ORDERS OF INTERSTATE COMMERCE COMMISSION—EVIDENCE.

In a suit in the Commerce Court to review an order of the Interstate Commerce Commission, made after a full hearing, on the ground that it is not sustained by any substantial evidence and that the Commission acted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

arbitrarily, such issues must be determined exclusively by the record made before the Commission, and new evidence is not admissible.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148; Dec. Dig. § 98.*]

8. CARRIERS (§ 26*)—INTERSTATE COMMERCE COMMISSION—DIVISION OF JOINT RATES.

A reasonable division out of joint rates cannot be denied a common carrier for transportation services by the Interstate Commerce Commission because of any past or present derelictions, or even the fear of further violations of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67–82; Dec. Dig. § 26.*]

9. CARRIERS (§ 24*)—REGULATION OF RATES—INTERSTATE COMMERCE COMMISSION.

Common ownership or control of a lumber mill and a railroad which is an interstate common carrier cannot be prohibited by the Interstate Commerce Commission, nor made the basis of a denial to the railroad of rights accorded to another road not so owned.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 60–66; Dec. Dig. § 24.*]

10. CARRIERS (§ 24*)—REGULATION OF RATES—TAP LINES—"TRANSPORTATION SERVICE"—"PLANT SERVICE."

While every actual carrying of material or product at a mill is not a "transportation service," the distinction between transportation and plant service cannot be dependent upon the distance the goods are moved, but whether any particular service involving an actual hauling is industrial or transportation depends upon whether, on the one hand, it is an inter-industry act, a step in the manufacturing process, or, on the other hand, a movement of raw material from without to the mill or of finished product from the mill toward the market.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 60–66; Dec. Dig. § 24.*]

For other definitions, see Words and Phrases, vol. 8, p. 7076.]

11. CARRIERS (§ 26*)—REGULATION OF RATES—INTERSTATE COMMERCE COMMISSION—TAP LINES.

Orders of the Interstate Commerce Commission respecting allowances by trunk lines to tap lines, which were also interstate common carriers for some purposes at least, for services in the transportation of lumber products from the mills to the trunk lines, and the division of joint rates as between the trunk and tap lines, *held* arbitrary and unjustifiable, where distinctions were made between mills within from 1,000 feet to 3 miles of the trunk lines and those at a greater distance and between proprietary mills of the tap lines and nonproprietary mills, to all of which mills the same service was rendered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67–82; Dec. Dig. § 26.*]

Petitions by the Louisiana & Pacific Railway Company and others against the United States and others, the Woodworth & Louisiana Central Railway Company, Limited, and others, against the same, the Mansfield Railway & Transportation Company and others against the same, and the Victoria, Fisher & Western Railroad Company and others against the same, to set aside orders of the Interstate Commerce Commission; the Interstate Commerce Commission, the Railroad Commission of Louisiana, the Atchison, Topeka & Santa Fé Rail-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

way Company, and the Gulf, Colorado & Santa Fé Railway Company, interveners. Decree for petitioners.

For opinions of Interstate Commerce Commission, see 23 Interst. Com. Com'n R. 277 and 549.

Luther M. Walter, of Chicago, Ill., and H. M. Garwood, of Houston, Tex. (W. R. Thurmond, of Kansas City, Mo., on the brief), for petitioners.

Blackburn Esterline, Special Asst. Atty. Gen., of Washington, D. C., for the United States.

Charles W. Needham, of Washington, D. C., for Interstate Commerce Commission.

Wylie M. Barrow, of Baton Rouge, La. (Ruffin G. Pleasant, of New Orleans, La., on the brief), for Railroad Commission of Louisiana.

James L. Coleman, of Chicago, Ill. (Robert Dunlap and T. J. Norton, both of Chicago, Ill., on the brief), for intervening carriers.

Before KNAPP, Presiding Judge, and HUNT, CARLAND, and MACK, Judges.

MACK, Judge. Following the supplemental report of the Interstate Commerce Commission in *Star Grain & Lumber Co. v. A., T. & S. F. Railroad*, 14 Interst. Com. Com'n R. 364, 17 Interst. Com. Com'n R. 338, in which the Commission, while entering no formal order, condemned the making of allowances and divisions to tap lines for the traffic of proprietary mills, the trunk lines filed with the Commission cancellations of the tariffs which had provided for joint rates with the several petitioners herein. Thereupon the Mansfield Railway & Transportation Company and others filed complaints requesting that joint rates and through routes with the trunk lines be enforced. These complaints were made a part of investigation and suspension docket No. 11, under which the Commission entered into a full and complete investigation of the so-called tap line situation in reference to lumbering operations in the Southwest, and more particularly in the states of Arkansas, Missouri, Louisiana, and Texas. It had theretofore entered upon an extensive general examination of industrial lines of all classes, and it had also, on specific complaints at an earlier period, considered the matter as it affected this particular region. See *Central Yellow Pine Association v. V. S. & P. R. Co.*, 10 Interst. Com. Com'n R. 193; *Central Yellow Pine Association v. I. C. R. R. Co.*, 10 Interst. Com. Com'n R. 505; *Kaul Lumber Co. v. C. of G. Ry. Co.*, 20 Interst. Com. Com'n R. 450.

Pending the investigation and final order of the Commission, the cancellation of the joint rates had from time to time been suspended, withdrawn, refiled, and again suspended. On April 23, 1912, the Commission filed its report in investigation and suspension docket No. 11, entitled "The Tap Line Case" (23 Interst. Com. Com'n R. 277), and on May 14, 1912, its supplemental report (23 Interst. Com. Com'n R. 549), findings, and order.

It found that any allowance or division with respect to the products of the so-called proprietary lumber companies of a large number of tap lines, including all of the tap lines that are petitioners herein,

was unlawful. The order, however, did not affirmatively forbid the trunk lines to make allowances or divisions.

Petitions filed in this court by the petitioners herein were on motion dismissed for want of jurisdiction on the authority of *Proctor & Gamble Co. v. U. S.*, 225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091. Thereupon the Interstate Commerce Commission, pursuant to the request of these petitioners, amended its original order, and on October 30, 1912, entered the order which is now sought to be annulled. While the Commission adhered to the views theretofore expressed, it not only found as to each of the petitioners herein "that the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the respective proprietary lumber companies in moving the product of the mills to the trunk lines is not a service of transportation by a common carrier railroad, but is a plant service by a plant facility, and that any allowance or divisions out of the rate on account thereof are unlawful and result in undue or unreasonable preferences and unjust discriminations, as found in said reports"; but in order to enable the petitioners herein to secure a judicial review of the legality of its action, it also expressly ordered the trunk line defendants "to cease and desist and for a period of two years hereafter, or until otherwise ordered, to abstain from making any such allowances to any of the above-named parties to the record in respect of any such above-described services."

While thus forbidding allowances and divisions in respect to services in moving the logs to and the lumber from the proprietary mills, the Commission further expressly ordered as to the tap lines that are petitioners in this court:

"That in case of the failure of the principal defendants (the trunk lines) to re-establish, on or before January 1, 1913, the through routes and joint rates in effect on April 30, 1912, on traffic other than the products of the mills of the respective proprietary companies the Commission will upon appropriate petition herein enter an order requiring the establishment of such through routes and joint rates or enter upon an inquiry with respect thereto."

The terms of the original order were followed in dismissing, among others, the complaint of the Mansfield Railway & Transportation Company in so far as it related to rates on products of the mill of the proprietary company. The amended order, however, instead of merely authorizing, now directed the trunk lines to re-establish through routes and joint rates with a number of tap lines not now before this court, provided that the rates from points on these lines should not exceed the junction point rates; and provided also that the divisions and allowances out of such joint rates on the products of the mills of their proprietary lumber companies should not exceed certain stated amounts.

The findings in the amended order differed from those in the original order by adding thereto the specific findings hereinabove set forth in reference to plant service, plant facilities, undue and unreasonable preferences, and unjust discrimination.

A careful consideration of the several reports and orders leads to the conclusion that the Commission held:

First. That each of the petitioning tap lines is a bona fide interstate common carrier.

Second. That in respect to the services rendered by them for the nonproprietary mills they acted in this capacity.

Third. That in respect to the services rendered by them for the proprietary companies they acted not in their capacity of common carriers but purely as a plant facility, and performed, not a transportation, but a plant service.

Fourth. That in respect to the services performed for their proprietary companies, each of the other tap lines with which the trunk lines were directed to re-establish joint rates, although under a limitation as to the amount of the division or allowance to be paid, not merely performed a transportation service, but also in so doing acted in its capacity of an interstate common carrier.

[1] The evidence before the Commission tending to show that the petitioning tap lines were originally constructed as mere plant facilities to serve only the proprietary interests, that the latter owned or through common ownership in whole or in large part controlled them, that the later incorporation was primarily in order to secure rebates, that the incorporation of only a part of the logging road was a device to retain a monopoly, that the traffic other than that of the proprietary mills was negligible in quantity and merely incidental, that the trunk lines and their branches could be compelled to render such service and at such rates as would make it unnecessary to employ the tap lines as common carriers, as well as the evidence of many other facts on which the Commission in its report and counsel in argument and briefs lay much stress, might have justified the Commission in finding that these tap lines were not in fact bona fide common carriers. We do not, however, consider this question as open, because, in our judgment, the Commission impliedly, if not expressly, held them to be interstate common carriers when it authorized and in effect directed the re-establishment of through routes and joint rates as to the nonproprietary traffic, inasmuch as the Commission is without authority to make such an order except as between interstate common carriers.

For the same and similar reasons we say that the Commission necessarily deemed the services rendered for proprietary companies by those tap lines not now before us with which the trunk lines were ordered to re-establish joint rates as to all traffic, to be not merely transportation services rendered by or on behalf of the proprietary companies for which, under section 15 of the act, an allowance may be made, but transportation services rendered by the tap lines as interstate common carriers. Under the act a carrier may perform accessorial, nontransportation services for a shipper, provided this be done without unjust discrimination. It cannot, however, be compelled so to do. It must therefore follow that, in the judgment of the Commission, the services which it compels a carrier to perform are necessarily transportation services. Moreover, while under section 15 a carrier may permit a shipper, directly or indirectly, to render a service connected with transportation, and may make a just and

reasonable allowance therefor, it cannot be compelled to permit such substituted performance of any of its own obligations. It follows therefore that when the Commission, instead of merely fixing a maximum allowance to be paid to the tap lines or to the proprietary companies for switching and other services rendered with the consent of the trunk line in connection with through shipments directs the establishment by the trunk lines of joint rates with such tap lines, and the payment of not exceeding a specified division out of such joint rate for such services, it necessarily holds such services to be not merely services connected with transportation but the services of an interstate common carrier engaged in such transportation.

[2] That a common carrier may, however, as to some of its work, act in a strictly private capacity, is well settled (*S. F. P. & P. Ry. v. Grant Bros.*, 228 U. S. 177, 33 Sup. Ct. 474, 57 L. Ed. 787); and that it may as to certain shippers, and particularly as to a proprietary company, be a mere plant facility and perform merely plant or industrial services as distinguished from transportation services, has been held by this court in *Crane Iron Works v. U. S.*, No. 55, June 7, 1912, 209 Fed. 238.

Whether or not a payment provided for in the tariff for such a service would be per se illegal in the absence of an order by the Commission forbidding it (*C. & A. Ry. v. U. S.*, 156 Fed. 558; *Am. S. R. Co. v. D., L. & W. Ry.* [C. C. A.] 207 Fed. 733, reversing s. c. [D. C.] 200 Fed. 652), it is clearly within the power of the Commission to prohibit such payment (*Am. S. R. Co. v. D., L. & W. Ry.*, supra).

If, then, the Commission was justified in finding that these interstate common carriers, the petitioning tap lines, were mere plant facilities as to their proprietary companies, and that the services rendered by them in hauling logs to and lumber from the proprietary mills were merely the plant services of plant facilities, its order forbidding any division or allowance therefor would be valid and proper.

[3] Whether or not this is a justifiable finding of fact is to be determined, in the first instance, by the Interstate Commerce Commission. When, as in these cases, a full and fair hearing has been granted, the Commission's findings of fact are subject to review in this court only upon an allegation that they are not sustained by any substantial evidence in the record before it or are arbitrary in being based upon improper distinctions and considerations.

No constitutional question can properly be involved in such a case, inasmuch as the tap lines, if they are in fact acting only as plant facilities in respect to the proprietary companies, can have no constitutional right to that which is necessarily an illegal allowance, however much they may be injured financially by the denial thereof.

[4] Nor can the Commission be charged with such arbitrary action as would justify an annulment of its orders in respect to the petitioning tap lines merely because of a different finding as to some other tap lines, whose history, physical conditions, and relations to and service for the proprietary companies are in many respects like, although necessarily not identical with, those of the petitioning tap

lines and their proprietary companies; for, though the orders are made in one proceeding, they are separate and distinct as to each of the tap lines, and are expressly based upon a careful investigation of and separate findings in relation to each of the companies. Moreover, an erroneous conclusion by the Commission as to the real nature of the services of one or more of the tap lines toward its or their proprietary companies would of itself be no justification for the annulment of the findings and the orders as to some other companies on the ground of arbitrary action, if the latter are based upon substantial evidence. Arbitrary action can, however, be predicated on a disregard by the Commission of the very criteria which it adopts to determine the ultimate questions of fact, or on the adoption of distinctions without real differences.

The important questions, therefore, to be considered by this court are:

First. Whether the Commission acted arbitrarily and on improper considerations in determining under what circumstances a common carrier tap line would be deemed to be acting as a mere plant facility of and performing mere plant service for the proprietary companies. Or,

Second. Whether in each of these cases there was substantial evidence to justify the ultimate findings and the consequent order of the Commission; not whether this court would have drawn the same conclusion from conflicting evidence; not whether, in the judgment of this court, it is expedient or inexpedient to encourage the building of these tap lines by the large lumber interests of the southwest, but solely whether in the evidence before it there can be found a substantial basis for the Commission's conclusions.

Before determining these questions, there are some subsidiary matters which require attention.

[5] 1. It is urged upon us that the petitions herein should be dismissed on the ground either that, though affirmative in form, they are nevertheless negative in substance, or that the petitioners in this court are not those against whom the order is directed. This motion must be denied. The amended order is clearly an affirmative order. It expressly forbids certain action because of its illegality. Disobedience would involve not merely the penalties prescribed by the act for illegal transactions, but the other and heavier penalties therein prescribed for violation of the orders of the Commission.

Inasmuch as the petitioners herein, though not the parties commanded in the order to desist from the illegal action, are directly and financially affected by the orders in question, they have a standing as complainants in a court of equity. *I. C. C. v. Diffenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83.

[6] 2. The petitioners in cases Nos. 90 and 91 seek not only to have the order of the Commission annulled, but pray also that the trunk lines may be ordered to perform certain contracts made with them. As this court is without jurisdiction to enforce such contracts, this additional prayer may be disregarded. Neither joining a cause of action over which this court has no jurisdiction with one over

which the court has jurisdiction nor the joining of unnecessary parties defendant would, however, justify the dismissal of the petitions.

[7] 3. The Interstate Commerce Commission has moved to strike out the testimony taken by this court on the ground that the only real issues in the case, viz., whether or not there was substantial evidence before the Commission to support its order, and whether or not it acted arbitrarily, not in the sense of denying a full and complete hearing, but in the sense of acting in utter disregard of the evidence or upon distinctions not based upon the evidence, must be determined exclusively by the record as made before the Commission. In our judgment this motion must be granted.

Under the law as it existed prior to the amendment of 1906, the findings of the Commission on the facts were expressly given only prima facie effect. For this reason the courts, while stating that the carriers ought not to withhold evidence from the Commission and for the first time produce it before the court, nevertheless held that neither party was restricted in the courts to the evidence before the Commission on the question of reasonable rates, unjust discriminations, or dissimilarity of circumstances. *C. & N. O. & T. P. Ry. v. I. C. C.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; *I. C. C. v. Alabama Midland Ry. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414.

Under the amendment of 1906, however, the determination of the Commission as to the facts is final and binding, subject to the qualification that it must be supported, not by a mere scintilla of proof, but by substantial evidence. *I. C. C. v. Union Pacific R. R.*, 222 U. S. 541, 548, 550, 32 Sup. Ct. 108, 56 L. Ed. 308. Whatever may be the rule as to the admission of additional evidence when an order of the Commission is attacked as making a rate that is confiscatory, we are of the opinion that when, as in these cases, the real basis of the complaint is that the findings of the Commission are unsupported by substantial evidence or are arbitrary, as based upon distinctions shown by the evidence to be improper, the correctness of such allegations can be tested only by the evidence that was before the Commission.

If, after the hearing by the Commission and either before or after its order shall have been entered, new evidence should be discovered, or a change should have taken place such as should cause the Commission to modify or reverse its findings and order, the proper remedy is to apply for a rehearing, to present a supplemental complaint, or to file a new complaint before the Commission. Any and all evidence bearing upon the questions of fact involved in the matters adjudicated should, however, first come before the Commission in order that it may be able to determine the ultimate facts in the case.

We come, then, to a consideration of the main questions: Was there, as to each of these petitioning tap lines, substantial evidence to justify the findings of the Commission? Did the Commission differentiate the several companies arbitrarily on distinctions or differences not justifiable in law? While evidence was given as to each road separately and specifically, and while the report deals with each road separately, a considerable mass of testimony and a considerable por-

tion of the reports cover the entire situation. It is apparent therefrom that very real evils existed, evils demanding correction.

Tap lines, in many instances, were receiving amounts entirely disproportionate to the services rendered by them; amounts based, not upon the cost or the value of the services rendered, if they were transportation services, but upon other and totally illegal considerations. Such payments were, in a large measure at least, secret rebates, and to that extent unlawful. Many tap lines received no allowances for work practically identical with that performed by other lines to which most liberal allowances were given. Moreover, while prior to 1906 divisions and allowances, especially in the form of secret rebates, were made directly to the mills, after the amendment of 1906 the test of the right to receive them, as fixed by the trunk lines, was incorporation of the tap line as a common carrier, although it is clear that incorporation is not essential to the status of an interstate common carrier.

The power of the Commission to prevent such rebates and unjust discriminations is beyond question. It is to be accomplished, however, not by enjoining payments, which the law itself recognizes as legal, but by requiring equality of treatment and by regulating the sums to be paid, so that they will be fairly proportioned to the services rendered. That the Commission is not authorized to forbid lawful payments merely because, in its judgment, unjust discriminations result therefrom, or to declare that to be unjust discrimination which results only from a perfectly lawful payment, is apparent from the case of *I. C. C. v. Diffenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83. The invalidity of the Commission's finding, when unsupported by the evidence, that certain services are plant facility and not transportation services, is also attested by the same case.

In the *Diffenbaugh* Case the Commission held that on grain passing through an elevator and mixed, treated, weighed, or inspected therein, no allowance for elevation might be made to the elevator owner if he had any interest in the grain itself. The basis of the order was its determination that the elevation under such circumstances was not transportation within the act, and that an unjust discrimination resulted in favor of the elevator owner, against other grain dealers who did not have elevators, even though the payment was an honest one, limited to the bare cost of elevation, inasmuch as he obtained undue advantages by being thereby enabled to perform other services in respect to the grain. But the courts held that unjust discrimination could not be based upon a lawful and proper payment and that such a service was in fact a transportation service. Mr. Justice Holmes says (222 U. S. 46, 32 Sup. Ct. 24, 56 L. Ed. 83):

"The act of Congress in terms contemplates that, if the carrier receives services from an owner of property transported, * * * he shall pay for them."

"The only permissive element being that the Commission may determine the maximum" to be paid.

Judge Sanborn, writing the opinion of the Circuit Court en banc, said (176 Fed. 409, 418):

"Reasonable compensation for transfer services may not be denied lawfully because there is a possibility that those who receive it may at some future

time violate the law and secure rebates or effect discrimination. There is no more power in the Commission to forbid carriers from paying or allowing for the elevation and transfer of grain in transit reasonable compensation because there is a possibility that a future violation of the law may arise out of such an allowance than there is to prohibit carriers from charging and receiving reasonable rates for transportation of all property, because there would be less danger of future rebates and discriminations if they were compelled to conduct transportation without compensation."

[8] Equally may it be said that a reasonable division out of joint rates cannot be denied a common carrier for transportation services because of any past or present derelictions, or even the fear of further violations of the law. The law itself fixes the method of punishment for such wrongs; it does not include therein a denial of proper compensation for proper services.

Common ownership of a railroad and an industry facilitates the making of discriminations and the covering up of rebates. For this reason Congress enacted the commodities clause, which forbids a railroad from transporting any commodity "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part or in which it may have an interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

But Congress at the same time expressly excepts "timber and the manufactured products thereof" from this prohibition. It has thereby made it manifest that, in its judgment, the possible evils of secret rebates and unjust discriminations which might result from the common ownership of a railroad and a lumber plant do not offset the advantages that may be derived therefrom. It is clear, too, as well from the report and the evidence before the Commission, particularly the concurring opinion of Mr. Commissioner Prouty, as from the position taken by the state of Louisiana in this court in support of the contentions of these petitioners that these advantages are very real; that the vast forests of the country will not be developed without branch or tap lines running from the great trunk lines into the woods themselves, near which sawmills are most advantageously to be located; and that in a large measure the capital for the construction of such branch or tap lines must be raised by those who control the forests and the mills.

[9] Common ownership or control of a lumber mill and a railroad cannot, therefore, be prohibited by the Commission or be made the basis of a denial to a railroad of rights accorded another road not so owned.

Counsel for petitioners strenuously urge that this is the real basis for the action of the Commission in classifying many of these tap lines. Despite some expressions in the report which would seem to support this conclusion, we accept the Commission's express recognition of this limitation of its power and its disclaimer both in this and in later cases (see *McCloud Lumber Co. v. S. P. Co.*, 24 *Interst. Com. Com'n R.* 89, 94) of the adoption of this test.

What, if any, general rules did the Commission formulate? While it is stated at page 293 of the report (23 *Interst. Com. Com'n R.*):

"That the question is not susceptible of solution on general grounds; * * * that the only safe course is to ascertain and determine on the facts disclosed in each case what is the real relation between the tap line and the (proprietary) industry"

—the Commission, nevertheless, further says:

"It is apparently the practice of the trunk lines, where no allowance is made, to set the empty car at the mill and to receive the loaded car at the same point. Indeed, they do this in many cases even when an allowance is made to the tap line. But whenever this service is performed by the trunk line, it is included in the lumber rate and is done without additional charge. * * * By their common practice the public carriers interpret the lumber rate as applying from mills in this territory apparently as far as three miles from their own lines. * * * The transportation (in such case) commences at the mill. If therefore a lumber company, having a mill within that distance of a trunk line, undertakes, by arrangement with the trunk line, to use its own power to set the empty car at the mill and to deliver it when loaded to the trunk line, it is doing for itself what the trunk line, under its tariffs, offers to do under the rate. In such a case the lumber company may therefore fairly be said to furnish a facility of transportation for which it may reasonably be compensated under section 15, whether its tap line is incorporated or unincorporated. * * * It is not lawful when the lumber company refuses to permit the trunk line to do the work. No allowance, however, ought to be made by a trunk line to a lumber company where the mill is within, say, 1,000 feet of the trunk line. We should regard an allowance under such circumstances as a mere device to effect an unlawful payment to the lumber company. We should take the same view of an allowance where a short switch track to the mill has been torn out or is still available but not used in order to give the appearance of a longer haul to the mill over a spur or switch track constructed by the lumber company or by its tap line.

"Where a mill is distant more than three miles from a trunk line and is connected with the latter by a tap line not recognized by this Commission as a common carrier in respect of the service performed for its proprietary lumber company, no allowance or division may lawfully be made by a trunk line either to the lumber company or to its tap line. Such a lumber company, although using rails, stands in no better position under the law with respect to its lumber than does a lumber company that uses other means of delivering its lumber to a public carrier. But where a mill is more than three miles distant from a trunk line and is connected with it by a tap line organized as a common carrier and so recognized by this Commission, the mill is to be regarded as a shipping point equally with all other mill points in the extensive rate group which the trunk line carriers have defined in this territory; and the lumber rate is to be regarded as in effect from the mill, the tap line being entitled to a division thereof. * * *

In a concurring opinion, Prouty, C., however, said (23 Interst. Com. Com'n R. 344):

"I do not fully concur in the suggestion that main-line carriers may make to the owners of private railroads not common carriers allowances for the movement of lumber from the mill to the main line. I doubt whether this is a transportation service within the meaning of section 15."

In effect the Commission holds:

First. Switching service within three miles of a trunk line is by custom included in the through rate.

Second. Such switching is a transportation service.

Third. For switching products of a proprietary mill located within the three-mile limit, no division of the through rate may be made,

but an allowance, under section 15, may be paid either to the industry or to its tap line, if the trunk line prefers to permit the industry or tap line to do this work.

Fourth. For switching products of a nonproprietary mill an allowance may be given, and, in the case of a common carrier tap line, a division out of the through rate should be made.

Fifth. But no such allowance or division shall be made if the proper switching distance is or should be less than 1,000 feet.

Sixth. The benefit of the blanket rate is to be extended beyond the three-mile switching limit for a mill on or connected by switch (presumably not over three miles long) with a common carrier tap line and through the latter with a trunk line, provided only that the mill be not a proprietary industry as to the tap line. Neither allowance nor division is to be given the tap line for switching the products of such a proprietary mill.

[10] In our judgment these distinctions must be regarded as arbitrary and without justification as a matter of law. In determining the proper boundaries of free switching or blanket-rate service, the Commission could, of course, take into consideration, or even be guided by the practice of the roads as to the distances within which switching should be free.

In view of its finding as to the custom, it could have limited the blanket rate to mills within three miles of a trunk line. This, however, it did not do. On the contrary, it expressly ordered that the blanket rate be extended to mills on (or probably within three miles of) a common carrier tap line that connected with a trunk line, irrespective of the distance of the mills from the trunk line, provided only that they were nonproprietary. The alleged custom was thereby disregarded.

Moreover, a custom relating to the territorial extent of a blanket rate cannot, in the nature of things, be determinative of the character of the service. If switching from 1,000 feet to three miles from a proprietary mill to a trunk line by means of a tap line is a transportation service, as the Commission (Prouty, C., doubting), in our judgment, correctly held, then switching for a longer or a shorter distance under similar conditions cannot be a plant service. The distinction between transportation and plant service cannot be dependent upon the distance that the goods are moved.

Inasmuch as the reports are specifically made a part of the order, and as the Commission therein expressly permits payment of an allowance to a proprietary mill located within the three-mile limit (23 Interst. Com. Com'r R. 603, Victoria, Fisher & Western R. R., No. 93), we do not interpret the finding in the original and amended orders that the service for the proprietary companies is a plant service and an allowance therefor illegal as intended to apply to a switching service from 1,000 feet to three miles. As we have already stated, the possibility, particularly in the case of short switches, of an abuse or illegal use by a railroad of the right granted to it by statute to make an allowance for services connected with transportation which, in its discretion, it permits the shipper to perform, does not

vest the Commission with power absolutely to forbid its exercise as an unjust discrimination. It may cut down the compensation if it be too high; it may enforce any reasonable regulations to prevent unjust discrimination, but it may not forbid such payments as unlawful because the service is relatively either small or great.

Nor may the line be drawn on the basis of what is and what is not essential to the industry. Transportation would not flourish without manufacturing; manufacturing could not be successfully carried on without transportation; they are distinct activities; but both are essential to the industry. Raw materials must be brought to and the finished product must be carried from the mill; whether any particular service involving an actual hauling of the goods is transportation or industrial depends upon whether, on the one hand, it is an interindustry act, a step in the manufacturing process, or, on the other hand, a movement of raw material from without to the mill or of finished product from the mill toward the market. Every actual carrying of each part of the material or product is, of course, not a transportation service. The Crane Iron Works Case, *supra*, well illustrates this. In that case, as in other cases therein cited (*General Electric Co. v. N. Y. C. & H. R. R. Co.*, 14 Interst. Com. Com'n R. 237; *Solvay Process Co. v. D., L. & W. R. R. Co.*, 14 Interst. Com. Com'n R. 246), it was held that the hauling between buildings of an extensive plant was a part of the manufacturing, not of the transportation operations; that the transportation ended, as to raw materials, when the common carrier had performed all that it could have been required to perform and all that it did for nonproprietary mills, that is, when it made delivery at some point on the plant; that any further activity on the part of the tap line common carrier within the plant itself could not have been compelled and was not a transportation service for which the trunk line could pay either an allowance to the industry or a division of the joint rate to the tap line as a common carrier.

[11] But the situation here is totally different. The actual service in transporting logs to or lumber from the proprietary mills in no respect differs from that performed for independent mills; the carriage over the tap line ranges from a short switch to a many-mile haul; its purpose, so far as the lumber is concerned, is not to serve the industry in its internal operations, but directly to serve both the mill, as shipper, and the general consuming public, as consignees and purchasers. When these tap lines, which it must again be emphasized, are not private carriers, but are admittedly for some purposes interstate common carriers, take the car loads of finished lumber at the mills for the purpose of either hauling or switching them to a trunk line so that they may reach their ultimate destination beyond the state, the interstate transportation has actually begun.

As to the logs, the conditions, while not identical, are not dissimilar. The hauling, it is true, is primarily for the benefit of the mill; consignee and consignor are one. If the service had continued to be what it originally was in most of these cases, by a private carrier for the one industry alone or from the forests to the directly adjacent mills,

forest and mill being in fact one entire plant, so that the haul was inter-industrial, it might well be held to be a plant-facility service (*Kaul Lumber Co. v. C. of G. Ry. Co.*, 20 Interst. Com. Com'n R. 450, 455); but as *Prouty, C.*, says in that case:

"The thing done is properly the function of a common carrier and not necessarily of a plant facility. Great quantities of logs are transported to mills for manufacture by railroads as common carriers under published tariffs."

The Commission might have limited the blanket rate to the lumber either directly or by forbidding milling in transit. This, however, was not done. On the contrary, the order directing re-establishment of the old rates as to nonproprietary mills sanctioned the extension of the blanket rates not only to the mill, but back to the forests with the milling in transit privilege. That applied to each of the petitioning tap lines and is in itself a recognition of their status as interstate common carriers not only of lumber but also of logs.

Again, it is immaterial that in an early stage of the industry or in small plants logs are hauled to and lumber from the mills by horse and wagon and not by railroad. When this is the method of bringing the goods to the trunk line, the allowance may or should be forbidden, not because of the nature of the service—clearly it is transportation when performed by a common carrier expressman—but because of the means used to perform it. The allowance to be made by a trunk line under section 15, and the payment of which cannot be forbidden (*I. C. C. v. Diffenbaugh*, *supra*), is only for a service that is a part of or for an instrumentality to be used in the transportation which the trunk line would otherwise be compelled to perform, not for a service which is neither part of nor directly connected with the trunk line's transportation, even though it be transportation in its relation to the industry.

The fact that these tap lines connect directly with the private logging roads of the proprietary mills, that the latter alone run into the forests, that the point at which the common-carrier service begins is more or less arbitrarily determined solely in the interest of the proprietary mills, that other mills must haul their logs by team to the tap line or must purchase them in the open market, and that thereby these proprietary mills have great commercial advantages over their competitors, does not in any manner affect the matters now before us. As the Supreme Court has said in the *Diffenbaugh Case*, *supra*:

"The law does not attempt to equalize fortune, opportunities, or abilities."

As the actual service rendered by the tap line from the time it takes the logs until it delivers the finished product to the trunk line is the same for proprietary and nonproprietary mills, and as this is held to be a transportation service by an interstate common carrier as to the latter, it must be held to be a similar service as to the former.

In view of our conclusions as to the arbitrary character of the distinctions on which the order of the Commission is based, it becomes unnecessary for us to consider the evidence as to each petitioning tap line separately.

It follows, therefore, that the Commission was not only without power to forbid any allowance whatsoever to be made by a trunk line to the petitioning proprietary industries for switching either less than 1,000 feet or more than 3 miles, but it was also without power to prohibit the making of joint rates by the trunk lines and the petitioning tap lines and the payment by the former to the latter of some division thereof for its services in hauling logs to and lumber from the petitioning proprietary mills, and its order must to this extent and as to these petitioners be annulled.

The Commission is, of course, fully empowered to regulate the amount of allowances and divisions so as to prevent rebates and unjust discriminations. In this way, as well as by the prohibition of or prosecution for certain illegal practices mentioned in the report, whereby proprietary mills obtain undue advantages, most of the evils, which the Commission has sought by its order to prevent, will be checked. But such as are inherent in the common ownership of industrial and common carrier transportation facilities do not constitute legal wrongs and must remain unless and until Congress shall extend the scope of the commodities clause.

In so far as the order of the Commission is negative, in dismissing the complaint filed to secure an order compelling the re-establishment of through routes and joint rates, we are without jurisdiction to determine its validity.

A decree will be entered in accordance with the views herein expressed, and it is so ordered.

BUTLER COUNTY R. CO. v. UNITED STATES.

(Commerce Court. November 26, 1913.)

No. 89.

CARRIERS (§ 26*)—REGULATION OF RATES—INTERSTATE COMMERCE COMMISSION—
DIVISION OF JOINT RATES—TAP LINE.

An order of the Interstate Commerce Commission permitting the re-establishment of a joint rate, including rates on both logs and lumber, between trunk lines and a tap line reaching lumber mills, but limiting the amount which might be allowed to the tap line with respect to services rendered to a proprietary mill to a switching charge on the lumber transported to the trunk lines, *held* invalid as based on arbitrary distinctions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67-82; Dec. Dig. § 26.*]

Petition by the Butler County Railroad Company against the United States, respondent, Interstate Commerce Commission, intervener, to annul an order of the Interstate Commerce Commission. Decree for petitioner.

For opinion of Interstate Commerce Commission, see 23 Interst. Com. Com'n R. 277 and 549.

William A. Glasgow, Jr., of Philadelphia, Pa., for petitioner.

Blackburn Esterline, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

Charles W. Needham, of Washington, D. C., for the Interstate Commerce Commission.

Before KNAPP, Presiding Judge, and HUNT, CARLAND, and MACK, Judges.

MACK, Judge. Complaints filed by this petitioner against several trunk lines, requesting that joint rates and through routes theretofore in force be re-established, were made a part of the Interstate Commerce Commission's investigation and suspension docket No. 11. The reports and orders of the Commission in those proceedings are fully considered in our opinion filed this day in cases Nos. 90 to 93 (209 Fed. 244).

The finding in those orders that certain tap lines were plant facilities did not include this petitioner. As to it, as well as to a number of other tap lines not now before us, the order was as follows:

"Seven. It is ordered that the said principal defendants (the trunk lines) be and they are hereby required, on or before January 1, 1913, to re-establish, and for a period of two years to maintain, with (the Butler County Railroad Company) the through interstate routes and joint rates in effect in accordance with their respective tariffs filed with this Commission on April 30, 1912.

"Eight. Provided that the rates on yellow pine lumber and articles taking the same rates from points on the lines of the (Butler County Railroad Company) shall not exceed the current rates in effect from the junction points.

"Nine. Provided further that the allowances or divisions out of such joint rates to be paid by said principal defendants, respectively, to the said (Butler County Railroad Company) on the products of the mills (of its proprietary company) shall not exceed the divisions or allowances specified in the afore-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said supplemental report of the Commission, which are hereby fixed as maximum divisions or allowances thereon, until further order, the Commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations and are unlawful."

At page 629 of the supplemental report (23 Interst. Com. Com'n R.) the Commission says:

"For its service in moving the products of the cooerage company's (the proprietary) mill to the Iron Mountain and to the Frisco, a distance of less than one mile, this tap line may lawfully receive out of the rate nothing beyond a reasonable switching charge, which we fix at \$1.50 per car."

This is the only provision for any allowance or division in respect to the traffic of the proprietary company.

The effect of the order of the Commission is to find that this tap line is a common carrier both of logs and of lumber, but while it may receive a division out of the joint rate for both the log and the lumber traffic of nonproprietary companies, it may receive neither a division nor an allowance for the log traffic and only an allowance but no division for the lumber traffic of the proprietary mill.

For the reasons stated in the opinion filed this day in cases Nos. 90 to 93, we are of the opinion that the distinctions here made are arbitrary and that the order is, in this respect, beyond the power of the Commission.

When the Commission permits the re-establishment of a joint rate which was applicable both to the logs and the lumber, including the milling-in-transit privilege, thereby recognizing the tap line as a common carrier both of logs and lumber, it is without power to forbid the payment by the trunk line to the tap line of a reasonable division for its services both in hauling the logs to a mill, proprietary or non-proprietary, and in hauling or switching the lumber from such a mill to a trunk line. It is in such case equally without power to limit the payment in respect to the traffic of the proprietary mill to a mere allowance for switching the lumber. The proviso contained in paragraph numbered 9 of the order must therefore be annulled.

If the divisions theretofore in force were so excessive as to produce an unjust discrimination, or to amount to a secret rebate, the Commission may reduce them to a reasonable sum, and nothing herein stated is intended in any manner to limit the power of the Commission in this respect.

A decree will be entered accordingly, and it is so ordered.

CURTIS v. PHELPS et al.

(District Court, N. D. New York. November 24, 1913.)

1. PLEADING (§ 317*)—BILL OF PARTICULARS—RIGHT TO BILL.

Where, in an action at law by the receiver of a national bank to recover from the directors damages resulting from their negligence in permitting the looting of the bank by the cashier, plaintiff was necessarily forced to obtain his information from an examination of the bank's books and papers, which were and had been equally available to defendants,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the forged notes by which the cashier had abstracted money from the bank were set out in full so far as known, and his acts of misconduct stated, defendants were not entitled to a further bill of particulars to make the complaint more definite and certain.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 954-962; Dec. Dig. § 317.*]

2. PLEADING (§ 313*)—BILL OF PARTICULARS—OFFICE.

The office of a bill of particulars is to prevent surprise and narrow the evidence to the issues framed, but not to furnish defendant with plaintiff's evidence or the names of his witnesses, or to unduly limit the evidence on the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 949; Dec. Dig. § 313.*]

3. PLEADING (§ 320*)—BILL OF PARTICULARS—DUTY TO FURNISH.

A party cannot be required to furnish a better or more particular statement unless he has more information on the subject than his adversary.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 972; Dec. Dig. § 320.*]

In Equity. Bill by Rensselaer L. Curtis, as receiver of the First National Bank of New Berlin, against Almer H. Phelps and others. On motion by defendant Herbert L. Wheeler for a further and better statement of complainant's claim and further and better particulars of the various matters alleged in the complaint. Denied.

See, also, 208 Fed. 577.

Geo. W. O'Brien, of Syracuse, N. Y., for complainant.

Ulysses G. Welch, of Edmeston, N. Y. (Herbert L. Wheeler and O. U. Kellogg, both of Cortland, N. Y., of counsel), for defendant.

RAY, District Judge. The complainant is the receiver of the First National Bank of New Berlin, and his information necessarily has been derived from an examination of the books of the said bank and papers found therein when it was closed and came into his possession, and information derived from the directors, officers, and employés and customers of the said bank, and people residing in that vicinity.

[1] The defendants were directors of the said bank, and, for years, or during their respective terms of office, had access to all the books and papers of the bank (and such books will be open for the inspection of the defendants at suitable times and places and under suitable regulations), and reside at or in the vicinity of the village of New Berlin, where all or nearly all of the transactions complained of took place and, in view of the voluminous and specific charges in the bill of complaint, must be, or, at least, may be, as well or better informed as to all such matters than the complainant himself. The alleged forged notes are set out in full so far as known. Arnold, the cashier, whose incompetency, immoral life, and extravagant and wasteful habits are referred to and charged, resided in New Berlin, had charge of the bank and was associated with the defendants, and his habits and mode of life, etc., must be far better known to them than to the complainant. At least, due and diligent inquiry will fully inform the defendants as to the truth or falsity of such allegations. Just how,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by what means, and when Arnold abstracted, purloined, or stole the funds of the bank and made it insolvent are matters as to the details of which the directors are or should be much better informed than the complainant. The contents of the books, the false entries, or no entries, as the case may be, the forged notes and false certificates of deposit, and untrue entries concerning same, are or may be known to the defendants by examining the books, and on these and the absence of the funds and the wasteful and dissolute life of Arnold, quite likely, the complainant bases the charge that Arnold abstracted and embezzled the funds. Just when and how it was done the complainant probably is unable to state, and he so says. Taking the whole subject-matter into consideration, with the means of knowledge open to the complainant and those which have been and are open to the defendant with the very full statements of the bill of complaint of over 120 typewritten pages, I am constrained to the conclusion that the motion should be denied.

[2] It is not the office of a bill of particulars to furnish the defendant with complainant's evidence, or the names of his witnesses, or to unduly limit the evidence on the trial, but to prevent surprise and, of course, narrow the evidence to the issues framed.

[3] It is also fundamental that the party required to furnish a better and more particular statement shall be better informed on the subject than his adversary. Not only are the notes referred to set out, but a transcript of the certificate of deposit account is annexed to the bill of complaint. As to reports made to the Comptroller of the Currency with which the defendant Wheeler had to do, it is apparent that Wheeler knows better than the complainant, and, moreover, copies can be had. On the question of the negligence of the defendant it is apparent from the bill of complaint that he is charged with, not only special and specific acts of negligence as charged, but with general and continuous negligence in respect to all the matters charged while the defendant had to do with the bank. Again, it is impossible for the complaint to state in advance just what his witnesses will testify to, and for this reason no specifications should be required which would unduly limit the complainant on the trial and result in the concealment of the truth rather than its development and in serious embarrassment at the trial. It has been wisely said that:

"Great caution should be exercised by the courts in requiring parties to furnish particulars in actions for damages resulting from negligence." *Villiers v. Third Ave. R. R. Co.*, 22 Misc. Rep. 17, 48 N. Y. Supp. 614; *MacDonald v. N. Y., N. H. & H. R. Co.*, 25 R. I. 40, 54 Atl. 795; 4 *Standard Encyclopedia of Proc.* 384, note 79.

The motion is denied.

SCHMIDT v. PACIFIC MAIL S. S. CO.

(District Court, N. D. California, First Division. October 29, 1913.)

No. 15,483.

1. SEAMEN (§ 20*)—SUIT FOR WAGES—SET-OFF.

Under a custom that, on the arrival in port of a vessel which makes regular trips, the seamen who signed for the voyage remain on duty during the time of discharging and reloading, receiving the same pay as on the voyage, with an extra allowance for victualing, the employment while so in port is under the original contract of hiring, and any matter which would be a set-off against a claim for wages during the voyage may be pleaded as a set-off against a claim for such port wages.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 86-91; Dec. Dig. § 20.*]

2. SEAMEN (§ 31*)—LIABILITY OF STEWARD—ARTICLES UNACCOUNTED FOR.

The chief steward of a vessel cannot be held liable for articles in his charge as such and unaccounted for at the end of a voyage, in the absence of proof that they were lost through his fault or negligence.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 212-214; Dec. Dig. § 31.*]

In Admiralty. Suit by Ed. Schmidt against the Pacific Mail Steamship Company. On exceptions to answer, and final hearing on the merits. Exceptions overruled, and decree for libelant.

James W. Ryan, of San Francisco, for libelant.

Knight & Heggerty, of San Francisco, for respondent.

DOOLING, District Judge. Libelant shipped as chief steward, on respondent's steamship City of Sydney, in July, for round trip voyage from San Francisco to Balboa. The voyage ended in September, and on September 24th libelant received from the shipping commissioner all of his wages therefor.

[1] The City of Sydney makes regular trips between these ports, and while in San Francisco, during the time this controversy arose, was engaged in discharging freight brought in, and loading freight for the next trip. It is the custom for the employes to remain on duty while in port, unless they receive notice of discharge from such employment, and to sign articles for the next trip on the day preceding the next sailing day. While in port they receive what is known as "port pay"; that is to say, their regular wages plus \$1 per day for victualing, as no meals are served on the vessel during her stay. Following this custom, libelant, having received no notice of discharge, remained in the service of respondent while the City of Sydney was discharging and receiving freight for its next trip, from September 25th to October 1st, inclusive. Upon October 1st he was told that his services would not longer be required. Upon demanding his wages for this service in port, he was informed that, while his wages amounted to \$30.33, he could not receive them, because of the loss of certain silverware intrusted to him as chief steward when he shipped in July, and not accounted for by him at the end of the trip

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on September 24th, or thereafter, and amounting in value to \$32.90, which sum respondent claimed the right to offset against his wages of \$30.33, earned while in port. This set-off is pleaded as a defense, and libelant interposed exceptions thereto, on the ground that it did not arise out of the same contract as that upon which the suit was brought; that, if entitled to offset this loss at all, respondent should have done so at the time the libelant received his wages on September 24th at the end of the voyage for which he shipped; and that the employment of libelant while in port was under a new contract, beginning at the time he signed off at the end of the voyage.

The rule is well settled that in the admiralty court a set-off, to be allowed, must grow out of the same transaction as that which must be proven to support the libel. But it seems to me that, as there was but one contract of hiring here, that is to say, the contract entered into in July, when libelant shipped as chief steward, and as he would have to prove this contract in order to claim that he continued in the employ of respondent after receiving his wages and signing off on September 24th, by reason of the custom before mentioned, the matters set up are sufficiently connected with the contract upon which he relies to constitute, if sustained, a proper set-off, and for that reason the exceptions to the special defense are overruled.

[2] But I cannot agree with respondent's contention that under the facts of the case here the set-off should be allowed; and this for at least two reasons. There is no proof, in the first place, that libelant ever received into his charge the articles mentioned. Libelant testifies that no inventory was made, and that he does not know whether the articles were on the vessel when he took charge or not. The only other testimony is that of the port steward, who says that he told libelant, when he put him in charge, to make an inventory and check it up with the equipment book, and that he later asked him how he found things, to which he replied: "Everything is all right." This is not sufficient to establish the receipt of the articles by libelant.

The other serious reason militating against the allowance of the set-off claimed is that it would make the chief steward under an ordinary contract of employment an insurer of all articles intrusted to him. There is no suggestion or proof here of negligence, and I am not prepared to concede that, even were it clearly shown that the articles were intrusted to the libelant, the mere fact that they were not on the vessel after a two months voyage would render him responsible for their loss. Nor do I believe that such a claim, where respondent did not check up the articles intrusted to the libelant before the voyage, and offered no suggestion or proof of negligence on his part, but undertook to hold him to the responsibility of an insurer, furnishes the sufficient cause required by section 4529 (U. S. Comp. St. 1901, p. 3077) to relieve respondent from the penalties in that section provided.

A decree will therefore be entered for libelant as prayed for.

CHRISTENSEN v. MATSON NAVIGATION CO.

(District Court, N. D. California, First Division. September 22, 1913.)

No. 15,423.

SEAMEN (§§ 11, 29*)—SUIT FOR INJURIES—PLEADING.

Exceptions sustained to a count of a libel by a seaman to recover damages for a personal injury but overruled to a count for failure to provide libelant with proper medical care and attention.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 39-44, 186, 187, 188-194; Dec. Dig. §§ 11, 29.*]

In Admiralty. Suit by Robert H. Christensen against the Matson Navigation Company. On exceptions to libel. Sustained in part.

F. R. Wall, of San Francisco, Cal., for libelant.

Walter H. Linforth, of San Francisco, Cal., for libelee.

DOOLING, District Judge. The libel excepted to contains two counts. The first is for damages for injuries to libelant, a seaman, alleged to have been caused through the negligence of the libelee, as owner of the vessel Hilonian, in sending her to sea with certain drums of gasoline unlashed upon her deck, and thereby failing to furnish libelant a safe place in which to work. But it does not appear, nor is it the fact, that the unlashed condition of the drums of gasoline was the proximate or other cause of injury to libelant. The injury was caused by a heavy sea shipped in rough weather while libelant was at work under the orders of the mate endeavoring to lash the drums. But it does not appear at all that he was injured by reason of the drums being unlashed, or that the leaving of the drums unlashed rendered his working place at all unsecure. The exceptions to the first count will be sustained.

The second count is for failure to provide proper medical care, attention, etc., to libelant after the injury and is sufficient in form and substance. The exceptions thereto will be overruled.

UNITED STATES v. MacMILLAN et al. (four cases). SAME v. HOLLOWAY et al. (three cases). SAME v. SAMPSELL et al. (two cases).

(District Court, N. D. Illinois, E. D. November 18, 1913.)

Nos. 10,622-10,630.

1. CLERKS OF COURTS (§ 70*)—CLERK OF FEDERAL COURT—LIABILITY FOR INTEREST ON DEPOSITS.

A fund constituted from deposits made with the clerk of a federal court by litigants, pursuant to a rule of court, to be drawn against by the clerk for the payment of the fees of himself and other officers of the court as they accrue, so long as such fund remains as a security deposit is not public money of the United States, but the property of the litigant, and the United States has no claim to interest paid thereon.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 109-118; Dec. Dig. § 70.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CLERKS OF COURTS (§ 70*)—CLERKS OF FEDERAL COURTS—LIABILITY FOR INTEREST ON DEPOSITS.

Money collected by the clerk of a federal court for official services rendered is not so collected as revenue of the United States, but as fees and emoluments of his office, and belongs to him, subject only to his duty to render an account of the same semiannually and to pay into the treasury any excess above the amount he is allowed by statute to retain; and the United States has no right or title to any interest he may receive on the fund pending his semiannual return, either as an increment of the fund or as an emolument of the office, and as such to be accounted for.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. §§ 109–118; Dec. Dig. § 70.*]

3. WORDS AND PHRASES—"EMOLUMENT" OF OFFICE.

An "emolument" of an office is a sum received by the officer for the performance of some act or service pursuant to the obligation or sanction of his office and for which he has the right by virtue of his office to exact the payment.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 3, pp. 2367, 2368.]

At Law. Actions by the United States, four against Thomas C. MacMillan and others, three against Edward M. Holloway and others, and two against Marshall E. Sampsell and others. On demurrers to pleas in each case. Demurrers overruled.

These nine actions in the form of debt, four of them against the present, two against a former, clerk of this court, three against the clerk of the Circuit Court of Appeals, and each of their respective bondsmen, are brought by the government upon alleged breaches of official bonds. The declarations aver such breaches to consist of failures to account and pay over to the United States specified sums of money "derived from payments made to the respective clerks," for and on account of interest on public moneys intrusted to "said clerks in their respective official capacities as clerks," to wit:

(a) Moneys paid to the clerk as his fees under the bankruptcy laws of the United States, and

(b) Moneys paid to the clerk as his fees, and compensation as his emoluments as clerk under the various statutes of the United States, and

(c) Moneys deposited with the clerk by various litigants in said District Court under and by virtue of certain rules of said court, and

The aggregate sum of interest moneys, default in whose payment to the government is so averred, is further characterized as having been "paid to him (the clerk) for the use of the said moneys collected and held by him as clerk as aforesaid under the laws of the United States," etc., and "the same is and was no part of any sum or sums earned by him * * * (the clerk) as such clerk, but was in fact and is the property of the United States."

To the several declarations pleas were interposed, each setting up, in brief: That there came into the possession and custody of the defendant clerk, and was deposited by him in various banks while he was in such custody and possession, certain moneys, referred to as the aggregate principal, composed of, and coming from various sources, viz.:

"(a) Moneys paid to the clerk as clerk's fees and compensation, under the bankruptcy laws of the United States; and

"(b) Moneys paid to the clerk as his fees, and compensation, and as his emoluments as clerk, under various other statutes of the United States; and

"(c) Moneys deposited with the clerk by various litigants in said District Court, under and by virtue of certain rules of said court, hereinafter referred to.

"That on the average balances of said 'aggregate principal' so remaining from day to day on deposit, the clerk received interest at the rate of two

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(2) per cent., said interest so received being the said * * * (sum) mentioned in the declaration, and no other.

"That as to the money included in items 'a' and 'b' and in that portion of item 'c' which was, after its deposit, paid to the clerk as clerk's fees, emoluments, or compensation as hereinafter mentioned (and which portion is hereinafter for convenience referred to as fund 'd'), the clerk did on the first day of each January and July of each year, or within thirty days thereafter, during all the time mentioned in the declaration, and in all respects as provided by statute, make a written return to the Attorney General of the United States, on a form prescribed by the latter, for and covering the next preceding semiannual period, of all the fees and emoluments of his said office as clerk of said District Court, and included in the same all of the moneys composing said items 'a' and 'b' and that portion of item 'c' paid to the clerk as fund 'd.'

"That each of said returns included also a statement of the necessary expenses of said office during the same respective semiannual period, including necessary clerk hire (and including his own compensation as allowed by law), and was accompanied by vouchers, for, and showing the payment of, the same. That each said return particularly stated the amounts for the respective preceding half year, of all fees and emoluments received, and of all of said necessary expenses paid out, which expenses were deducted on said statement from the entire amount of all said fees and emoluments received. That the surplus money then remaining, and thus shown, was in each said half year period, and immediately after said return was made, to wit, on the same day, paid into the Treasury of the United States, or to the Subtreasurer of the United States, as was then directed by the Attorney General, and said surplus thus shown and accounted for and paid, was in each case received by the United States.

"And the said interest received by the clerk in each said semiannual period earned and accrued as aforesaid upon said items 'a' and 'b', and upon that portion of item 'c' above mentioned as fund 'd' was so earned and accrued before, and not after, the said fees and emoluments composing the said items had been so included in, and made the subject of said return, and had formed the basis of the computation and ascertainment of said surplus."

The pleas (of the defendants, clerks of the District Court) further set out the court rules, which provide for the deposit by plaintiffs with the clerk, of the sum of \$25, to be applied to the payment of accruing costs; for the deposit by defendants appearing separately, of the sum of \$5 for the payment of defendant's costs that may accrue; for the receipt by the clerk of moneys paid to be applied on judgments, subject to the clerk's right to take one per cent. thereof as earnings of the office; for the accounting of interest on such latter sums upon motion of a party, no such interest to be accounted for without the order of the court; for the repayment to original depositors of unexpended balances remaining in the clerk's hands after expiration of a specified time. The pleas proceed:

"That said item 'c' was composed entirely of money paid to the clerk by litigants in said court, under and by virtue of said court rules above mentioned, and for the purpose of being disbursed by the clerk.

"To himself as fees or compensation allowed by law; and to the marshal and other court officers as their respective fees or compensation allowed by law; and to other persons, and for other purposes, connected with litigation, as the same should be from time to time by said court directed.

"That all of the fees and emoluments, earned by the clerk, and to which he became entitled, to be paid and which he was paid out of said item 'c,' were by him included in and specified in his said respective semiannual returns and reports as aforesaid.

"That that portion of the money composing said item 'c' which was composed of said fees and compensation of the marshal, and other court officers, and said sums directed by the court to be paid to others, was all, by the clerk, paid to those court officers entitled to the same, as, and when the same was by such officer earned, or was paid to such other person when and as the court directed the same to be paid to them, as the case might be, said portion being herein called and referred to as fund 'e.'

"That the money, composing the residue of said item 'c,' other than fund 'd' and fund 'e,' was by the clerk paid out to the persons depositing the same, or to their successors entitled thereto, under and by virtue of said court rule, as and when the same was and became payable.

"That of the said sum of money composing item 'c' that portion earned by, and paid to, the clerk as fees and emoluments earned by him as clerk (being fund 'd') was in each case included in, and settled for, in the respective semiannual returns as aforesaid."

The government has demurred to each plea, and all of the cases are now before the court upon such demurrers.

Elwood G. Godman, of Chicago, Ill., and Garfield Charles, Asst. U. S. Attys.

Geo. T. Buckingham, of Chicago, Ill., for defendants.

GEIGER, District Judge (after stating the facts as above). From the declarations and pleas we may summarize that the funds, which we may term the "principal" received by the clerks and deposited in the banks and whereon the interest was earned, may be classified into: (a) Moneys deposited by litigants with the clerk subject to be disbursed to himself or to others as occasion may demand in the course of the litigation; (b) fees and emoluments earned by the clerk and paid to himself out of such last above specified deposits—and, as to such earned fees and emoluments, a semiannual account was rendered, the account being charged to himself, and against the same was credited the office expense, the compensation retainable (\$3,500 per annum) and the surplus remaining, which latter was always paid to the government.

To put it in another way, the interest moneys in question arose from bank deposits which were constituted from two sources: First, moneys deposited by litigants who, until such moneys were actually covered into fees payable by them, retained the beneficial interest or ownership therein; and, secondly, the fees and emoluments, before a surplus was ascertained and paid over.

What is the character or status, as between the government, the clerk, and the litigant, of the moneys received, upon which, when deposited in the banks, the interest moneys arose, as stated? Are they public moneys whereof the clerk is trustee for the plaintiff government? This is the fundamental question whose answer, if affirmative, will sustain, if negative, will overrule, the demurrers.

Exhaustive historical reviews of legislation respecting fees of clerks of the federal courts are found in *United States v. Hill*, 120 U. S. 169, 7 Sup. Ct. 510, 30 L. Ed. 627, *United States v. Hill*, 123 U. S. 681, 8 Sup. Ct. 308, 31 L. Ed. 275, and *United States v. Mason*, 218 U. S. 517, 31 Sup. Ct. 28, 54 L. Ed. 1133; and, in considering the question now presented, no purpose will be served by repetition thereof. It will suffice to note that, prior to 1841, clerks were under no obligation to render any account of fees or emoluments to the government. They retained all revenues so coming to their hands. But in that and subsequent years the legislation having the effect of limiting their earnings was inaugurated and continued. The cases cited, and others, deal with the intent embodied in such legislation, and, as will be seen, are persuasive in determining the status or character of the moneys or

revenues which now come, as prior to such legislation came, into clerks' hands in the discharge of official duties.

It will be assumed that the plaintiff seeks recovery of the interest money in its own right; that the failure to account for and pay it to the government is assigned as a breach by the respective clerks of an official obligation to be discharged by them to the plaintiff; that while, as seen from the statement of facts, the defendant clerks have assumed obligations toward litigants respecting the disbursement of deposited moneys and the return to such litigants of any unexpended portion, no breach of any such obligation is assigned as a basis for institution of suit by the government on behalf of others; in other words, the plaintiff seeks recovery of the interest moneys "as the property of the United States." So, too, it will be assumed that, if the revenues coming to the hands of the clerks are in truth public moneys, the property of the government, then any interest earned thereon, no matter when or how, rightfully follows the principal or corpus, as an incident or increment, in no event subject to personal appropriation by the custodian of the principal.

[1] Considering first the interest money as arising upon a fund in part constituted from deposits made by litigants to be drawn against by the clerk for payment of fees as they accrue, certainly neither the clerk nor the government has any interest in such deposits, prior to proper appropriation for the uses intended, except to hold them. Even admitting for the time being that the fees when actually earned and paid are then public funds, the deposit made by a litigant to secure such payment is in no proper sense a fund in or over which the government has obtained the slightest proprietary interest or power of disposition. That interest and right is retained by the litigant, save only as he has surrendered it to the clerk to exercise by drawing against it in the defrayal of fees as and when, under the law, they accrue and are chargeable against the litigant. While the transaction in making the deposit under the rule may not technically be a bailment, the clerk, in the nature of things, stands as a sort of insurer for the return to the litigant of the deposit or such part thereof as shall not have been earned as fees either by himself or others for whose benefit it is made. Certainly the deposit is not made for the benefit of the government. The clerk, under the law, is required to account for fees earned whether they are paid or not; and the rule does not impress such deposit with the character of public moneys or revenues; but is a mere regulation for the protection of the clerk, to guaranty to him in advance, and as an administrative convenience in the discharge of his duties of and in the payment of moneys primarily receivable by him as his compensation. As indicated, if these court rules for deposits were not in force, it would rest with the clerk to insist upon payment of each fee as it is earned, in advance. If he failed to collect, but accounted for it as earned, the loss is his. His failure actually to collect the money from the litigant, while it might so result in loss to him, would not, if he accounted for it to the government, be a breach of any condition of his bond. So long, therefore, as the moneys deposited by the litigant retain their status as a security deposit, the gov-

ernment has and can have no claim to any increment thereof by way of interest.

[2] Coming now to the character or status of the other constituent of the fund upon which the interest money in question arose—the moneys earned by the clerk as official fees and emoluments and which, pending the semiannual accounting and return were deposited in the banks. While it is true that in *Bean v. Patterson*, 110 U. S. 401, 4 Sup. Ct. 23, 28 L. Ed. 190, the Supreme Court, upon an application for leave to docket an appeal, ruled that, under an act substantially like that governing district court clerks, the clerk of the Supreme Court could demand payment of certain fees in advance; and declared that:

“As the law now stands, the fees and emoluments of the office (clerk of Supreme Court) belong to the government, subject only to the payment of the annual salary of the clerk, necessary clerk hire, and incidental expenses, and the clerk is the collecting agent for the government;”

—and while the Circuit Court of Appeals for the First Circuit, in *United States v. Mason*, 129 Fed. 742, 64 C. C. A. 270, adopted this expression in considering certain items of a clerk's account as constituting a “necessary expense” of his office; nevertheless, the question respecting the character or status of funds in the hands of a district court clerk prior to his semiannual accounting was directly presented in the recent case of *United States v. Mason*, 218 U. S. 517, 31 Sup. Ct. 28, 54 L. Ed. 1133, *supra*; and the ruling therein is, in my judgment, decisive of the present cases. It involved the validity of an indictment charging a clerk of a District Court with embezzling funds in his hands; and required answer to the concrete question whether, before a surplus of moneys in the clerk's hands was ascertained and required to be paid over, the funds received by him were public moneys of the United States. A negative answer is given, based, as the court says, upon consideration of the “history of his (the clerk's) relation to these moneys and of the statutes which specifically define his rights and duties.” Mr. Justice Hughes quotes the language found in *United States v. Hill*, *supra*:

“The clerk of a court of the United States collects his taxable ‘compensation,’ not as the revenue of the United States, but as the fees and emoluments of his office, with the obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any ‘revenue law,’ properly so called, but out of a statute governing an officer of a court of the United States.”

And proceeds:

“But, for the reasons we have stated, even the duty to pay the surplus shown by the return or audit is not governed by the statutes relating to embezzlement, which have been referred to in support of these counts. The amount with which the clerk is chargeable upon his accounting is not the ‘public money’ or ‘the money or property of the United States’ within the meaning of their provisions. The fees and emoluments are not received by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and, with respect to the amount payable when the return is made, the clerk is not trustee, but debtor. Any other

view must ignore not only the practical construction which the statutes governing the office have received, but their clear intent."

[3] This language, it seems to me, leaves nothing further to be considered except the suggestion made by plaintiff that the interest moneys, being received upon funds which came to and were in the clerk's hands by virtue of his office, should be considered and accounted for as emoluments. What test is afforded in determining whether a sum of money received by an official is an emolument of his office? Certainly this: That the official do some act or perform some service pursuant to the obligation or sanction of his office to or for the benefit of the one paying the money charged to be an emolument; that the one paying the money has the right to exact from the official the rendition of the service, and the official has the right to exact the money return—under official obligation or sanction of the particular office to which the emolument is claimed to attach. To put it in another way: The payment moves to the official in consideration of the rendition by him of some official act or service; the official does the act or renders the service by virtue of his office. The official character of the act is his warrant for exacting the payment.

Now, while it is true that the incumbency of the office of clerk by an individual, his receipt of moneys for fees, emoluments, or deposits by litigants, and the deposit thereof by the clerk in banks, all concur in furnishing or creating the occasion through which he receives interest on the funds in the bank, yet he is not required, therefore cannot and does not deposit the funds in the bank upon an interest-paying basis by virtue of his official obligation; nor can or does he exact the interest from the banks under the sanction of official right or duty. Therefore such interest is not and cannot be an emolument.

In this connection it is further urged by the government that, until the semiannual return is made, the moneys received by the clerk for fees, court costs, etc., belong "to the office of the clerk and not his individual property." It is not possible that the "office" of clerk can be treated as an entity, apart from the government or the clerk, having a proprietary interest or title in or to the funds. If the contention be that, because the moneys are paid to and received by the clerk by virtue of his office and not individually, therefore they are not his individual property, the reply is aptly stated by Mr. Justice Hughes in the *Mason Case*:

"There has thus been established a distinct system with respect to the fees and emoluments of the clerks. Its features are to be explained by the history of the clerk's office and the requirements of its convenient administration. It is urged that the fees and emoluments are attached to the office, and are received in an official capacity. The consideration, however, does not aid the prosecution, for they were attached to the office before the statute of 1841, when they belonged to the clerk without any duty * * * to account for * * * them."

This last observation suggests the query if, prior to the passage of these statutes, the clerk had deposited in the bank all moneys received by him as clerk and had received interest on his daily credit balance, could it reasonably be claimed that such interest money was an emolu-

ment of his office? It is my judgment, that, whatever effect these various statutes may have, they do *not* have the effect of transforming into fees and emoluments, payments which, prior to their passage, were not fees and emoluments received for the discharge of official duties. They furnish no new tests for determining the character of funds received by the clerk. Nothing demonstrates this more clearly than *United States v. Hill*, *supra*, and the amendment to the statute which ensued the rendition of that decision. There, a clerk of the District Court, by direction of the judge, rendered services by way of assistance in naturalization proceedings—the preparation of cases for hearing, examination of witnesses, and the like—for which he collected compensation from the applicants. It was sought to compel him to account for the moneys thus received; but, as the duties were held not to pertain to the office of clerk, he was not obliged to include them in his return. A law subsequently enacted by Congress declared such compensation subject to be accounted for as other fees and emoluments—doubtless to avoid the effect of the ruling referred to.

The conclusion to be drawn from the *Mason Case* would therefore appear to be: That the statutes which have been passed since 1841 do not abolish, but on the contrary were and are intended fully to recognize and continue in force, the pre-existing system of compensating clerks of courts by means of fees and emoluments collected from persons who as litigants or otherwise are recipients of their official services; that the fundamental purpose of these statutes is (1) to place a limitation upon the aggregate amount of compensation which may be received by clerks through such system; (2) to impose upon the clerks the obligation to pay to the government—of which they are officials—the excess beyond such limitation; (3) to provide the manner and means, semiannually, of reducing such obligation to concrete terms, by requiring returns, accounting and the like; and (4) the manner and means of securing performance by the clerks of the statutory obligation to pay the excess, if and when ascertained. This conclusion, and no other, is reconcilable with the Supreme Court's view that the clerk is not a trustee, but a debtor, of the government. Of course, when a clerk has breached his obligation with respect to holding and properly disbursing moneys deposited by litigants, the power of the government as obligee in the bond given by the clerk, to sue on behalf of and vindicate the litigant's rights, cannot be denied. *United States v. Abeel*, 174 Fed. 12, 98 C. C. A. 50. That does not impress the amount sought to be recovered with the character of public revenues. The bond is given to secure the faithful discharge of the official's duties, whatever they may be and to whomever they may be owing; and the fact the government is obligee therein is of no importance save as a participation by it to make secure and effective the "distinct system" of having the features noted, *viz.*, compensation of the clerk, not out of public revenues, but by fees from litigants, with the obligation on the clerk to pay to the government the excess over a specified amount.

The conclusion is that the demurrers must be overruled, and orders may be entered accordingly, in each of the nine cases.

UNITED STATES v. UNION GAP IRR. CO.

(District Court, E. D. Washington, S. D. August 23, 1913.)

No. 199.

1. WATERS AND WATER COURSES (§ 145*)—APPROPRIATION OF WATER FROM STREAM—RIGHT TO CHANGE POINT OF DIVERSION.

While both by the common law and by statute in Washington an appropriator of water from a stream has the right to acquire water rights from other persons and to change the point of diversion, such right is subject to the qualification that the change of use or of the point of diversion must not be permitted to injuriously affect rights which have been lawfully acquired subsequent to the appropriation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20; Dec. Dig. § 145.*]

2. WATERS AND WATER COURSES (§ 145*)—SUIT BY APPROPRIATOR TO PROTECT RIGHTS—INJUNCTION.

The United States, as an appropriator of water from the Yakima river for use in irrigation projects, *held* entitled to an injunction to restrain defendant, as purchaser of other water rights in the river above, from so changing the use of such water and the point of diversion as to materially lessen the quantity at complainant's point of diversion, which it had lawfully appropriated and required in carrying out its project and fulfilling its contracts.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20; Dec. Dig. § 145.*]

In Equity. Suit by the United States against the Union Gap Irrigation Company. Decree for complainant.

Oscar Cain, U. S. Atty., and E. J. Farley, Asst. U. S. Atty., both of Spokane, Wash., and E. W. Burr, Special Asst. U. S. Atty., of North Yakima, Wash., for plaintiff.

Allen & Wilson and Henry J. Snively, all of North Yakima, Wash., for defendant.

RUDKIN, District Judge. It appears from the bill of complaint in this case that the plaintiff has examined, surveyed, located, and has now in active operation extensive irrigation works for the storage, diversion, and development of water for the reclamation of arid and semiarid lands in Yakima county, under Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1911, p. 662); that the plaintiff has availed itself of the provisions of the act of the Legislature of the state of Washington, entitled, "An act relating to the appropriation of waters of the state for irrigation purposes, granting to the United States the right to exercise the power of eminent domain in acquiring lands, water and other property for rights of way, and for reservoirs and other irrigation works, granting to the United States certain rights in state lands and in the waters of the state, relating to water users' associations, and declaring an emergency," approved March 4, 1905 (Laws of 1905, p. 180), and by virtue thereof did, on the 10th day of May, 1905, appropriate all of the unappropriated waters of the Yakima river, and has appropriated large quantities of water in Yakima county, which are being distributed,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stored, and developed; that immediately thereafter the plaintiff began work upon, and now has in operation, in process of construction and in contemplation, irrigation projects which, when completed, will require all of the waters of the Yakima river so appropriated for irrigation purposes, which projects will be completed as rapidly as the lands under them can be prepared for irrigation; that on the 25th day of November, 1905, the plaintiff and the Fowler Ditch Company entered into a certain contract whereby the ditch company relinquished to the plaintiff all its rights in and to the waters then claimed and owned by it in the Yakima river, save and except 23 cubic feet per second during the months from April to August, inclusive, of each year, 16 cubic feet per second during the month of September of each year, and 12 cubic feet per second during the month of October of each year; that the defendant herein, prior to the 23d day of May, 1906, succeeded to all the right, title, and interest of the Fowler Ditch Company in and to the waters reserved by the foregoing contract; and on said last-mentioned date the plaintiff and the defendant entered into a further contract, whereby the defendant surrendered, yielded up, and abandoned all claims and rights to any waters in the Yakima basin save and except 28 cubic feet per second during the months from April to August of each year, 19 cubic feet per second during the month of September of each year, and 14 cubic feet per second during the month of October of each year, in addition to the amounts reserved to the Fowler Ditch Company under the contract first above mentioned; that, notwithstanding the terms and conditions of the foregoing contracts, the defendant has heretofore appropriated, diverted, and used large quantities of water in excess of the amounts to which it is entitled, and thereby entailed great damages upon the plaintiff, and threatens to continue so to do; that if such diversion is continued, great and irreparable damage and injury will ensue to the plaintiff, in that a vast number of acres of arid and semiarid land in Yakima county are being furnished by plaintiff with water from the Yakima river for irrigation, domestic, and other, purposes, by reason whereof said lands, which without water are valueless, have been rendered highly productive, and support and maintain a large number of people; that no other source of water supply exists; that plaintiff has entered into contracts to so furnish water to a large number of persons, which is constantly increasing; that the amount of water available to the plaintiff, exclusive of the amounts to which the defendant is justly entitled to use under the foregoing contracts, is no more than sufficient to supply the water which the plaintiff has obligated itself to deliver; that if the defendant diverts and uses more than its share of water, as aforesaid, the plaintiff's supply of water will be diminished to such an extent that it will be unable to fulfill its obligations, and will be prevented from furnishing such persons with water in sufficient quantities to adequately and properly irrigate their lands; that if a failure of water ensues during the irrigation season, growing crops will be destroyed and rendered totally valueless; and that the plaintiff is remediless at law. The relief sought is an injunction against the unlawful, unauthorized, and excessive di-

version. The answer substantially admits the allegations of the bill, denying only that the plaintiff did, on the 10th day of May, 1905, appropriate all the unappropriated waters of the Yakima river, that the plaintiff will be injured by the diversion of water by the defendant, or that there is not sufficient water in the river to supply the needs of the plaintiff outside of and in addition to the water diverted by the defendant. The answer then avers that the West Side Irrigation Company, a corporation, is the owner of and entitled to use 80 cubic feet of water per second of time from the Yakima river in Kittitas county; that on the 22d day of June, 1889, one L. F. Ellison entered into a contract with that company, whereby he was granted water for irrigation purposes on a certain tract of land then owned by him, not exceeding 500 inches, measured according to the custom of miners under a 6-inch pressure; that the waters thus granted were used by Ellison for irrigation purposes from the date of this contract until the 27th day of March, 1909, and that on said last-mentioned date the defendant succeeded to all the rights of Ellison under the contract; that on the 5th day of June, 1886, one Younger appropriated 1,000 inches of water from the Yakima river in Kittitas county; that one Taylor was the owner of a one-fifth interest in the waters so appropriated, and used the same for irrigation purposes until the 15th day of March, 1909; that on the latter date the defendant succeeded to all the right, title, and interest of Taylor in and to the waters so appropriated, and that during the year 1911 the defendant changed the point of diversion of said waters from the points of original diversion in Kittitas county to the head gate of the Fowler ditch in Yakima county, in the mode prescribed by law.

The rights acquired from Ellison and Taylor, or more particularly the right of the defendant to change the point of diversion of these waters from Kittitas county to Yakima county, is the main question at issue. The right of the plaintiff to maintain this suit is beyond question. Aside from any rights it may have acquired under the legislative act of 1905, it acquired by purchase from the Washington Irrigation Company, on the 23d day of June, 1906, the Sunnyside Canal, having its intake below Union Gap in Yakima county, together with an appropriation of 1,000 cubic feet of water per second of time, made by the Northern Pacific, Yakima & Kittitas Irrigation Company on the 22d day of April, 1891, and it has a manifest right to protect this appropriation and the rights acquired thereunder by injunction. It further appears from the testimony, to my satisfaction, that for a number of years last past, during the months of July, August, and September, there has been a shortage of water in the river at the intake of the Sunnyside Canal, so that the government and its predecessor in interest could not avail themselves of the full amount of their appropriation, or of all the water to which they were entitled. This fact is so notorious that the court might perhaps take judicial notice of it, but in any event it is fully supported by the testimony.

[1, 2] The right of the defendant to acquire water rights from other parties, and to change the point of diversion, is recognized by the common law and by statute in this state, but the right is subject to the

important qualification that the change of use or of the point of diversion must not be permitted to injuriously affect rights which have been lawfully acquired subsequent to the appropriation. That the change of the point of diversion in this case to the full extent claimed will injuriously affect the rights of the plaintiff does not, in my opinion, admit of doubt or question. For a period of about 20 years prior to its acquisition by the defendant the Ellison water right was used on a tract of from 20 to 30 acres of gravelly land on or near the west bank of the Yakima river, in Kittitas county. The land was irrigated by flooding, and could be irrigated in no other practical way. The entire 500 inches was thus used three or four times each season for a period of perhaps a week each time, or not exceeding 30 days in all. The remainder of the time the water was permitted to flow down the canal of the West Side Irrigation Company, and was subject to use by the company or its patrons. The Taylor water right was used on similar land, and in the same way, but the quantity used was less and the period of use longer, perhaps continuously throughout the irrigation season. That a large percentage of the water thus used found its way back into the river, and was subject to diversion and appropriation by others is self-evident. What portion found its way back, or what portion will find its way back from the present place of use, cannot be foretold with any degree of certainty, but it can safely be said that a much greater percentage of this 700 inches of water found its way back into the river from the place of use in Kittitas county than will possibly find its way back from the present place of use, and this alone is fatal to the right to change the place of diversion against the protest of other parties who have acquired rights in the stream. *Hague v. Nephi Irr. Co.*, 16 Utah, 421, 52 Pac. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; *Hard v. Boise City Irr. & Land Co.*, 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407; *Southern Cal. Irr. Co. v. Wilshire*, 144 Cal. 68, 77 Pac. 767; *Baer Bros. Land & Cattle Co. v. Wilson*, 38 Colo. 101, 88 Pac. 265; *Williams v. Altnow*, 51 Or. 275, 95 Pac. 200, 97 Pac. 539; *Head v. Hale*, 38 Mont. 302, 100 Pac. 222; 40 Cyc. 720, and cases cited.

It was suggested in argument that the West Side Irrigation Company is entitled to 80 cubic feet of water per second of time as against the plaintiff, and that the defendant claims its rights through mesne conveyances from that company, and this in a measure is true, but there is nothing in the record to indicate that the defendant has any other or greater rights than had its predecessor in interest. Certainly Ellison never asserted or enjoyed any other or different rights than I have already indicated, and the defendant as his successor in interest occupies no better position. The mere permissive user of the water for the brief period since the transfer confers no right in law.

The only remaining question in the case is the relief to which the plaintiff is entitled. The government, like an individual, can appropriate only so much water as it applies to beneficial uses, and can only restrain a diversion which operates to its prejudice. Under the testimony in the case I am inclined to the opinion that the diversion of the amount of water claimed by the defendant will work no prejudice

to the plaintiff until the 1st day of July each year, and that it will thereafter. A decree will accordingly be entered perpetually enjoining the defendant from diverting from the Yakima river into the Fowler ditch any waters claimed under the Ellison and Taylor purchases from and after the 1st day of July of each year.

BLUE POINT OYSTER CO. v. HAAGENSON et ux.

(District Court, W. D. Washington, S. D. November 21, 1913.)

Nos. 1,705-1,710.

1. SPECIFIC PERFORMANCE (§ 75*)—CONTRACTS ENFORCEABLE—CONTRACTS FOR CONTINUOUS ACTS DURING LONG PERIOD.

A court of equity will not decree specific performance of contracts by which owners of oyster beds agree to sell to the other party their entire production for a term of 20 years at a stated price per sack in the shell, with provisos that they shall sell to no one else, and respecting the quality of the oysters and the quantity which each sack shall contain when shelled, for the reason that the character of the obligations are such that continuous supervision of the court would be required during the term of the contracts, and for the further reason that complainant has a complete and adequate remedy at law; oysters of the quality named having an ascertainable market value.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 210; Dec. Dig. § 75.*]

2. EQUITY (§ 41*)—JURISDICTION—GRANTING LEGAL RELIEF.

Where a court of equity is without jurisdiction to grant the relief prayed for in a suit, it will not grant relief which may properly be obtained in an action at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 116-118; Dec. Dig. § 41.*]

In Equity. Suits by the Blue Point Oyster Company against B. Haagenon and Jane Doe Haagenon (whose true name is unknown), his wife, against Rasmus Matre and another, against Eli Rockey and wife, against the Olsen Oyster Company and others, against John A. Fosse and others, and against William Griener and wife. Causes transferred to law docket.

Frank H. Kelley, of Tacoma, Wash., and John M. Pipes, of Portland, Or., for complainant.

Welsh & Welsh, of South Bend, Wash., for defendants.

CUSHMAN, District Judge. Five suits are brought by complainant, an Oregon corporation, engaged in the business of buying and selling oysters, against certain citizens and residents of Washington, oyster growers, for the specific performance of certain contracts. The suits and separate contracts, upon which they are based, differ in no material respect. The contracts were all made in October and November, 1909.

The contract in one of these suits provides:

"This agreement, made and entered into this 20th day of October, 1909, between Eli Rockey of Bay Center, party of the first part, and Blue Point Oys-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ter Company, a corporation, of Portland, Oregon, party of the second part, witnesseth: That, whereas, party of the first part is the owner of certain oyster beds on Willapa Bay, state of Washington, of about 123 acres in extent, and is now engaged in cultivating and raising what are commonly known as 'native oysters,' and whereas, party of the second part is engaged in the business of dealing in and selling oysters at wholesale, and has special facilities for handling and marketing oysters in large quantities: Now therefore, party of the first part for and in consideration of the covenants and agreements herein-after contained and to be performed by party of the second part, does hereby covenant and agree to and with party of the second part, that party of the second part shall have the sole and exclusive right to purchase all of said 'native oysters' raised and cultivated in or on said oyster beds, and the entire output and product of same, except what he shall use in and through his oyster house at South Bend, Wash.; said right and privilege to extend and continue for the period of twenty (20) years from the date of these presents.

"And party of the first part does covenant and agree to and with party of the second part, that he, party of the first part, will not during said period of twenty years either directly or indirectly sell, or offer to sell, any of said native oysters raised or cultivated in or on said oyster beds to any person, firm or corporation other than party of the second part.

"Party of the second part for and in consideration of the covenants and agreements hereinbefore contained and to be kept and performed by party of the first part, does hereby covenant and agree to and with party of the first part, that party of the second part will for the period of twenty years following from the date of these presents, purchase of party of the first part all native oysters raised or produced in or on said oyster beds now owned by party of the first part, paying therefor to party of the first part the sum of two and 75/100 dollars (\$2.75) per sack of 100 pounds in shell; said oysters to be good, merchantable oysters and of standard quality, and each sack shall contain not less than eight (8) quarts of oysters, including natural juice when shelled. Provided, however, that the annual increase of yield of said beds shall not exceed ten (10%) per cent. of that of the preceding year, unless however, the parties hereto mutually agree thereto, and shall determine the extent or amount of such excess, and if the said parties cannot so mutually agree, then said increase shall never exceed said ten per cent. of the preceding year. All payments hereunder to be made on the 10th day of the succeeding month, providing statements are in three days prior.

"And it is further agreed by and between the parties that all of said oysters shall be delivered by party of the first part f. o. b. at the town of ———, state of Washington.

"And it is further agreed and stipulated by and between the parties hereto, that if party of the second part shall fail or neglect to make prompt payment for all oysters shipped to it under this contract, then, party of the first part may at his option declare this contract terminated and the same shall be held as null and void.

"And it is further agreed that should any of the sacks of oysters be found to contain more than eight quarts of oysters then in that event all oysters in addition to the said eight quarts shall be paid for at the rate of 34½ cents for each and every quart over the said eight quarts.

"In witness whereof the parties hereto have hereunto set their hands and seals in duplicate the day and year first above written."

Four of the five contracts were subsequently modified, allowing the defendants to sell otherwise than to complainant until June 1, 1910. The complainant alleges that oysters, such as those produced upon the defendants' lands, at the time the contracts were made, had a market price of \$2.75 per sack, and that, by the latter part of 1910, they were worth \$5 per sack in the market. In June, 1910, the complainant notified each of the defendants:

"We will be ready by July 1st to handle all the oysters you will have, as per our agreement."

All of the defendants refused to furnish complainant oysters thereafter. Several, if not all, of the defendants have been selling oysters to others than complainant since June, 1910. In December, 1910, these suits were begun. Complainant alleges damage, in each suit, in excess of \$2,000. The defendants admit the contracts, but contend that they were subsequently abrogated by oral agreement between the parties; that the contracts are unenforceable as against public policy, as contrary to the provisions of the first and second sections of the Sherman Act, and as void under the state Constitution prohibiting monopolies. Defendants deny complainant's allegation that it has not an adequate remedy at law.

Complainant relies upon the following authorities: *Ore. Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Fisheries Co. v. Lennen et al.* (C. C.) 116 Fed. 217; *Harrison v. Glucose Sugar Ref. Co.*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915; *Robinson v. Suburban Brick Co.*, 127 Fed. 804, 62 C. C. A. 484; *Anderson v. U. S.*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428; *Chicago, etc., R. Co. v. Pullman, etc., Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97; *U. S. Consol. S. R. Co. v. Griffin Skelly Co.*, 126 Fed. 370, 61 C. C. A. 334; *Standard Oil Co. v. U. S.*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, 25 Ann. Cas. 734, with extended note; *U. S. v. Du Pont de Nemours (C. C.)* 188 Fed. 127; *Bigelow v. Mining Co.*, 167 Fed. 721, 94 C. C. A. 13; *Trenton Pot. Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; *Lanyon v. Garden, etc., Sand Co.*, 223 Ill. 616, 79 N. E. 313, 9 L. R. A. (N. S.) 446; *Whitwell v. Continental Tob. Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689; *Harbison-Walker Refractories Co. v. Stanton*, 227 Pa. 55, 75 Atl. 988; *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369; *Fonotipa, Ltd., v. Bradley (C. C.)*, 179 Fed. 959; *Phillips v. Iola Cement Co.*, 125 Fed. 593, 61 C. C. A. 19; *Hopkins v. U. S.*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; *Davis v. A. Booth & Co.*, 131 Fed. 31, 65 C. C. A. 269; *Whitwell v. Con. Tob. Co.*, 125 Fed. 454, 458, 60 C. C. A. 290, 64 L. R. A. 689; *Loewe v. Lawlor (C. C.)* 148 Fed. 924; *Pocahontas Co. v. Powhatan Co.*, 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, 9 Ann. Cas. 667; *Slaughter v. Thacker Coal Co.*, 55 W. Va. 642, 47 S. E. 247, 65 L. R. A. 342, 104 Am. St. Rep. 1013, 2 Ann. Cas. 335; *Texas Co. v. Central Fuel Oil Co.*, 194 Fed. 1, 114 Fed. 21; *Curtis Bros. Co. v. Catts*, 72 N. J. Eq. 831, 66 Atl. 935; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. Rep. 214; *Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co.*, 63 Md. 285; *Ridenbaugh v. Thayer*, 10 Idaho, 662, 80 Pac. 229.

Defendants rely upon the following authorities: *Cravens v. Carter-Crume Co.*, 92 Fed. 479, 34 C. C. A. 479; *Finck v. Schneider Granite Co.*, 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452; *Citizens' L. H. & P. Co. v. Montgomery L. & W. P. Co. (C. C.)* 171 Fed. 553; *Stewart v. Stearns & Culver Lbr. Co.*, 56 Fla. 570, 48 South. 19, 24 L. R. A. (N. S.) 649; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36,

25 Am. St. Rep. 102; U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Chesapeake & Fuel Co. v. U. S., 115 Fed. 610, 53 C. C. A. 256; Santa Clara Valley Mill & Lbr. Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 214; S. J. Tribolet v. U. S., 11 Ariz. 436, 95 Pac. 85, 16 L. R. A. (N. S.) 223; Ellis v. Inman P. & Co., 131 Fed. 182, 65 C. C. A. 488; U. S. v. Jellico Mt. Coal & Coke Co. (C. C.) 46 Fed. 432, 12 L. R. A. 753; Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Wheeler-Stenzel Co. v. Nat. Window Glass Jobber's Ass'n, 152 Fed. 864, 81 C. C. A. 658, 10 L. R. A. (N. S.) 972; Pingrey, Extraordinary Indus. & Interstate Contracts, §§ 320, 321, 330, 331; 20 Am. & Eng. Enc. (2d Ed.) 856-857; Rutland Marble Co. v. Ripley, 77 U. S. (10 Wall.) 339, 19 L. Ed. 955; Elec. L. Co. v. Mobile & S. H. R. Co., 109 Ala. 190, 19 South. 721, 55 Am. St. Rep. 927; Starnes v. Newsom, 1 Tenn. Ch. 239; Bomer Bros. v. Canaday, 79 Miss. 222, 30 South. 638, 55 L. R. A. 328, 89 Am. St. Rep. 593; Gen. Elec. Co. v. Westinghouse, etc., Co. (C. C.) 144 Fed. 458; Berliner Gramophone Co. v. Seaman, 110 Fed. 30, 49 C. C. A. 99; Grape Creek Coal Co. v. Spellman, 39 Ill. App. 630; Marks v. Gates, 2 Alaska, 527; Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Lone Star Salt Co. v. Texas S. L. R. Co., 99 Tex. 434, 90 S. W. 863, 3 L. R. A. (N. S.) 829; Taussig v. Corbin, 142 Fed. 660, 73 C. C. A. 656; 2 High on Injunctions (4th Ed.) p. 10961, par. 1109.

[1] The first question to be determined is whether complainant has established a right to relief in a court of equity. The description of the land in the contracts is so uncertain that, ordinarily, specific performance would not be decreed. 36 Cyc. 592. In these cases that obstacle has been removed, as the answers disclose by particular description a portion, at least, of the lands contemplated. There are allegations in the answers in aid of equity jurisdiction. These allegations are made to establish the defense that the contracts are in restraint of trade, but the parties will not be able, by their allegations or admissions to confer jurisdiction upon a court, over a subject-matter not warranted.

Specific performance will not be decreed in these causes by reason of the character of the obligations and the exacting and continuous supervision of the court which would be necessary to enforce its decree. Such supervision on the part of the court would be required to determine whether the oysters tendered by defendants to complainant were up to the "requirements" of the contract; whether they ran eight quarts to the bushel; if over, how much over, and, if complainant alleged defendants were selling to others, to ascertain whether or not they were, in fact, selling from the lands described, or oysters above or below the grade *required by the contract*.

Further, it is a matter of common knowledge that, in the native oyster trade, the oysters are disposed of by the sack in the shell. The contracts in question contemplate this. The court's supervision would be required in order to determine, by sample or otherwise, whether the oysters tendered would "open up" eight quarts to the sack.

Marble Co. v. Ripley, 77 U. S. (10 Wall.) 339, 19 L. Ed. 955; 36 Cyc. 576, 587.

The holding in the case of Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21, is not opposed to the conclusion reached. That decision was on demurrer. All the allegations were conceded. A simple contract for taking 700,000 barrels of crude oil was involved. The suit disclosed special equities in that the defendant was insolvent, and that complainant had gone to great expense in building pipe lines to the oil wells of the defendant, which pipe lines would be worthless unless specific performance was decreed. Such equities do not appear in the present cases.

The equities urged in these cases, as warranting a decree for specific performance, are that the oysters raised in the particular locality in which these lands are situated have a peculiar flavor, and other characteristics which make them a distinct article of commerce, not obtainable elsewhere. It may be that they differ slightly in certain characteristics from other native oysters of the Pacific Coast. There is no evidence of any broken contracts because of the tendering of oysters grown elsewhere in the state, in lieu of oysters from Willapa Harbor, where these lands are situated. There is no difference, working such a prejudice as to require a decree of specific performance to protect complainant in its substantial rights; nor such that damages would not afford ample relief.

Specific performance has in many cases been decreed where corporate stock, the market value of which could not be determined, was the subject of contracts. 36 Cyc. 560, 567. But the bills in these cases set out that the market price of oysters, such as those raised on the lands in question, was, at the time the contracts were made, \$2.75, and, at the time the suits were brought, \$5 per sack.

Complainant alleges that there has been damage sustained in excess of \$2,000 in each case, and it is therefore apparent that an action at law is adequate for any past breach of the contracts. There is no ground to apprehend that it will be more difficult in the future to determine the market value of those oysters than in the past.

It is further urged that, if complainant is relegated to its remedy at law, it will require a multiplicity of suits. Section 723 of the Revised Statutes (volume 4, Fed. Stat. Ann., p. 530 [U. S. Comp. St. 1901, p. 583]) which section was substantially re-enacted in section 267 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [U. S. Comp. St. Supp. 1911, p. 237]) provides:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

To warrant the interposition of a court of equity, the remedy afforded by it must be more adequate, or more complete than that at law.

The contracts involved in these suits have 16 years yet to run, and give complainant the right to purchase oysters produced by defendants on said lands. If it was probable that any decree that could be framed in these cases would leave no chance for future honest disagreement between the parties over what constituted a compliance, and if the

decree could be enforced once for all time, it might plausibly be contended that the remedy in equity was more complete than that at law, and that a multiplicity of suits would be avoided. But, as above pointed out, it is clear that constant supervision of the court would be required over the full period covered by the contracts. The court's power would, if equity assumed jurisdiction, nominally be exercised in the present suit, yet, so far as the completeness and adequacy of the remedy is concerned, the several proceedings, resulting in the present cases, would, in all probability, be as numerous and burdensome as separate suits at law. The foregoing would be true, even if it were conceded that suits at law, at recurrent intervals, will be required, which concession is not necessary.

[2] Upon the hearing, the court was asked by complainant, in the event that it should find that the complainant was not entitled to specific performance, to assess its damages. This will not be done, for to do so, after the conclusion reached, would be to refuse jurisdiction in equity and exercise it in the same case.

The case of *Cartwright v. Southern Pacific Co.*, 206 Fed. 234, recently decided by the United States District Court in Oregon, is not an authority to the contrary. That was a case to enjoin the defendant from maintaining certain dikes in the Willamette river, which changed the channel of the stream, throwing the current against complainant's land. The court found that a decree requiring the abatement of the obstacle would be no benefit to the plaintiff, but a substantial injury to the defendant, and therefore, while finding for the complainant, denied the injunctive relief prayed, stating:

"The only question in the case, therefore, is one of damages. I have been in doubt whether, under the circumstances stated, the plaintiff's remedy is at law or in equity, and whether the court should proceed to assess the damages or transfer the cause to the law side of the court, as provided in equity rule 22. * * * but have concluded that, inasmuch as the jurisdiction of a court of equity was properly invoked to compel the removal of the dykes or dams, if the facts warrant (*Morton v. Oregon Short Line*, 48 Or. 444 [87 Pac. 151, 1046, 7 L. R. A. (N. S.) 344, 120 Am. St. Rep. 827]), it will retain this suit for the adjudication of the entire matter in controversy, although it may not be able to grant the entire relief demanded (*U. S. v. Bernard*, 202 Fed. 728 [121 C. C. A. 190])."

The court expressly found that the jurisdiction of a court of equity had been properly invoked to compel the removal of the dikes.

The causes will be transferred to the law side of the court.

UNITED STATES v. ERIE R. CO.

(District Court, W. D. New York. July 11, 1913.)

1. CARRIERS (§ 100*)—TARIFF SCHEDULES—DEMURRAGE—NOTICE OF ARRIVAL OF CARS.

Under a tariff schedule of a railroad company requiring the payment of demurrage after 24 hours on the arrival of cars at their destination and notice to the consignee, where cars were to be delivered at the yards of the company for reconsignment, a notice of their arrival at such yards,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

without more particular designation, is sufficient, and demurrage is assessable after 24 hours from the giving of the notice.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 427–433; Dec. Dig. § 100.*]

2. CARRIERS (§ 38*)—INTERSTATE COMMERCE ACT—INDICTMENT FOR VIOLATION—SUFFICIENCY.

An indictment charging a railroad company with violation of Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3156), as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1911, p. 1289), by failing to observe its tariff schedule as to demurrage, *held* sufficient where it charged that for a period of two years defendant delivered coal to a particular consignee without assessing demurrage accrued or keeping records of demurrage charges, while as to other shippers and consignees it made and collected such charges and kept such records.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 84–87; Dec. Dig. § 38.*]

3. CARRIERS (§ 32*)—INTERSTATE COMMERCE ACT—CONSTRUCTION.

The provision of Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3156), as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1911, p. 1289), prohibiting an interstate carrier from extending to any shipper or person any privileges or facilities "in the transportation of passengers or property" except such as are specified in its tariffs, relates solely to transportation privileges and facilities, and does not apply to such as may be extended to a consignee after the shipment has reached its destination.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*]

Criminal prosecution by the United States against the Erie Railroad Company. On demurrer to indictment. Overruled except as to count 51.

John Lord O'Brian, of Buffalo, N. Y., U. S. Atty.

Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y. (Adelbert Moot and George Brownell, both of Buffalo, N. Y., of counsel), for defendant.

HAZEL, District Judge. [1] The defendant, the Erie Railroad Company, organized and existing under and by virtue of the laws of New York, has been indicted for failure to observe its tariff in violation of the Interstate Commerce Act of February 24, 1887, as amended by the Act of June 29, 1906. The indictment contains 51 counts; the first 50 counts charging in effect that the defendant company at the times specified failed strictly to observe its demurrage tariff published and filed as required by law, and the fifty-first count charging the giving to the consignee of privileges and advantages not mentioned in its tariff and schedule. The defendant has demurred to the indictment, contending that the first 50 counts are insufficient in law, as it is not alleged therein that any demurrage ever accrued. The specific objection is that it is not averred that the coal cars were placed for delivery at a particular point on the tracks designated by the consignee, and that it is not stated whether the cars were to be unloaded by the defendant or by the consignee; and it is argued, *inter alia*, that a simple notification to the consignee of the arrival of the cars at the East Buffalo

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

freight yards of the defendant company does not entitle the latter to exact demurrage.

An inspection of the indictment, however, makes clear that the consignee contracted for the transportation of coal from Carbondale, Pa., and other points, to the East Buffalo freight yards of the defendant company for reconsignment, and was seasonably apprised of the arrival of the shipments at that place. It is then charged that the cars were detained beyond the full period allowed by the tariff, but that demurrage was not assessed or collected by defendant within 30 days thereafter. The tariff and schedule, establishing demurrage charges of \$1 per day a car from the receipt of notice by the consignee until the cars are released, do not particularize the manner of delivery or the place of unloading, and, as the shipment of coal was for reconsignment, it was obviously unnecessary in this case to use more specific language as to such matters. Though it is a common practice for railroad companies to deliver freight at particular places on their lines, at piers, wharves, private sidings, or points connecting with lines of other carriers, yet, as the commodity in question was concededly to be reconsigned, the rule of personal delivery, emphasized by various citations in defendant's brief, has no application. *Hutchinson on Carriers*, §§ 341-370. I think it is the law that a consignee is bound by the destination given at the beginning of the journey, and that he may be subject to demurrage charges after receipt of notice of arrival at that point. *Rorer on Railroads*, vol. 2, p. 1232. It has several times been held by the Interstate Commerce Commission, whose ruling this court is bound to follow unless such ruling is inconsistent with law (*New Haven R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515), that demurrage is ordinarily assessable against a car load shipment only at a point of origin or destination or at the place of reconsignment. *Munroe & Sons v. M. C. R. R.*, 17 Interst. Com. Com'n R. 27; *Germain v. N. O. & N. R. Co.*, 17 Interst. Com. Com'n R. 22; *United States v. Denver, etc., R. Co.*, 18 Interst. Com. Com'n R. 7. Delivery therefore at the defendant's freight yards at East Buffalo where the coal was to be reconsigned, in the absence of any other or different arrangement with the shipper or consignee, was a fulfillment of the carrying contract, and the defendant was not bound to wait for directions as to any other disposition of the commodity before its right to demurrage accrued. The case of *Hite et al. v. Central R. R. of New Jersey*, 171 Fed. 370, 96 C. C. A. 326, is a precedent for this ruling.

[2] It is next contended that, instead of alleging failure by the defendant to strictly observe its tariff, the indictment charges merely failure to observe a custom as to demurrage exactions. But I am of a contrary opinion. It is substantially alleged that for a period of two years the defendant delivered coal to the consignee, Williams & Peters, at East Buffalo without assessing demurrage or keeping records of demurrage charges and without rendering bills of account or collecting any demurrage, while as to other shippers and consignees, some of whom are named in the indictment, daily records of demurrage were kept and monthly bills of account rendered which were forthwith col-

lected in money. Under the circumstances, the recital of the ordinary method or system of business inaugurated by the defendant for charging and collecting demurrage on transportations of anthracite coal, though not in terms a part of the tariff, nevertheless has a clear bearing upon its strict observance and upon the intention of the defendant to violate the statute.

That railroad companies and common carriers generally, including defendant company, have a system of dealing with shippers and consignees by which carrying charges and charges for delays in acceptance or unloading are itemized and monthly statements forwarded and collected, has become so well recognized that judicial notice may be taken of such practice. There is nothing in the indictment relating to the custom or usage that raises a presumption of any intention or understanding to give an extension of credit to the consignee for the period specified in the indictment, or for any other period beyond 30 days after accrual of the demurrage. As I read the indictment, the words "charge for demurrage" do not imply extension of credit, but have reference to book entries in relation to the transportation. Omission to make any such entries in connection with the transportation in question is of the essence of the charge, and when considered in connection with the assessment of demurrage against other consignees, and its collection within 30 days thereafter, as was customary, strengthens the inference that the defendant in his relations with Williams & Peters intended to violate the statute.

Defendant's right to extend credit to the consignee for a period of two years without a definite arrangement in regard thereto, and its right to refuse credit to others, is perhaps a debatable question in view of the apparent conflict of judicial decisions. *United States v. Hocking Valley R. Co.* (D. C.) 194 Fed. 234, and *contra*, *Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co.*, 168 Fed. 161, 94 C. C. A. 217, 21 L. R. A. (N. S.) 982, 16 Ann. Cas. 613. But any such question need not be discussed or passed upon at this time and may be reserved for the trial, especially in view of the fact that any assumption that the defendant extended credit to Williams & Peters is palpably negatived by the statements of fact contained in the indictment.

[3] The fifty-first count of the indictment is demurred to on the ground that no crime in violation of section 6 of the act is set forth. This count, after including by reference the preceding counts, in substance charges that defendant gave to Williams & Peters a "privilege and advantage" which it refused to others, in extending to them the free use of trackage and free telephone service in notifying them of the arrival of cars and in reconsigning or forwarding such cars. By section 6 of the act under consideration, common carriers engaged in interstate commerce are forbidden to extend to any shipper or other person any privileges or facilities in the transportation of persons or property save such as are specified in the tariffs. I think the section contains a limitation requiring me to hold that the term "privileges and facilities" relates solely to the transportation of persons or property and bears upon the transportation rates and charges. The first 50 counts of the indictment, as already shown, are based upon the

failure to assess Williams & Peters for demurrage which accrued as a result of the detention of coal cars in the freight yards of the defendant. Such detention implies the use of trackage, and storage of cars, and it is difficult to conceive that the defendant may be held criminally liable for extending privileges and facilities of the kind enumerated, and at the same time held criminally liable for its failure to assess and collect demurrage; the transportation being identical. However, the privileges or advantages extended to the consignee, to which there is no reference in the tariff, are thought to come within the jurisdiction of the Interstate Commerce Commission, for, as said by the Supreme Court in the *United States v. Pacific & Arctic Ry. & Nav. Co. et al.*, 228 U. S. 87, 33 Sup. Ct. 443, 57 L. Ed. 742, decided April 7, 1913, the act is "more regulatory and administrative than criminal." Although this case dealt with unlawful discrimination, still I think the following quotation from the opinion may be appropriately included herein:

"It (the Interstate Commerce Act) has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court."

But as the offense of unlawful discrimination is expressly disclaimed by the district attorney, I will sustain the demurrer as to the fifty-first count on the ground that the so-called privileges and advantages extended to the consignee by the defendant were extended after the termination of the journey, or after the arrival of the freight at its destination for reconsignment, and therefore had no relation to the actual transportation of the property or to the rates and charges specified in the tariff published and filed.

My conclusion is that counts 1 to 50, inclusive, are valid in law, and as to them the demurrer is overruled; while as to count 51 the demurrer is sustained.

THE SINALOA.

(District Court, N. D. California, First Division. September 13, 1913.)

No. 15,405.

MARITIME LIENS (§ 25*)—FEDERAL STATUTE—SERVICES OF WATCHMAN.

Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1192), which gives a lien for repairs, supplies, or other necessities furnished to a vessel on order of the owner or a person authorized by him, does not cover the services of a watchman employed by the owner for a vessel while lying in her home port.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 31-36; Dec. Dig. § 25.*]

In Admiralty. Suit by M. A. Taylor against the gasoline launch Sinaloa. On exceptions to libel. Exceptions sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

H. W. Hutton, of San Francisco, Cal., for libellant.
Denman & Arnold, of San Francisco, Cal., for respondent.

DOOLING, District Judge. Exceptions to libel for services as watchman, alleged to have been performed on the launch Sinaloa at the request of her owner. It is not averred where the vessel lay at the time of the performance of the services, but the cause was argued on the assumption that she lay in her home port; the real question submitted being whether the services of a watchman employed by the owner create a lien upon the vessel under the act of Congress of June 23, 1910, when such services have been rendered in her home port.

It has been frequently held that such service is not maritime. *The Sirius* (D. C.) 65 Fed. 226; *The America* (D. C.) 56 Fed. 1021; *The E. A. Barnard* (C. C.) 2 Fed. 712; *The Island City*, Fed. Cas. No. 7,109. In the absence of the act of Congress of June 23, 1910, the services of a watchman would create no lien. This act provides:

"That any person furnishing repairs, supplies, or other necessities, including the use of a dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

This act does not by any fair construction of its terms include the services here in suit, nor is it clear that its terms should be so extended by construction as to include them. The apparent intent of the act was to relieve those persons who formerly would have had a lien if credit had been given to the vessel from the necessity of alleging and proving that credit had been so given. The purpose does not seem to have been to create a new class of liens, or liens for services which had been theretofore determined not to be maritime, but only to deal with certain matters that had always been recognized as cognizable in admiralty.

While it is quite true that the libellant should be paid for any services rendered by him, I am of the opinion that his remedy is against the owner, and not against the vessel.

The exceptions will therefore be sustained, and the libel dismissed.

MACKENZIE v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. December 30, 1913.)

No. 1,794.

1. CRIMINAL LAW (§ 805*)—TRIAL—INSTRUCTIONS—REQUESTED CHARGE—DEFINITENESS.

In a prosecution for using the mails in furtherance of a scheme to defraud, a requested charge that an honest belief by the defendant of the truth of the "statements" was a defense was properly refused for indefiniteness as to what "statements" were referred to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1958, 1989; Dec. Dig. § 805.*]

2. CRIMINAL LAW (§ 829*)—TRIAL—REQUESTED CHARGE—INSTRUCTIONS GIVEN.

Where, in a prosecution for using the mails in furtherance of a scheme to defraud, the court in various ways charged that in order to convict the jury must find not only that the scheme was false, but that it was known to be false by accused, that he knew his representations made through the mails in order to further the scheme were untrue, etc., such instructions sufficiently covered a requested charge that an honest belief by defendant of the truth of the statements made by him was a defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Robert M. Mackenzie was convicted of using the mails in furtherance of a scheme to defraud, and he brings error. Affirmed.

James A. Wakefield, of Pittsburgh, Pa., and Robert P. Kennedy, of Uniontown, Pa., for plaintiff in error.

E. Lowry Humes, U. S. Atty., of Meadville, Pa., and R. M. Gibson, Asst. U. S. Atty., of Pittsburgh, Pa.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The defendant was indicted under section 215 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]) for using the mails in furtherance of a scheme to defraud. He was convicted, and is now complaining because the trial judge declined to give the following instruction:

"1. That an honest belief by the defendant as to the truth of the statements is a defense."

[1, 2] Usually, in order that the judge may have time to consider requests to charge, they should be handed up before either counsel addresses the jury, and it may be that Judge Young declined to answer the foregoing request because (with two others) it was offered too late. But, in any event, it was properly declined for two reasons: (1) Because it was indefinite, since it did not point out with sufficient precision what "statements" were referred to; and (2) (without laying weight

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
209 F.—19

on this consideration, and assuming that the "statements" mean the letters that are set out in the indictment) because the general charge had fully covered the ground. The learned judge repeatedly instructed the jury that the defendant must have known the scheme to be false. He said, *inter alia*:

"In other words, this statute aims at any scheme to defraud which is false in fact, and known to the person executing it to be false. * * * You see, therefore, that this statute is aimed at a scheme to defraud which is false, which is known to be false by the person, and in furtherance of which the United States mails are used. * * * So you see that there enters into it the question of the falsity of the representations; the knowledge of the person at the time that his scheme is untrue," etc.

Still further, he told the jury that the government was charging that the defendant's assertions in his letters—

"* * * were untrue; that they were known to be untrue by the defendant; that he used the United States mails in further execution of this fraud."

And was also charging that the defendant knew that the letters sent to him by certain witnesses for the government—

"* * * showed no condition of disease; that the defendant knew that they showed no condition of disease, but, notwithstanding that, by his correspondence or his letters he led the persons sending those letters to believe that they were suffering with serious disease which he could cure; that this was false; and that he knew it to be false."

In another part of the charge he stated that the government was asserting that the defendant "professed to cure certain diseases that he could not cure, and which he knew he could not cure," adding that if defendant's advertisement was false, "and known to be false by the defendant, and he was attempting to gain money from persons upon this advertisement, and used the mails in execution of it, then a scheme to defraud exists." The charge also called attention to the fact that the defendant had testified to the truthfulness of his statements, saying that he was required to meet the assertion that by "pretending" to diagnose a disease from the symptom blanks he was furthering a scheme to defraud. And at the very end the judge again directed the jury to the defendant's position "that there was no scheme to defraud, (and) that what he stated in his advertisement was true."

These instructions were adequate, and fully covered the point to which the foregoing request was directed. It is well settled that no error is committed by declining a point that has been answered in the general charge. *Coffin v. United States*, 162 U. S. 672, 16 Sup. Ct. 943, 40 L. Ed. 1109.

The judgment is affirmed.

THOMAS J. BAIRD INV. CO. v. HARRIS.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1913.)

No. 3,875.

1. VENDOR AND PURCHASER (§ 2*)—VALIDITY OF CONTRACT—WHAT LAW GOVERNS.

The validity of a contract for the sale of land must be determined by the law of the state where the land is situated.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. FRAUDS, STATUTE OF (§ 106*)—CONTRACT FOR SALE OF LANDS—REQUISITES AND SUFFICIENCY OF WRITING—SEPARATE WRITINGS.

An agreement for the sale of land within the statute of frauds will not be enforced in equity or at law, if it appears from its face that any of its terms are left open to be settled by future conferences between the parties; but it is sufficient to validate the contract if in the course of the transaction the party to be charged in some writing signed by him or his authorized agent recognizes or ratifies an agreement sufficiently explicit in terms and disclosed in writings which show unmistakably that they relate to the same transaction.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 193, 210, 211; Dec. Dig. § 106.*]

3. FRAUDS, STATUTE OF (§ 153*)—STATUTE AS DEFENSE—PLEADING.

A general denial by the defendant, in an action on a contract for the sale of lands, although coupled with an admission of the execution of the contract set out, is as effective to let in the defense of the statute of frauds as though the statute had been specially pleaded.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 367; Dec. Dig. § 153.*]

4. VENDOR AND PURCHASER (§ 8*)—VALIDITY OF CONTRACT.

A contract to sell land and convey the same by a good title is not violated because the vendor is not the actual owner if he has an enforceable contract for its purchase, and the tender of a deed from a third person, conveying the requisite title, is a compliance with his contract. Nor is it material that the vendor depended upon payments required to be made by the purchaser before or at the time of delivery of the deed to pay off incumbrances.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 5; Dec. Dig. § 8.*]

5. PLEADING (§ 290*)—ANSWER—ADMISSIONS BY FAILURE TO DENY AGENCY—OKLAHOMA CODE.

Under Rev. Laws Okl. 1910, § 4759, which provides that "in all actions allegations of any appointment of authority shall be taken as true unless the denial of the same be verified," an allegation in the petition, in an action for breach of a contract by defendant to purchase lands, that a person named was the duly authorized agent of defendant to act for him in the transaction, unless denied under oath, is sufficient to establish the agency, and that the authority of the agent was in writing, where that was necessary.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 859-863, 886½; Dec. Dig. § 290.*]

6. FRAUDS, STATUTE OF (§ 118*)—ADMISSIBILITY OF EVIDENCE TO AID MEMORANDUM.

In an action by the vendor for breach of a contract by which defendant agreed to purchase certain lands where some of the terms of the sale were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not stated in the written contract, a bill in equity, signed and sworn to by defendant and filed by him in a prior suit for the cancellation of the contract on the ground of fraud, in which such terms were set out, was admissible in evidence as a recognition and admission of the contract, including such terms for the purpose of taking it out of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 199, 262-265; Dec. Dig. § 118.*]

7. FRAUDS, STATUTE OF (§ 118*)—EVIDENCE TO AID MEMORANDUM—SUFFICIENCY.

Evidence, consisting of letters and other writings signed by the defendant or his authorized agent, *held* to contain sufficiently specific recognition and acknowledgment of the terms of a contract for the sale of land, in connection with a written memorandum signed at the time, to render the contract valid and enforceable under the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 199, 262-265; Dec. Dig. § 118.*]

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action at law by the Thomas J. Baird Investment Company against D. W. Harris. Judgment for defendant, and plaintiff brings error. Reversed.

Plaintiff in error brought this suit below to recover damages laid at \$11,076.95 for breach of contract for the sale to defendant in error of certain real estate located in Nelson county, N. D.

The petition declared upon a contract consisting of a writing called an "earnest money contract of sale," dated October 11, 1908, supplemented by oral agreements alleged to have been subsequently ratified and recognized in writing by the defendant personally and through his duly authorized agent and attorney. The original written contract is attached to the petition as "Exhibit A," and is as follows:

"Earnest Money Contract of Sale.

"Deer Creek, Okla. 10-11, 1908.

"Received of D. W. Harris of Deer Creek, Okla., cash \$500. Note \$1000. Due Nov. 11, 1908. Total \$1,500. As earnest money and in part payment for the purchase of the following described property situated in the county of Nelson and state of North Dakota, viz:

"All of section 21, the north half of section 28, the east half of section 20 and the southeast quarter of section 17, all in township one hundred and fifty-one, north of range 57 west, which we have this day sold and agreed to convey according to the conditions of this contract to said D. W. Harris for the sum of forty-three thousand and two hundred dollars (\$43,200) on terms as follows, viz:

"Five hundred dollars (\$500) in hand paid as above, and		
\$1,000 Nov. 11, 1908		\$2,140 Jan'y. 1, 1912
\$3,500 Dec. 11, 1908		\$2,140 Jan'y. 1, 1913
\$4,000 Jan'y. 11, 1909		\$2,140 Jan'y. 1, 1914
\$2,140 Jan'y. 1, 1910	Real Estate,	\$8,000
\$2,140 Jan'y. 1, 1911	Fixtures,	\$1,000
	Estimate Dis.	\$1,000

with interest on deferred payments at 6 per cent. from date until paid, payable Jan'y. 1, annually, payable on or before the dates as named above, or as soon thereafter as a warranty deed conveying a good title to said land is tendered, time being considered the essence of this contract.

"And said sale, then D. W. Harris is to deed the following real estate to

the Thomas J. Baird Investment Co., of Lakota, N. D. The south nine (9) feet of lot 11 and lot 12 and lot 13 and 14 all in block 2 in Deer Creek, Okla., free of incumbrance, D. W. Harris is to receive credit of \$8,000, said company is to allow said Harris \$1,000 credit for fixtures in said Harris' store.

"The Thomas J. Baird Investment Company agrees to stand shrinkage not to exceed \$1,000 or any part thereof from the cost of said D. W. Harris' stock in closing out same, and allow credit to Harris for amount of said shrinkage.

"And it is agreed that if the title to said premises is not good and cannot be made good within sixty days from date when first payment shall become due, this agreement shall be void, and the above mentioned five hundred dollars (\$500) refunded, but if the title to said premises is then good, in the name of the grantor, and said purchaser refuses to accept the same said five hundred dollars (\$500) shall be forfeited to Thomas J. Baird Investment Co.

"But it is agreed and understood by all parties to this agreement that said forfeiture shall in no way affect the rights of either party to enforce the specific performance of this contract.

"[Signed] Thomas J. Baird Investment Co.,

"By Thomas J. Baird, Prest."

"I hereby agree to purchase the said property for the price and upon the terms above mentioned, and also agree to the conditions of forfeiture and all other conditions herein expressed.

"[Signed]

D. W. Harris."

It will be observed that in this writing, of the total consideration of \$43,200, but \$29,700 is provided for in the specified terms of payment. Concerning matters not contained in this earnest money contract, the petition says:

"The difference in amount between the total purchase price of \$43,200 named in said contract, and the several sums specified therein, amounting to said sum of \$29,700, was to be paid by the said defendant assuming a mortgage on said premises for the principal sum of \$13,500, and which he agreed to pay as a part of the consideration of said transfer of said property to him, and said property was to be conveyed to him subject to said incumbrance of \$13,500. That at the time of the making of said contract, the said defendant orally agreed to assume said mortgage of \$13,500 as a part of the consideration of the purchase price of said real property above described, and thereafter recognized and ratified said oral agreement in writing, the same being contained in letters written by the said defendant, and by his duly authorized agent and attorney to this plaintiff, copies of which are attached hereto and reference to which will be specifically made herein.

* * *

"That it was orally agreed between the said plaintiff and the defendant, and which said oral agreement was thereafter ratified and recognized in writing by the said defendant, through letters written by himself and his duly authorized agent and attorney, and copies of which are hereto attached, and to which reference will be specifically made hereafter, that the deed to the said defendant for the real property described in said contract should not be delivered to the said defendant until said three notes, aforesaid (aggregating \$8,500), were paid, and that the proceeds of the payment of the said notes were to be used by the said plaintiff in taking up and satisfying other incumbrances on said real property hereinbefore referred to, other and in addition to the said mortgage of \$13,500, and that upon the payment of said notes, and the execution of the five notes, each for \$2,140, set out and described in said written contract, and the execution and delivery to the plaintiff by the defendant of a real estate mortgage on the land purchased by him securing the payment of said notes, and the delivery by the defendant to the plaintiff of a deed to the real property situated in the town of Deer Creek in the county of Grant, and the state of Oklahoma, which he was to convey to the plaintiff as a part of the consideration of said contract; that thereupon he was to receive from the plaintiff the deed to the real property situated in the county of Nelson and state of North Dakota purchased by him. * * *

"That the written contract between plaintiff and defendant, a copy of which is hereto attached marked 'Exhibit A,' being silent as to the manner of the payment of said sum of \$13,500 in addition to the several payments therein specified, and which was the balance of the total purchase price of \$43,200, was supplemented by oral agreement between plaintiff and defendant, and by the correspondence had between plaintiff and defendant, and plaintiff and defendant's duly authorized attorney, the said Emery H. Breeden, by the recognition and ratification of the agreement between plaintiff and defendant as contained in said correspondence, and that the complete contract between plaintiff and defendant consisted of said original contract, in writing, and said oral agreement, and said correspondence, all as set forth herein."

To the petition were annexed, and especially referred to therein as exhibits, in addition to Exhibit A, aforesaid, the following:

Exhibit B: A letter from defendant to Baird, dated October 29, 1908.

Exhibit C: A letter from plaintiff to the First National Bank of Medford, Okl., dated November 16, 1908, containing the earnest money contract aforesaid; the three notes first specified therein for collection; a warranty deed from one Henry L. Pitts, the owner of the lands purchased, to the defendant; the five notes of \$2,140 each; and a mortgage securing the same to be executed by the defendant. This letter contained specific directions respecting the disposition of these papers, and acts to be done by the defendant in performance of the contract; it also embraced the following statement:

"These papers are sent you upon the request of Mr. Harris. We extended the due date of the first note to the 20th of this month. Inasmuch as these papers are sent to Oklahoma by the request of Mr. Harris, if there are any expenses attached, he should pay them. In remitting, we would prefer Chicago exchange. Kindly acknowledge these papers and if there is anything about them you do not understand, please write us. We have sent all the abstract to Mr. Harris."

Exhibit D: The warranty deed from Pitts and wife to the defendant, to which reference has been made.

Exhibit E: A letter from plaintiff to defendant, of date November 12, 1908.

Exhibit F: A letter from defendant to Baird, of date November 18, 1908.

Exhibit G: A letter to plaintiff from Emery H. Breeden, alleged to be the agent and attorney of defendant, of date November 28, 1908.

Exhibit H: A letter from Breeden to Baird, of date December 4, 1908.

The contents of these exhibits will be referred to hereafter to such extent as may be deemed material.

In his answer the defendant first interposed a general denial to the allegations of the petition. In the course of three further defenses stated in the same answer, he admits the agreement and contract declared by the plaintiff, but charges that he was induced to make the same through certain false and fraudulent representations, upon which he relied, and as the result of a conspiracy to defraud him formed by Baird and a confederate named Lamb; that as soon as he learned of the fraud practiced he promptly took steps to rescind the contract. The misrepresentations alleged were that the mortgage of \$13,500, which defendant was to assume, would not be due and payable for five years after the date of the contract, and would not be due and payable until after the maturity of the mortgage to be given plaintiff to secure the five notes of \$2,140 each; when in truth and in fact the former mortgage matured in a little more than one year.

At the trial defendant relied upon the statute of frauds as a defense, and at the close of plaintiff's case interposed a demurrer to the evidence; this, the court sustained, upon the disclosed grounds that the contract sued upon had not been successfully established, because essential parts of it were not evidenced by any writing signed by the defendant, or sufficiently authorized by him; and, as an incident to this, that the correspondence of defendant's attorney, Breeden, was not admissible because the evidence did not show his authority to have been in writing, as required by the statute. The court in its ruling conceived the Oklahoma statute to be controlling.

P. C. Simons, of Enid, Okl. (Parker & Simons, of Enid, Okl., on the brief), for plaintiff in error.

J. C. Robberts, of Enid, Okl., and Emery H. Breeden, of Medford, Okl. (John F. Curran, of Enid, Okl., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge (after stating the facts as above). [1] As this is a contract for the sale of and affecting the title to real estate, its validity must be determined by the law of the state in which the land is situated. *Clark v. Graham*, 6 Wheat. 577, 5 L. Ed. 334; *Caldwell v. Carrington*, 9 Pet. 86, 9 L. Ed. 60. Particularly is this true, since, as we shall see, the statute relied on affects the validity of the contract and not the remedy. *New York Third National Bank v. Steel*, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119. The statutes of North Dakota and Oklahoma are identical. The suit was brought in Oklahoma, but the land involved is located in the former state; consequently, the interpretation placed upon the statute by the Oklahoma courts, while persuasive and entitled to great respect, cannot be viewed as decisive and controlling in the case before us.

The terms of the statute are these:

"The following contracts are invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or by his agent: * * * An agreement for the leasing for a longer period than one year or for the sale of real property or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent be in writing, subscribed by the party sought to be charged."

In the absence of express decision to the contrary by the Supreme Court of North Dakota, we think the following generally accepted rules to be applicable:

[2] An agreement within the statute will not be enforced in equity nor at law if it appears from the face of the agreement that any of the terms, no matter how unimportant they may seem to be, are left open to be settled by future conferences between the parties thereto. In such cases there is no complete agreement. *Scholtz v. Northwestern Mutual Life Ins. Co.*, 100 Fed. 573-574, 40 C. C. A. 556. Such agreement or contract may be authenticated and established through the medium of letters and separate writings and documents, provided they refer to each other and to the same persons and things, and manifestly relate to the same contract and transaction. *Wood on Statute of Frauds*, § 345, p. 655; *Atwood v. Rose et al.*, 32 Okl. 355, 122 Pac. 929; *Swallow et al. v. Strong et al.*, 83 Minn. 87, 85 N. W. 942. It is sufficient if in the course of the transaction the party to be charged in some writing signed by him, or his duly authorized agent, recognizes or ratifies an agreement sufficiently explicit in terms and disclosed in writings which show unmistakably that they relate to the same transaction. *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496;

Townsend v. Kennedy, 6 S. D. 47, 60 N. W. 164. The rule has been thus well stated:

"It is immaterial in what form the memorandum is made, or whether it was ever delivered to the other or not, provided that, in itself, or by reference to other writings, it embraces all the essential elements of the contract. Nor is it material in what form the writing admitting the existence of a contract, a memorandum of which is signed by one party, is made by the other party. If it admits the contract, and refers to the memorandum in such a manner that the court can connect it therewith, and ascertain the terms of the contract without the aid of parol evidence, it is sufficient to bind him, although he did not intend thereby to ratify the contract. The moment written evidence of the contract, under his hand, in whatever form, exists, the contract is taken out of the statute, even though such admission is in the form of a letter repudiating the contract." Wood on Statute of Frauds, § 345, p. 651.

The original earnest money contract of sale, signed by both parties, was, in itself, a memorandum sufficiently explicit to satisfy the statute under ordinary circumstances. In the absence of special provision respecting the payment of the balance of the purchase price, the law would presume that it was to be paid in cash at the close of the transaction. However, the plaintiff, in its petition, has stated that other material terms were explicitly agreed upon, viz., the assumption of a mortgage of \$13,500 by the defendant, and also the giving of a mortgage to secure the deferred payments aggregating \$10,700. Having so stated the contract, it must be held to establish it as declared.

[3] The plaintiff contends that the defendant has not sufficiently pleaded the defense of the statute. This contention is untenable. It may now be accepted as settled by weight of authority that a party may admit an agreement not in conformity with the statute of frauds and yet avail himself of the defense by coupling with the admission a claim to the protection of the statute; and this is particularly true in those states where the statute makes the contract void and not merely voidable. American & English Enc. of Pleading & Practice, vol. 9, pp. 711, 712. The defendant has interposed a general denial. This operates to deny that any such agreement was made and puts the plaintiff to proof. Such a denial is as effective for letting in the defense as if the statute of frauds had been specially pleaded. May v. Sloan, 101 U. S. 231-237, 25 L. Ed. 797.

[4] The main insistence of the defendant is that the memorandum is defective, in that it does not provide: (1) A warranty deed from Pitts instead of from plaintiff; (2) that the defendant should execute a mortgage to secure the deferred payments, aggregating \$10,700; (3) that the \$13,500 mortgage should be assumed and should not fall due within a period of five years, or at least until after the maturity of the mortgage for \$10,700 last mentioned. He also insists that plaintiff has not shown ability to perform the contract on its part, in that it depended upon payments from the defendant to enable it to discharge certain existing incumbrances upon the property. We are of opinion that the objection to the deed is not well taken. The contract provides that a warranty deed conveying a good title to said land must be tendered. It is not objected that the deed from Pitts did not carry such title. It is not necessary that the vendor should be the actual owner,

but only that he have an enforceable contract for the purchase, or that he stand in such relation to it that he can carry his contract into effect at the time specified. *Gray v. Smith et al.* (C. C.) 76 Fed. 525. Nor do we think it material that the plaintiff relied upon certain payments from defendant to enable it to remove certain incumbrances. If the ability of the plaintiff to make title were involved, if plaintiff could not secure the deed nor make conveyance without first obtaining money from the defendant, this criticism might have weight; but here the conveyance has been tendered. The rule invoked does not extend to the mere satisfaction of prior incumbrances by employing a part of the purchase money. These are mutual and contemporaneous steps in the performance of the contract. Such conditions are met with in the great majority of real estate transactions, and are not regarded as impairing the validity of contracts in which they inhere. Moreover, the correspondence recognizes this feature of the contract. It remains to be seen then whether, within the requirements of the statute, there was a sufficient memorandum embodying the entire contract, and a sufficient subscription by the defendant or his agent; because the defendant in this action is, of course, the party to be charged. Even though it were to be conceded that the subscription of both buyer and seller is necessary, it cannot well be claimed that that of the seller is wanting.

[5] The trial court was of opinion that the letters written by Breeden, defendant's agent, were inadmissible, as tending to disclose a written contract, because plaintiff had failed affirmatively to prove the agent's authority to be in writing subscribed by the defendant. The laws of Oklahoma (Rev. Laws 1910, § 4759) provide:

"In all actions, allegations of the execution of written instruments and indorsements thereon of the existence of a corporation or partnership or of any appointment or authority, etc., shall be taken as true unless the denial of the same is verified by the affidavit of the party, his agent or attorney."

In the petition Breeden is described as the duly authorized agent and attorney of defendant and as duly authorized by Harris to represent him in said transaction. These allegations are not denied under oath. The general allegation of an authorized agency will be presumed to be an agency with full powers legally conferred. The failure to deny under oath is equivalent to an admission in the answer. The law of the forum regulating the procedure is controlling. No further proof of the agent's authority was required. *Mitchell v. Knudtson Land Company*, 19 N. D. 736, 124 N. W. 946.

All other essential terms of the agreement being contained in the original memorandum (Exhibit A) which was subscribed by both parties, and the additional provisions respecting the assumption of the mortgage of \$13,500, and the making of the mortgage securing deferred payments aggregating \$10,700 by defendant, being disclosed in writings subscribed by plaintiff, it remains to be seen whether in the letters or other documents received or offered in evidence recognition or ratification of these terms by the defendant appears in writings subscribed by him; and in determining this we must look at all the correspondence and writings relating to this transaction which are

presented in the record, whether attached to the petition as exhibits or subsequently offered in evidence. *Williams v. Smith*, 161 Mass. 248-252, 37 N. E. 455.

Exhibit C, the letter of November 16, 1908, from the plaintiff to the First National Bank of Medford, Okl., in connection with the deed from Pitts, sets out the disputed terms of the contract with sufficient particularity. This letter, with its inclosures, was forwarded to the bank for defendant's inspection, and as an important step in the closing of the contract. On the same day plaintiff wrote defendant saying:

"We have this day sent to the First National Bank of Medford, Oklahoma, your notes, deed and a mortgage. Please call and execute mortgage and notes at your earliest convenience. Not knowing Mrs. Harris' name, we left that blank and instructed the bank to fill it in. We also left the county in which you live blank for them to fill in. All of these papers are drawn in accordance with our understanding. We have just received your letter and note what you say about the payments."

Four days before, November 12, 1908 (Exhibit E) Baird had written Harris inclosing to him nine abstracts covering the land in question. In this letter he referred to their agreement that the incumbrance of \$13,500 should be left against the property. November 18, 1908 (Exhibit F), Harris wrote Baird as follows:

"I received the abstracts all O. K. Was glad to hear from you. I will send you my abstract in a few days."

This letter, written in response to plaintiff's letter of November 12th, gives implied assent to the mortgage of \$13,500 as one of the terms of payment of the purchase price. *Townsend v. Kennedy*, 6 S. D. 47, 60 N. W. 164. But it may be said that the letters of November 16th to the First National Bank of Medford and to Harris, with their fuller recitals, had not yet been brought home to defendant because no reference is made to them. However, on November 24, 1908, the agent Breeden, having been employed by defendant to assist him in the transaction, wrote to plaintiff a letter in defendant's behalf. In the course of this letter he says:

"The abstracts show in addition to the \$13,000 which grantee is to assume in mortgages that there are three other mortgages aggregating \$9,643.24 on the land. Mr. Harris understands that you are to use the amount he is to pay on the notes executed at this time to remove or release this indebtedness, and I wish to know if that is correct."

Some additional details are then requested respecting the payment of taxes on the land and interest on the mortgage. That Harris was to execute a mortgage back for \$10,700 is recognized as a part of the agreement; but some question is raised as to an insurance clause contained in it, and also respecting some embarrassment to Harris that might arise from the fact that the \$13,500 mortgage would mature before that securing the deferred payments aggregating \$10,700. This letter is a sufficient written recognition both of the \$13,500 mortgage and the \$10,700 mortgage as parts of the original agreement between the parties. Still further recognition is contained in Breeden's letters to Baird of December 4 and 5, 1908, in which the former seeks

to repudiate the contract. That of December 5th was admitted without objection.

[6] Plaintiff offered in evidence, as further tending to sustain the contract sued on, a bill in equity filed in the circuit court for the district of Oklahoma, in which Harris was complainant and the plaintiff in this case was defendant. This bill sought to set aside the contract here under consideration and to recover back the cash payment of \$500 made thereunder. The bill is subscribed and sworn to by Harris. This offer was rejected by the trial court on the stated ground that the pleading was not signed in connection with the making of the contract. In this, we think the court erred. This was a pleading in a former case between the same parties; it was subscribed and verified by the party here charged; it did not set up the statute of frauds. The writings claimed to embody the contract were then in existence and were sufficiently referred to, and the pleading manifestly related to the same contract and transaction. In the bill it was stated that the contract was made as charged, including the agreement to assume the mortgage for \$13,500 as a part of the purchase price, and to give back a mortgage to secure the deferred payments aggregating \$10,700. This contract is sought to be avoided because of certain alleged fraudulent representations made by plaintiff herein respecting the time of maturity of the \$13,500 mortgage, which Harris claims induced him to enter into the contract and agreement which was, in fact, made. Such a solemn and formal recognition and admission of a prior oral agreement is competent and admissible on both reason and authority. Brown on the Statute of Frauds (5th Ed.) § 354a; 20 Cyc. 254; Jones v. Lloyd, 117 Ill. 597, 7 N. E. 119.

It is true that in the former pleading, as in the present, the defendant Harris coupled his admissions respecting the contract with the claim that the plaintiff, through its president, Baird, induced him to enter into that contract through fraud and misrepresentation as to the time when the incumbrance which he was to assume would fall due; but this is a defense which has no relation to the statute of frauds. By implication it recognizes and presupposes the existence of the contract which is thus assailed as induced and tainted by fraud. The defendant contracted to assume a certain incumbrance. Let it be conceded that through fraud or inadvertence he failed to provide against some details of the assumption which worked to his disadvantage. He cannot invoke the statute of frauds for his relief. That statute thus interpreted would be made to work a revolution in the law of contracts apart from the evidentiary phase to which it is confined. It would become the vehicle by which the terms of written contracts might be varied upon the sole ground that they did not contain all the matters of detail which one of the parties afterwards desired them to contain. This is not the function of the statute. Defendant's remedy, if his cause is just, lies in other forms of procedure of the nature disclosed in his former bill and affirmatively stated in his answer filed herein.

"The statute does not say that if a written agreement is signed the same exception shall not hold to it that did before the statute. * * * It does not say that a written agreement shall bind, but that an unwritten agreement

shall not bind." *Brown on the Statute of Frauds* (5th Ed.) § 409; *Glass v. Hulbert*, 102 Mass. 24-35, 3 Am. Rep. 418.

With the question of ultimate recovery based upon other considerations it has nothing to do. *Townsend v. Hargraves*, 118 Mass. 325.

[7] We conclude then that under the pleadings and upon the evidence introduced, as well as that offered and rejected, as herein stated, the demurrer to the evidence should have been overruled.

It follows that the judgment below must be reversed, and the cause remanded, with directions to grant a new trial.

HOOK, Circuit Judge, concurs in result.

McKINNEY et al. v. LANDON et al.
FIDELITY TITLE & TRUST CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. November 4, 1913.)

Nos. 4,008, 4,009.

1. COURTS (§ 500*)—FEDERAL AND STATE COURTS—CONFLICTING JURISDICTION.

On a motion in a federal court for an order directing its receivers to turn over the property of a corporation to receivers appointed by a state court after a hearing, the federal court cannot review the findings of the state court based on evidence, but is limited to a consideration of the question of priority of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1407, 1408; Dec. Dig. § 500.*]

2. COURTS (§ 489*)—JURISDICTION—APPOINTMENT OF RECEIVERS—FOREIGN CORPORATIONS.

As regards its business and property within a state, a foreign corporation is subject to the local law, and under Gen. St. Kan. 1909, § 5146, prohibiting a foreign corporation which violates the anti-trust laws of the state from doing business therein and making it the duty of the Attorney General to enforce such prohibition by appropriate proceedings a District Court of the state, vested with both equitable and legal powers, to be exercised as conditions require in a single action, has jurisdiction to appoint receivers for the business and property of such a corporation within the state at suit of the Attorney General, charging the unlawful absorption by the corporation of the property of domestic corporations.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

3. COURTS (§ 493*)—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.

By the bringing of such an action under the statute in which a receivership is prayed for, the state court acquires jurisdiction over the property of the corporation within the state to the exclusion of a federal court in a suit subsequently brought therein, although the latter first appointed receivers.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1346-1352; Dec. Dig. § 493.*]

Conflict of jurisdiction with state courts, see note to *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 356.]

4. COURTS (§ 489*)—FOREIGN CORPORATIONS—SUBJECTION TO STATE LAWS—VIOLATION OF ANTI-TRUST LAWS.

A foreign corporation engaged in interstate and local commerce may be adjudged guilty of a violation of the anti-trust laws of the state, its li-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cense to do business in the state may be canceled, and a receiver for all its property therein appointed under the general laws in aid of the enforcement of the judgment; and it is no defense that such property included instrumentalities used by it in conducting its interstate business, or that the corporation by the same course of conduct has also violated the similar laws of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock and Ralph E. Campbell, Judges.

Suits in equity by John L. McKinney and by the Fidelity Title & Trust Company against John M. Landon and others. From orders directing the receivers to surrender certain property to receivers appointed by a state court, complainants appeal. Affirmed.

For opinion below, see *McKinney v. Kansas Natural Gas Co.*, 206 Fed. 772.

These are appeals from a decree of the District Court of the United States for the District of Kansas directing receivers appointed by it to surrender certain property to receivers appointed by the district court of Montgomery county, Kan.

On January 5, 1912, the state of Kansas by its Attorney General brought an action in the district court of Montgomery county, Kan., against the Kansas Natural Gas Company, the Independence Gas Company, and the Consolidated Gas, Oil & Manufacturing Company. The Kansas Natural Gas Company is a Delaware corporation which had obtained a license or privilege to do business in Kansas where most of its property is located. The other two defendants were organized under the laws of the state of Kansas. The action was in quo warranto and under the anti-trust laws of the state. It was charged that the three defendants had entered into a series of unlawful contracts, agreements, trusts, and combinations to control, restrict, restrain, and monopolize the production, distribution, and sale of natural gas and to increase the cost thereof to consumers; also, that they were guilty of a "perversion, misuse, and abuse of the corporate powers and privileges granted to them" by the state; that the Independence Company had been reorganized into the Consolidated Company, and all of the property and franchises of the latter had been unlawfully taken over and absorbed by the Kansas Natural Gas Company with the further result that the two Kansas corporations were disabled from performing their duties as public service agencies. There was a prayer for an exhaustive decree embracing the ouster of the three defendants from the exercise of their corporate powers and privileges within the state, the appointment of receivers to take charge of their property and business, as well as other relief necessary fully to correct the wrongs and abuses complained of.

On September 30 and October 1, 1912, this cause was tried in the district court of Montgomery county and was taken under advisement.

On October 7, 1912, the appellant McKinney as the holder of second mortgage bonds of the Kansas Natural Gas Company filed, for himself and such other creditors as might join him, in the District Court of the United States for the District of Kansas, a creditors' bill against that company alleging its insolvency and praying the appointment of receivers and the marshaling and distribution of its assets.

On October 9, 1912, the United States District Court appointed receivers; the defendant Kansas Natural Gas Company having appeared, confessed the bill, and joined in the prayer. This receivership embraced property in Kansas, Missouri, and Oklahoma. In due course the receivers took possession.

On October 19, 1912, the appellant Fidelity Title & Trust Company, as trustee for the first mortgage bondholders of the Kansas Natural Gas Company, was on its intervening petition made a party plaintiff in the McKinney

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

suit as of October 7th; and, the defendant confessing the averments of the petition, the receivership was extended nunc pro tunc.

On February 3, 1913, the Kansas Natural Gas Company having defaulted in interest on its first mortgage bonds, the Fidelity Title & Trust Company as trustee filed in the District Court of the United States for the District of Kansas an independent bill in foreclosure against the Kansas Natural Gas Company. The Delaware Trust Company as trustee in the second mortgage was also made defendant. The prior receivership in the McKinney suit was extended over the foreclosure suit.

On February 13, 1913, the state court decided the cause pending before it, in favor of the state of Kansas. Its decree recites that the Independence Gas Company had forfeited its right to exist as a corporation and should be dissolved; the Consolidated Gas, Oil & Manufacturing Company had unlawfully perverted and abused its corporate privileges and had been a willing and active participant with the Kansas Natural Gas Company in a combination in restraint of trade and commerce in natural gas within the state of Kansas; the former had disabled itself from performing its corporate functions under its charter and discharging its duty to the public, and had subjected itself illegally to the dominion and control of the Kansas Natural Gas Company; the Kansas Natural Gas Company unlawfully had possession of the property and franchises of the Consolidated Gas, Oil & Manufacturing Company and was a trust and monopoly and had secured the monopoly of the production, distribution, and sale of natural gas in the state of Kansas and illegally acquired the power, which it was exercising, to dictate prices to the producer and consumer of that commodity, that the Consolidated Gas, Oil & Manufacturing Company should resume possession and control of its properties illegally held by the Kansas Natural Gas Company, and that receivers thereof should be appointed and further participation in the illegal combination restrained; the Kansas Natural Gas Company should be ousted of its Kansas privileges and enjoined from interfering with the corporate property and powers of the Consolidated Gas, Oil & Manufacturing Company, and that receivers of the property in Kansas of the Kansas Natural Gas Company should be appointed so that the court might take charge of and manage it until the perversions and abuses of privileges were corrected; that a receivership of both was especially necessary to bring about a separation of their corporate properties and a re-establishment of them in their lawful positions. The decree of the court was in great detail and separate receivers were appointed for each company. The appointment for the Kansas Natural Gas Company was confined to the property of that company which was in Kansas, and the receivers were directed, in conjunction with the Attorney General of the state of Kansas, to appear in the District Court of the United States and urge the prior jurisdiction of the state court "over the subject-matter and the parties and the rights of the state of Kansas" and to petition a discharge of the receivers appointed at the instance of the bondholders and for the delivery of the property in Kansas to the receivers of the state court.

In accordance with the direction of the state court, its receivers of the Kansas Natural Gas Company and the Attorney General of the state appeared in the United States District Court and petitioned accordingly, with the result above mentioned.

Charles Blood Smith, of Topeka, Kan., and John F. Philips, of Kansas City, Mo. (Samuel Barnum, of Topeka, Kan., on the brief), for appellants.

John S. Dawson, Atty. Gen. of Kansas, Chester I. Long, of Wichita, Kan., and John H. Atwood, of Leavenworth, Kan. (T. S. Salathiel and O. P. Ergenbright, both of Independence, Kan., John Marshall, of Topeka, Kan., and Thomas Morrison, of Chanute, Kan., on the brief), for appellees.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge (after stating the facts as above). The state of Kansas by its Attorney General began an action under the anti-trust laws of the state and in quo warranto against the Kansas Natural Gas Company and others in the district court of Montgomery county, Kan. It was charged in the body of the petition that the appointment of a receiver of that company was necessary for the correction of the wrongs complained of. The appointment of a receiver was also asked in the prayer for relief. The action was tried, and while held under advisement by the state court suits against the Kansas Natural Gas Company were commenced by and in the interest of its bondholders and other creditors in the federal court for the district of Kansas. The federal court appointed receivers who took possession. Thereafter the action in the state court was decided in favor of the state of Kansas, other receivers were appointed by that court and in conjunction with the Attorney General were directed to apply to the federal court for the surrender to them of the property located in Kansas. They did so and were successful. *McKinney v. Kansas Natural Gas Co.* (D. C.) 206 Fed. 772. The complainants in the federal court then prosecuted these appeals. The ultimate question for decision is: Which set of receivers has the superior right to possession?

[1] It should be said at the outset that we cannot review the evidence before the state court. We can only consider the jurisdiction of that court, the nature of the action brought by the state of Kansas, the relief sought and granted, and the chronological relation of the proceedings there to those in the federal court. The claim of counsel for appellants that the evidence before the state court did not warrant its findings cannot be considered; the remedy is by state procedure, not here. Indeed, counsel say their motion for a new trial is still pending in the state court. For the purposes of this case we must therefore take it as true that the Kansas Natural Gas Company, a Delaware corporation which had obtained a license to do business in Kansas, combined with one or more Kansas corporations to restrict, restrain, and monopolize trade and commerce within the state contrary to its anti-trust laws, that it unlawfully acquired control and was holding and using the property and franchises of local corporations for the wrongful purposes; and that all of them were perverting and abusing the corporate powers and privileges granted them respectively by the state. The petition filed by the Attorney General so charged, and the state court so found from the evidence. Within the above limitations the contentions of appellants are substantially as follows: (1) The state court had not power or authority to appoint receivers in the case before it. (2) The commencement of the action in the state court did not give that court constructive possession of the property of the Kansas Natural Gas Company; the state court had acquired neither actual nor constructive possession when the federal court appointed receivers. (3) It is conceded that the Kansas Natural Gas Company was engaged in interstate commerce as well as in commerce wholly within the state of Kansas. By the Sherman Anti-Trust Act, Congress has prescribed a specific method for preventing restraints of interstate commerce, and the action of the state court conflicts with the paramount authority of Congress.

[2] "Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence." *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410.

The merits as distinguished from jurisdiction relate to the duty of the court in a given case, and errors in respect thereof, whether by mistake of law or of fact, do not invalidate its action. Its action cannot be collaterally impeached, but stands everywhere until vacated according to the prescribed procedure. The jurisdictional character of a question is not determined by its importance. Thus, whether a suit in a federal court against a state official is a suit against the state contrary to the eleventh amendment is not jurisdictional, but relates to the merits. *Scully v. Bird*, 209 U. S. 481, 28 Sup. Ct. 597, 52 L. Ed. 899. And even where a statute says certain causes of action "shall not be enforced by any court," the prohibition may not go to the jurisdiction. *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039. The jurisdiction of the courts of a state is determined by its laws; and so of their procedure. District courts of the state of Kansas were established by the state Constitution to have such jurisdiction as might be provided by law. The statutes confer upon them as courts of original jurisdiction plenary cognizance "of all matters civil and criminal" except as otherwise provided. The grant is broad and sweeping. They have jurisdiction of actions in quo warranto (section 6276, G. S. 1909 [Code Civ. Proc. § 680]), and of actions to enforce the anti-trust laws, c. 81. The Code of Civil Procedure gives them specific authority to appoint receivers "after judgment to carry the judgment into effect" and to "dispose of the property according to the judgment," also in cases provided in the Code or by special statutes "when a corporation has been dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights," also, "in all other cases where receivers have heretofore been appointed by the usages of courts of equity." Section 5860 (Code Civ. Proc. § 266). By section 1728 a corporation which is insolvent or perverts or abuses its corporate privileges may be dissolved by the district court on petition of the Attorney General; the court is authorized to appoint a receiver when the petition is filed or upon decree of dissolution to wind up the corporate affairs; if the court deems dissolution not necessary or advisable, it may appoint a receiver to manage the property until the abuses can be corrected. This section alone regarded probably applies only to domestic corporations, but section 1724 provides that any corporation of another state "authorized to do business in this state shall be subject to the same provisions, judicial control, restrictions and penalties, except as herein provided, as corporations organized under the laws of this state." This section shows a clear purpose to apply the remedies of section 1728 to foreign corporations so far as compatible with their corporate parentage. The phrase "judicial control" is especially significant.

But whatever may be the true construction of these sections, we think that upon general principles a district court of Kansas, possessed of both equitable and legal powers to be exercised as conditions require in a single action, has authority to appoint receivers in a cause like

that before the court of Montgomery county. A corporation which violates the anti-trust laws of the state is prohibited from doing business therein, and it is made the duty of the Attorney General to enforce the prohibition by injunction or other proceeding. Section 5146. Obviously, circumstances may be presented in which a receivership is an appropriate, even a necessary remedy, and in a case calling for its use a court of a state equipped with general equitable powers may employ such remedy against the property of a foreign corporation within its jurisdiction. As regards its business and property within a state, a foreign corporation is subject to the local law. In that respect it has no especial immunities not possessed by corporations of the state. Its corporate existence derived from another sovereignty may not be dissolved nor the internal workings of its purely corporate machinery controlled or regulated, but in its local activities it is subject to the local police laws and its property within the state to the ordinary processes of the local courts. If in violation of the laws of the state of Kansas in which such a corporation is doing business it combines with other corporations there, absorbs and commingles their property with its own, and uses it in maintaining a trust or monopoly, the local corporations thereby abandoning their franchises and public duties, a case arises in which a district court of Kansas may revoke the permit of the foreign corporation to do business in the state and dissolve the local corporations, or, short of such radical discipline, set them in their proper places, and may also take possession of the combined property for separation and allotment to the lawful owners. Without possession by the court its power to correct the violation of the law charged and found to have been committed would be fatally defective. The judge of the state court correctly observed that it was powerless to execute its decrees while possession was withheld. Yet both jurisdiction and remedy were conferred upon it by the state laws in most comprehensive terms. Aside from the specific provisions of the statutes relating to corporations, we think that, under the general powers of courts of equity which the Kansas court possessed and by analogy to the principles which obtain in cases of trusts and the marshaling of assets, receivers were properly appointed. That the right asserted by the state of Kansas was not as a direct beneficiary or a creditor, but was the expression of its public policy, does not make the case different in principle. In one aspect the object of the action was to determine the ownership and enforce the distribution of specific property alleged to be unlawfully in the possession and control of a wrongdoer who was using it to violate the law.

[3] The action in the state court was begun first, but the federal court first appointed receivers. Did the subsequent appointment of receivers by the state court relate back so that it may be said that it was in constructive possession of the property from the time the action was commenced? It is a maxim of the law that a court having possession of property cannot be deprived thereof until its jurisdiction is surrendered or exhausted, and that no other court has a right to interfere. It is a principle of right and of law which leaves nothing to the discretion of another court and may not be varied to suit the convenience of litigants. *Merritt v. American Steel Barge Co.*, 24 C.

C. A. 530, 79 Fed. 228. It is essential to the dignity and authority of every judicial tribunal and is especially valuable for the prevention of unseemly conflicts between federal courts and the courts of the states. As between them it is reciprocally operative—mutually protective and prohibitive. The most difficulty arises in determining when possession of property has been taken, when jurisdiction has attached to the exclusion or postponement of that of other courts. It is settled, however, that actual seizure or possession is not essential, but that jurisdiction may be acquired by acts which, according to established procedure, stand for dominion and in effect subject the property to judicial control. It may be by the mere commencement of an action the object, or one of the objects, of which is to control, affect, or direct its disposition. See *Mound City Co. v. Castleman*, 110 C. C. A. 55, 187 Fed. 921, and the cases cited. The principle often applies “where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.” *Farmers’ Loan & Trust Co. v. Railroad*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. The mere fact that an exigency calling for a receiver may arise does not make the jurisdiction of the court in that respect relate to the beginning of the action (*Shields v. Coleman*, 157 U. S. 168, 178, 15 Sup. Ct. 570, 39 L. Ed. 660), as perhaps where it is an ordinary aid to execution on a final judgment and dependent upon conditions or circumstances that may or may not occur. But where the declared purpose of an action in whole or in part is directed to specific property, and the full accomplishment thereof may require judicial dominion and control, jurisdiction of the property attaches at the beginning of the action. And it is so if dominion and control are essential to the action, though not yet exercised. We think enough has been said of the nature of the action in the state court to show that it is within the principle invoked. Judicial dominion of the combined and commingled properties of the offending corporations is vitally necessary to the purposes of the action. In no other way could the marshaling and separation be effectually accomplished.

It is urged that the jurisdictions of the state and federal courts are not concurrent with respect to the subject-matters of the suits, but in questions like that before us the test is prior possession, actual or constructive, and not concurrency of jurisdiction. The subject-matter of which the one court has jurisdiction may be wholly without the power of the other. Prior possession by a court having jurisdiction of the case before it according to the laws of the sovereignty under which it was organized entitles it to hold until it is through.

[4] There remains for consideration the contention that, as applied to this case, the anti-trust statutes of the state conflict with the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and hence must give way. In this connection it is unimportant that the Kansas Natural Gas Company is a Delaware corporation instead of a corporation of Kansas. The character of its trade and commerce, interstate or local, determines the applicability of the anti-

trust laws of the nation or state and not the origin of its corporate existence. The term "interstate corporation" is a convenient colloquialism but hardly accurate. In respect of the contention now being considered, the case would not be different had that company been organized under the laws of Kansas. Nor is it material that it transports some of the gas it deals in from Oklahoma into Kansas and from Kansas into Missouri by pipe lines. By express exemption it is not a common carrier subject to the Interstate Commerce Act (Act June 29, 1906, c. 3591 [U. S. Comp. St. Supp. 1911, p. 1284] 34 Stat. 584) § 1, even would it matter were it otherwise. The point urged by counsel rests on the fact that the company is engaged in both interstate and local commerce and upon the assertion that the two are so intricately interwoven as to be inseparable. The claim of inseparable intricacy is not tenable. The two kinds of commerce are no more interinvolved than with most railroads of the country and many manufacturing and mercantile concerns. Whatever may be the origin and admixture of the commodity dealt in or the common use of the same plant, equipment, and instrumentalities, the two kinds of commerce are distinguishable. The company is in no better position than if it were an ordinary industrial and mercantile concern of Kansas producing, buying, shipping, and selling, locally and in other states, grains, oils, or other commodities which lose their particular identity in the mass of that which is dealt in. Again, the property and business of the company which are wholly within the state of Kansas are not negligible incidents to which the state anti-trust statutes are being forced; much of its property including that obtained from the other corporations is located there and much of its business is there transacted. The action of the state of Kansas was directed to the violation of the state statutes. The decree of the state court was expressly confined to the matters within its jurisdiction and subject to the local laws. There was no attempt to enforce the Sherman Act.

The contention therefore reduces itself substantially to this: A corporation in a state engaged in both interstate and local commerce which violates the Sherman Act and also the state statutes against trusts and monopolies is not subject to prosecution or action for the latter in a local court, but the remedy is under the Sherman Act in the courts of the United States; also, it is not competent for a state court in an action brought to enforce the state statutes to take possession, by receivers, of the physical property and instrumentalities employed by a defendant in interstate commerce. We think that neither phase of the proposition is tenable. The supremacy of the laws of the United States is not confined to those enacted pursuant to the commerce clause of the Constitution, but extends with equal force and potency to all the subjects committed to Congress. In this respect there is nothing peculiar or exceptional in that subject of national jurisdiction. Legislation by Congress does not necessarily exclude or displace legislation of the states upon those aspects of a subject which are of local or state concern. For example, it is the settled law that the same act or series of acts may constitute a violation of the separate laws of both nation and state, and that the offender may be prosecuted and punished in

each jurisdiction. *Cross v. North Carolina*, 132 U. S. 131, 139, 10 Sup. Ct. 47, 33 L. Ed. 287; *United States v. Cruikshank*, 92 U. S. 542, 550, 23 L. Ed. 588; *Fox v. Ohio*, 5 How. 410, 433, 12 L. Ed. 213. See *Grafton v. United States*, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084, 11 Ann. Cas. 640. It is no defense to a prosecution for a violation of the anti-trust laws of a state that the accused by the same general course of conduct has also violated the similar laws of the United States, or, indeed, has been punished therefor. The same reasoning applies when, as here, the proceeding is a civil action to enforce obedience to the law. In the *Addyston Pipe Case*, 175 U. S. 211, 247, 20 Sup. Ct. 96, 109 (44 L. Ed. 136), which was brought under the Sherman Act, the decree below was modified because it covered both interstate and local commerce and was therefore too broad. The court said:

"Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state."

The Kansas anti-trust statutes are a bona fide exercise of the police power of the state and not an attempt under the guise thereof to regulate or burden interstate commerce. Their effect upon that commerce is at the most incidental and collateral.

But it is objected that the state court of Montgomery county proposes to seize by its receivers the very property and instrumentalities which the owners employ in interstate commerce. That is frequently done in private litigation, the suits of the appellants in the federal court being instances, and it has never been held that a state in the enforcement of its valid laws by judicial proceedings is more restricted than the individual or the corporation. The power of Congress over interstate commerce is supreme, but the right to engage in such commerce is not a general sanctuary or refuge, nor does the use of commodities and instrumentalities therein exempt them from the ordinary local laws applicable to the mass of property in the state of which they are a part. They may be taxed as other property (*Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. Ed. 953), even while in the course of interstate commerce but temporarily at rest for business convenience or advantage (*General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754), also sold for the nonpayment of taxes. They may be appropriated under the power of eminent domain. They are subject to attachment and garnishment (*Davis v. Railway*, 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. [N. S.] 823, 18 Ann. Cas. 907), and to seizure and sale on execution like any other property. A domestic corporation engaged in interstate commerce may be dissolved by the state for abuse of its corporate powers and its property sold and the proceeds distributed among its creditors and stockholders to the destruction of its commerce of every kind. The license of a foreign corporation engaged in interstate and local com-

nerce to do business within a state may be canceled, it may be adjudged guilty of violating the anti-trust laws of the state and to pay a fine therefor, and a receiver of all its property in the state may be appointed under the general laws as an aid to the enforcement of the judgment. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 112, 29 Sup. Ct. 220, 53 L. Ed. 417; *Palmer v. Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435. In *Louisville & Nashville Railroad v. Kentucky*, 161 U. S. 677, 701, 16 Sup. Ct. 714, 40 L. Ed. 849, an injunction against the consolidation of competing lines of railroad was upheld over the objection of an interference with interstate commerce. The court said:

"It has never been supposed that the dominant power of Congress over interstate commerce took from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers."

And we add that when a foreign corporation combines with corporations of a state contrary to the public corporate duties of the latter and in violation of the statutes of the state against trusts and monopolies, and takes possession of and intermingles their property with its own, the state may by and according to the established processes of its courts take possession of the whole to make effective a decree of dissolution, segregation, and appropriate restoration, notwithstanding the combined property is employed by such corporation in interstate commerce as well as in commerce within the state.

The decree is affirmed.

BLAKE v. OLD COLONY LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. November 19, 1913.)

No. 3,722.

INSURANCE (§ 21*)—FOREIGN INSURANCE COMPANIES—DEPOSIT OF SECURITIES—TRUST.

A deposit of securities by a foreign life insurance company with the superintendent of insurance of a state, required by him as a condition to the granting of a license to do business in the state, but not required by the statutes of the state, did not create a trust in favor of domestic policy holders of the company; where there was no agreement to that effect and no evidence that such was the intention of the company, and on withdrawal from the state the company is entitled to a redelivery of the securities.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 23; Dec. Dig. § 21.*]

In Error to the Circuit Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action at law by the Old Colony Life Insurance Company against Frank Blake. Judgment for plaintiff, and defendant brings error. Affirmed.

Elliott W. Major, Atty. Gen., and Campbell Cummings, Asst. Atty. Gen., for plaintiff in error.

Silver & Dumm, of Jefferson City, Mo., for defendant in error.

Before HOOK and SMITH, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SMITH, Circuit Judge. The state of Missouri has an insurance department, the chief officer of which is designated as the "Superintendent of the Insurance Department." Mr. Robert G. Yates held this office in the years 1903 and 1904. He was then succeeded by W. D. Vandiver who in turn was succeeded by the plaintiff in error, hereafter called the defendant, Frank Blake. In 1903 and 1904 Mr. Joseph B. Reynolds was the actuary of the department. The laws of Missouri have at all times here material contemplated the organization of: (1) Life and accident companies on the joint-stock or mutual plan, or the two combined; (2) assessment insurance companies; (3) companies on the stipulated premium plan; and others. This was an action in replevin by the Old Colony Life Insurance Company, hereafter called the plaintiff, against Frank Blake, to recover three notes and trust deeds given to secure the same. The parties filed a stipulation in writing, waiving a jury as provided in section 649 of the Revised Statutes (U. S. Comp. St. 1901, p. 525). The court made special findings of facts substantially as follows:

This is an action of replevin for securities, amounting to \$5,000, deposited by the Cosmopolitan Life Association on or about October 17, 1903, with the insurance department of the state of Missouri. The defendant Blake is now superintendent of that department, and is now in possession and custody of such securities. The Cosmopolitan Life Insurance Association was a foreign corporation, organized under the laws of the state of Illinois, and made application to transact business in the state of Missouri on the stipulated premium plan, under article 4 of chapter 119 of the Revised Statutes of the state of Missouri of 1899. On making application to the insurance department of the state of Missouri it was informed by the then superintendent of insurance that it was the ruling of the insurance department of the state of Missouri that before a license under the stipulated premium law could be issued it would be necessary for the Cosmopolitan Association to deposit \$5,000 in money or securities with the department. The construction placed upon the law by the department was that all companies, foreign or domestic, must make such deposit before authority to do business in the state could properly be issued. The actuary of the department, Mr. Joseph B. Reynolds, also informed the company that it would be required to deposit \$5,000 before securing a license in the state, under the stipulated premium law, for the reason that it had no such deposit in the state of Illinois, and that the Missouri department would require that the deposit, if not made there, must be made in Missouri, in order that it might be placed on the same basis as domestic companies under the same law. No requirement existed under the laws of Illinois for making said deposit with the Illinois insurance department and that department would not receive such a deposit. The Cosmopolitan Association at once arranged to make, and did make, the required deposit with the Missouri insurance department, and thereupon the license to do business in Missouri was granted to it by that department. Contemporaneously with this application on the part of the Cosmopolitan Association, that company had undertaken to reinsure the business of a fraternal insurance company,

known as the Royal Tribe of Joseph, then doing business in the state of Missouri, and the reinsurance agreement entered into between the two organizations was submitted to the insurance department of the state of Missouri for approval. That approval was granted upon the making of the deposit and the issuance of the certificate of authority or license as aforesaid, and thereupon the Cosmopolitan Association took over the business of the fraternal organization under said reinsurance agreement. This certificate of authority or license was renewed for one year upon the 1st of March, 1904, and again upon the 12th day of May, 1905, for a period terminating March 1, 1906, and the Cosmopolitan Association continued to do business in Missouri until the 1st day of January, 1906, when it withdrew from the state and requested that its certificate of authority and license be canceled. Meantime the securities that it originally deposited, and which are the subject-matter of this suit, remained on deposit with the insurance department, and were left there without demand by the Cosmopolitan Association after its withdrawal from the state. Subsequently, and on or about the 9th day of September, 1909, an agreement was entered into between the Cosmopolitan Association and the Old Colony Life Insurance Company, a corporation organized under the laws of the state of Illinois, plaintiff herein, whereby plaintiff purchased all the assets of the Cosmopolitan Association of every character and description, and plaintiff agreed to assume all liabilities of said association for death claims, and all other liabilities of such association shown by an attached exhibit. Plaintiff further agreed that holders of stipulated premium policies in said Cosmopolitan Association should be entitled to receive, in exchange for their policies in said association, the plaintiff's "whole life nonparticipating policy" at the same rates of premium they had been paying to said Cosmopolitan Association, plus the increase in said rates necessary to conform to their attained ages; and on the same day the Cosmopolitan Association for valuable considerations, chief among which was the assumption of the risks of said association by plaintiff, transferred, conveyed, and assigned to the plaintiff, by writing duly executed, all the moneys, securities, books, records, office furniture, bills receivable, and all other personal or mixed property or effects belonging to said Cosmopolitan Association. Thereafter plaintiff by letter made demand upon the defendant as insurance superintendent for the recognition of plaintiff as the owner and assignee of the funds in his hands, and defendant refused until all of the outstanding policy holders who might be held to have the right to proceed against the deposit were satisfied. Coupled with this demand plaintiff asserted that it did not desire to withdraw this deposit from the insurance department of the state of Missouri until all the policies that were formerly issued by the Cosmopolitan Association were fully satisfied. This was done before the plaintiff company had investigated the nature of the deposit and the requirements of the law under which it was made. Meanwhile a number of suits were filed in Missouri against the Cosmopolitan Association, and in some cases against the plaintiff company, by persons holding policies in the Cosmopolitan Association issued while it was doing business in this state.

Judgments were afterwards secured against the Cosmopolitan Association, aggregating about \$2,000 and some other small claims are pending. Steps were taken under the Missouri statutes to subject this deposit to the payment of these judgments. The plaintiff made demand upon the defendant for these securities, which demand was refused. This suit followed. The Cosmopolitan Association is no longer doing business, and has no assets out of which claims may be satisfied. The plaintiff now has assumed the obligations of the Cosmopolitan Association to the extent hereinabove set forth. It is doing a legal reserve life insurance business in the state of Illinois, and perhaps elsewhere, but not in Missouri. Its headquarters are in the city of Chicago, and it has on deposit with the insurance department of Illinois an aggregate of \$221,000. The laws of Illinois do not know stipulated premium plan companies as defined in the laws of Missouri, and no deposits are there required or authorized from such companies, either foreign or domestic. It is conceded that there is no question of retaliatory law present in this case. At the time of the making of the deposit nothing was said or done with reference thereto by the representatives of the Cosmopolitan Association or of the state, except as hereinabove set forth, but the following certificate or license was issued:

"It is hereby certified that the Cosmopolitan Life Insurance Association of Freeport, Illinois, has complied with the requirements of the insurance laws of this state and is hereby authorized, subject to the provisions thereof, to do business of life insurance on the stipulated premium plan in the state of Missouri, until the first day of March, 1904."

Upon these facts the court found and held:

- (1) The insurance laws of Missouri do not require a deposit with the insurance department by foreign insurance companies doing business in that state on the stipulated premium plan.
- (2) Plaintiff is the owner of the securities sued for, and is not estopped from demanding the return of such securities from the defendant.
- (3) That no trust was created vesting in the insurance commissioner, either as an official or as an individual, the right to hold these securities for the exclusive benefit of the Missouri policyholders of the Cosmopolitan Association, or otherwise.
- (4) That the plaintiff is therefore entitled to recover.

The defendant requested the court to make the following declarations:

"If the court finds from the evidence that Robert G. Yates, on the 17th day of October, 1903, was the duly appointed, qualified, and acting superintendent of insurance of the state of Missouri, and on said date the Cosmopolitan Life Insurance Association was an insurance corporation organized and doing business under the laws of the state of Illinois, and on said date said Cosmopolitan Company made application through its managing officer for a certificate of authority to transact life insurance business in the state on the 'stipulated premium plan,' and as a prerequisite, among other things, was required to make a deposit of \$5,000 as an insurance fund, and on said date did deposit said \$5,000 with said superintendent of insurance of Missouri, in trust for the benefit of the policy holders of said company, and that from year to year until 1906, continued said deposit with the insurance department of Missouri, for the same purpose, and that thereupon said Cosmopolitan Company proceeded

to do an insurance business in this state on the stipulated premium plan, and wrote policies and collected the premiums therefor, and that said policies were still subsisting and in force when the plaintiff purchased and took an assignment of the benefits of said Cosmopolitan Company in October, 1909, and that losses accrued on said policies in this state, and the same have not been paid by said Cosmopolitan Company or plaintiff, when this suit was brought, nor up to this time, then plaintiff cannot recover in this action, and it will not avail plaintiff that such deposit may not have been required by the law of Missouri, and the plea of ultra vires will not avail plaintiff."

And again:

"The counsel for the Cosmopolitan having had the option to make the deposit to obtain the license, and having elected so to do, cannot now be heard to say it was 'involuntary,' and thereby reap all the benefits of a license and the increase of its business. The Cosmopolitan had no absolute right to a license, and could not have compelled the issuance to it of a license. There was no duress or fraud in the transaction.

"The superintendent construed the statute to require him to take the deposit, and the company accepted that construction, and both sides executed the agreement, and neither will be heard now to plead ultra vires, or that it was involuntary as to policy holders who have suffered losses in this state and are unpaid."

The court refused to make either of said declarations of law, and to each refusal the defendant at the time excepted.

The statutes of Missouri contain no express provision that foreign companies doing business on the stipulated premium plan shall make any deposit of securities before being authorized to do business. The insurance department did not so understand when it took these securities. Mr. A. C. Murray testifies that the Missouri Insurance Department first required that \$5,000 in securities be deposited with the Illinois Insurance Department, and it was only after the Illinois department had refused to take the deposit that the demand was substituted that the securities be deposited with the Missouri department. Mr. Joseph B. Reynolds, the actuary of the insurance department of Missouri, says:

"They were told that they would be required to deposit \$5,000 before securing the license in the state under the stipulated premium law, for the reason that they had no such deposit in Illinois, and that the Missouri department would require that the deposit, if not made there, must be made in Missouri, in order that they might be placed on the same basis as domestic companies are under the same law. That was not only what they were told, but was the rule of the department at the time."

It is quite clear that the demand for a deposit in Missouri was upon the broad equitable ground thus announced, and there was no claim that any Missouri statute required it; else why the offer to waive it, if the deposit was made in Illinois?

In his argument the defendant relies upon what is now section 6985 of the Revised Statutes of Missouri of 1909.

"When any such corporation, company or association shall desire to relinquish its business in this state, the superintendent shall, on application of such corporation under oath of its president or principal officer and secretary or actuary, give notice of such intention at least twice in a newspaper of general circulation published at the state capital. After such publication he shall deliver up to said corporation the securities, or any portion thereof, held by him

belonging to such corporation upon being satisfied that all the debts and liabilities of every kind are paid or provided for."

It is contended that the intent of the law must govern, and that a provision for the delivering up of securities would be foolish if no securities were required to be deposited. This is true, but section 6965, R. S. 1909, provides for the deposit of \$5,000 in securities by domestic companies, and section 6983, R. S. 1909, contains this provision with reference to foreign companies:

"When any state, territory or foreign country shall impose any obligations upon any such corporation of this state, or their agents transacting business in such other state, territory or foreign country, the like obligations are hereby imposed upon similar corporations of such other state, territory or foreign country, their agents or representatives transacting business in this state; and such corporation, company, association or society of such other state, territory or foreign country, and its agents and representatives shall pay all licenses, fees or penalties to, and make deposits with the superintendent of insurance imposed by the laws of such other state, territory or foreign country upon any corporation of this state doing business therein; and in case of failure to pay the same, the superintendent shall refuse the certificate of authority herein provided for or cancel such certificate, if one shall have been previously issued."

Manifestly the provision in 6985 has reference to domestic companies, and to the only securities required to be deposited by foreign companies, and they are the ones referred to in section 6985 as to be returned. The Legislature could have required foreign companies to make a deposit in trust, and could have defined who its beneficiaries should be, and of what the trust should consist, but it did not do so. It follows that the securities were deposited without authority of law.

The question of the existence of a trust and of the estoppel of the plaintiff to deny such trust have been argued together, and will be so considered.

Ignoring any question as to the statute of frauds of Missouri, a trust in personality may be established by parol evidence, but such evidence must be clear and convincing, not doubtful, uncertain, or contradictory. *Allen v. Withrow*, 110 U. S. 119, 129, 3 Sup. Ct. 517, 28 L. Ed. 90. Who was the beneficiary of the supposed trust, and what were its terms?

It appears that the laws of Missouri with reference to domestic stipulated premium companies provided in section 6965, R. S. 1909, that:

"Every corporation incorporating or reincorporating under the provisions of this article shall deposit with the superintendent of insurance such securities as are required by law to be deposited by insurance companies the sum of five thousand dollars before it shall commence business. Said five thousand dollars shall be a part of the insurance fund and an asset of the corporation. The securities deposited with the insurance department pursuant to this section shall be held by the superintendent in trust for the benefit and protection of and as security for the policy holders of such corporation, their legal representatives and beneficiaries."

There is nothing on the face of this statute that limits the benefits of the securities to domestic policy holders, and the insurance department was satisfied with a deposit in Illinois, which would certainly not have been for the exclusive benefit of policy holders in Missouri. These

securities were deposited and a certificate to do business in Missouri was issued, which made no reference to the securities. There was no declaration of trust, and nothing to indicate why or for whose security they were deposited. Mr. Yates, the then superintendent of insurance of Missouri, testified:

"They put up the money with the understanding—I don't know whether it was ever stated to him or not, but it was my understanding, and the reason why we demanded that was for the benefit of the policy holders which they had then, or might have in the future, in the state of Missouri, if they had any at that time."

There was nothing said between the parties as to who were the beneficiaries of the supposed trust. The insurance department thought it was to secure the Missouri policy holders, but there is nothing to indicate the Cosmopolitan Company so understood it, or understood the beneficiaries of the trust were different from what they would have been if the money had been deposited in Illinois. If we could ascertain who the beneficiaries were, whether all policy holders or only the Missouri policy holders, what policies did it secure? The holders of membership in the Royal Tribe of Joseph had no security, and there was no agreement they should have any. Was the trust simply for the benefit of insurers on the stipulated premium plan, or did it include the members of the former fraternal insurance society? We do not know and there is not a syllable of evidence tending to enlighten us. It is evident that if there was a trust, no individual has shown that he or his claim was secured by the trust by clear or convincing, or any other kind of, evidence and the whole matter remains doubtful and uncertain, and the same is true of the claim of estoppel which is not specially pleaded.

The case in this court of *Illinois Life Insurance Co. v. Tully*, 174 Fed. 355, 98 C. C. A. 259, is quite like the case at bar, and disposes of many of the questions argued here.

Reliance is placed upon *Boston & Albany R. Co. v. Mercantile Trust & Deposit Co. of Baltimore*, 82 Md. 560, 34 Atl. 778, 38 L. R. A. 97; *Clark v. Callahan*, 105 Md. loc. cit. 614, 615, 66 Atl. 618, 10 L. R. A. (N. S.) 616, 12 Ann. Cas. 162; *Coyne v. Supreme Conclave*, 106 Md. 54, 66 Atl. 704, 14 Ann. Cas. 870; *Ruhe v. Ruhe*, 113 Md. 595, 77 Atl. 797.

Special reliance is placed upon the first case, and upon the following language there used:

"In determining whether or not a trust has been created, courts will take into consideration the situation and relations of the parties, the character of the property, and the purpose which the settler had in view in making the declaration. No technical terms or expressions are needed."

But the defendant ignores that immediately following this language the court further said:

"It is sufficient if the language used shows that the settler intended to create a trust, and clearly points out the property, the beneficiary, and the disposition to be made of the property."

In this case the requirement that the settler clearly point out the beneficiary and the disposition to be made of the property is wholly

ignored. In that case the treasurer of state, in his receipt for the security, expressly stated:

"That said securities are now held by me, as such treasurer aforesaid, in my official capacity, on deposit as a guaranty for the payment of the policies of insurance issued by said company."

And in his separate schedule he referred to the—

"stocks and other securities * * * held by me in trust for the policy holders of the American Casualty Insurance and Security Company of Baltimore City."

Clearly there is no analogy between that case and this, and the same is true of the other cases cited.

Sufficient has been said to indicate that the defendant was not entitled to the declarations of law asked.

No error appears, and the judgment is affirmed.

NEW YORK, S. & W. R. CO. v. THIERER (two cases).

(Circuit Court of Appeals, Second Circuit. November 11, 1913. On Motion for Rehearing, December 18, 1913.)

Nos. 58, 59.

1. RAILROADS (§ 324*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

On the question of the negligence of a pedestrian, struck and injured by a train at a railroad crossing, the negligence of the railroad company, if any, is immaterial.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1020-1025; Dec. Dig. § 324.*]

2. RAILROADS (§ 324*)—CROSSING ACCIDENT—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—CROSSING SIGNALS—FAILURE TO GIVE.

Failure of a railroad company to give statutory signals on the train approaching a crossing will not relieve a pedestrian, struck and injured by the train at the crossing, from contributory negligence, if he had an opportunity to avoid the danger.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1020-1025; Dec. Dig. § 324.*]

Duty to give warning signals at crossings, see note to Chesapeake & O. Ry. Co. v. Steele, 29 C. C. A. 90.]

3. RAILROADS (§ 327*)—CROSSING ACCIDENT—DUTY TO LOOK AND LISTEN.

Under the New Jersey law, a pedestrian approaching a railroad crossing must look and listen for trains before attempting to cross.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

4. RAILROADS (§ 327*)—CROSSING ACCIDENT—LOOK AND LISTEN—OBSTRUCTIONS.

Where the view of a railroad track is obstructed, on a pedestrian's approaching a crossing, either by cars standing on an intervening track or by smoke or fog, he may not continue to walk across the tracks until he is able to see whether there is any danger, and is guilty of negligence unless he stops until he can see.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. RAILROADS (§ 327*)—CROSSING ACCIDENT—LOOK AND LISTEN—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Plaintiff, on approaching a railroad crossing at night, saw certain freight cars at the crossing on an intervening track, passed between them to the second track, looked to the south, and at the same moment was hit by a train backing north on that track. She did not testify that she listened, except that she did not hear any bell or whistle. *Held* that, since she could not have looked until just as she stepped into the danger zone, she did not perform her duty to look and listen and was guilty of negligence as a matter of law.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

On Motion for Rehearing.

6. NEW TRIAL (§ 68*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—STATE STATUTES—APPLICATION.

P. L. N. J. 1910, c. 278, provides that in an action for injuries or death in a railroad crossing accident plaintiff shall not be nonsuited for contributory negligence on his part or on the part of persons for whom the suit is brought, but in all such cases it shall be left to the jury to determine whether the person injured or killed was exercising due and reasonable care under the conditions existing at the crossing at the time of the injury or death, and if the jury shall determine that the person injured or killed was not exercising such care the verdict shall be for defendant. *Held*, that such act does not abolish the defense of contributory negligence in such actions, nor entitle plaintiff to recover in spite of it, but is a mere regulation of procedure, requiring that such issue be submitted to the jury without in any manner impairing the right of the court to set aside a verdict for plaintiff in case he determines that the person injured or killed has been guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 135-140; Dec. Dig. § 68.*]

Coxe, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge.

Actions by Annie Thierer and by Joseph Thierer against the New York, Susquehanna & Western Railroad Company. Judgment for plaintiff in each case, and defendant brings error. Reversed.

Stetson, Jennings & Russell, of New York City (F. B. Jennings, W. C. Cannon, and R. L. von Bernuth, all of New York City, of counsel), for plaintiff in error.

Emanuel A. Busch (A. J. Rose and Alfred C. Petté, both of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. These are writs of error to the District Court of the United States for the Eastern District of New York upon judgments entered on verdicts in favor of Annie Thierer for \$8,000 for personal injuries and of her husband, Joseph Thierer, for \$500 for loss of her services and expenses of her cure. By stipulation the cases were tried together and one bill of exceptions signed.

The defendant, the New York, Susquehanna & Western Railroad Company, has three tracks crossing at right angles Second street in North Paterson in the borough of Hawthorne, N. J. Second

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

street runs east and west and the defendant's tracks run north and south. The west track is the single track main line between Hawthorne to the south and North Paterson to the north. East of that track is a siding and east of the siding is a storage track. The Thierer family lived on Forest avenue, which runs parallel to and a block east of these tracks with nothing intervening. At the time of the accident they had lived there seven months. Forest avenue and Second street are both dirt roads.

September 26, 1911, at 5 p. m., the plaintiff Annie Thierer left her house, walking north a block to Second street and then a block west to the railroad crossing. She saw freight cars at the crossing on the first two tracks and testified that as she passed between the cars on the siding or second track she looked to the south and was at the same moment hit by a train backing to the north on the west track. She was badly injured on the left side of her head and her left leg had to be amputated below the knee.

[1, 2] The defendant was charged with negligence for failing to ring a bell or blow a steam whistle as required by statute while the train was approaching the crossing. The verdict of the jury establishes this charge. The serious question, however, remains whether the plaintiff's own testimony does not show that she was guilty of contributory negligence. Upon this question the negligence of the railroad company is immaterial. The failure of the railroad company to give the statutory signal will not relieve the pedestrian if he has an opportunity to avoid danger. *Pennsylvania R. R. Co. v. Righter*, 42 N. J. Law, 180, 185; *Conkling v. Erie R. R. Co.*, 63 N. J. Law, 338, 345, 43 Atl. 666. The law of New York is the same. *Rodrian v. N. Y., N. H. & H. R. R. Co.*, 125 N. Y. 526, 528, 26 N. E. 741.

[3] The law applicable to the case is of course that of the state of New Jersey, where it arose. The highest court of that state holds that pedestrians, before crossing railroad tracks at grade, must look and listen. Mrs. Thierer said absolutely nothing about listening except that she did not hear any bell or whistle. In respect to looking, she said again and again that, while walking at her ordinary gait, she looked to the south and was struck by the train backing up from that direction the moment she looked. Of course at that moment she must have been within the overhang of the train, the very situation that the rule as to looking and listening is intended to prevent. She did not look before she crossed. Such looking and listening as she gave amounts to not looking or listening at all. If looking and listening after one is on the track satisfies the rule, it might as well not exist.

[4] It is also a fair inference from the rule that, where circumstances prevent a pedestrian from seeing, he must stop until he can see. Mrs. Thierer walked out of a place of safety without looking until she was actually in a place of danger. If the cars on the siding were south of the crossing, she obviously had an unobstructed view for a distance to the south increasing the further the cars are found to have been from the crossing. On the other hand, if they were on the crossing and close up to her, ordinary care required her to stop in a place of safety and look. The wholesome rule as to looking

and listening implies that this care must be exercised under circumstances where the pedestrian can hear and see. Otherwise it is useless. If there is a temporary obstruction to the view, such as smoke or fog, he cannot continue to walk across the tracks until he is able to see whether there is any danger. This is equally true of a permanent obstruction, such as the open cars, in this case, standing upon the siding, if they are to be regarded as permanent.

[5] The law of New Jersey is quite plain on this subject. The Court of Errors and Appeals said in *Central R. R. v. Smalley*, 61 N. J. Law, 277, at page 279, 39 Atl. 695, at page 696:

"The duty of a person who is about to cross a railroad track is to be prudent—to look and to listen and to do the things that will make looking and listening reasonably effective. If the vision or hearing of such a person is limited by permanent obstructions or disturbances, he should for that reason be cautious; if his vision or hearing is limited by transient obstructions or disturbances, under circumstances which oblige him to rely on the sense thus limited, he should wait until it has again become efficient to warn him of peril. One sense, if well used, may give warning enough. To go on a railroad crossing in the way of a train which can be neither seen nor heard, but which would be either visible or audible except for some temporary hindrance to sight or hearing, is to be negligent."

And in *Swanson v. Central R. R.*, 63 N. J. Law, 605, at page 607, 44 Atl. 852:

"That it is the duty of the traveler upon a highway, before crossing a railroad, to look up and down the tracks and also listen for approaching trains, and that his failure to do so is such negligence as will prevent a recovery if he is run down at the crossing, has been declared by this court in a long line of cases. So, too, it is entirely settled that, if his ability to see or to hear an approaching train is temporarily diminished or destroyed by obstructions or disturbances which are transient in their nature, reasonable prudence requires him to wait until such obstructions or disturbances have disappeared and his senses have again become efficient to warn him of danger before attempting the crossing. *Merkle v. New York, Lake Erie & Western Railroad Co.*, 49 N. J. Law, 473 [9 Atl. 680]; *West Jersey Railroad Co. v. Ewan*, 55 N. J. Law, 574 [27 Atl. 1064]; *Pennsylvania Railroad Co. v. Pfuehl*, 60 N. J. Law, 278 [37 Atl. 1100]; s. c. on Error, 61 N. J. Law, 287 [41 Atl. 1116]; *Central Railroad Co. v. Smalley*, 61 N. J. Law, 277 [39 Atl. 695]."

And in *Passman v. West Jersey & Seashore R. R. Co.*, 68 N. J. Law, 719, at pages 721, 722, 54 Atl. 809, at page 810 (61 L. R. A. 609, 96 Am. St. Rep. 573):

"The respective rights of railroad companies and persons attempting to pass over their tracks at regular crossings are reciprocal. The company has the right of way; it must, however, give the statutory signals of the approach of its trains. A person about to cross a railroad track on a highway is presumed to know the danger, and, while he may reasonably expect to be warned by the prescribed signals of an approaching train, he cannot justify himself in risking the danger unless he has exercised the senses nature has given to protect him from harm, and he must exercise such faculties in the manner that an ordinarily prudent person would exercise them under similar circumstances. The greater the difficulty of discovering the danger as apparent from the surroundings, the greater is the care required, and, if the circumstances are such that one sense is rendered less reliable, the others must be used to a correspondingly greater extent. * * * The plaintiff's intestate in this case was riding on a bicycle, a vehicle propelled by his own power, over which he had personal control. The general rule to be applied requires a bicyclist, on approaching a railroad crossing where the view of the track is in any way ob-

scured, to dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen before attempting to cross, and, while his acts may vary in certain details, the law requires of him practically the same reasonable care as is required of a pedestrian. *Robertson v. Pennsylvania Railroad Co.*, 7 Am. & Eng. R. R. Cas. (N. S.) 605 [180 Pa. 43, 36 Atl. 403, 57 Am. St. Rep. 620]."

In each of the foregoing cases the plaintiff was held not entitled to recover as matter of law.

We feel compelled to the conclusion that Mrs. Thierer did not act with ordinary prudence, was guilty of contributory negligence, and therefore cannot recover. The judgments are reversed.

COXE, Circuit Judge (dissenting). I am unable to concur with the majority of the court that the plaintiff was, as matter of law, guilty of contributory negligence.

The plaintiff is a woman of ordinary intelligence and there is nothing to show that she was reckless or that her senses were in any way impaired. She was put in a position of great peril by the defendant's action in blocking both sides of the crossing, on the first two tracks, with stationary cars and then backing an engine across without warning or precaution of any kind. Manifestly the plaintiff could not look north and south at the same moment. As she left the second track and passed beyond the overhang of the freight cars she stooped forward to look in the direction where she had reason to think danger might be apprehended and before she could turn to look in the other direction the engine backed upon her. The presumption is that she took all the necessary precautions to preserve her life and to hold, upon such evidence, that she was in fault as matter of law seems to me unwarranted. In my opinion the question of contributory negligence was clearly one for the jury and the judgment should be affirmed.

On Motion for Rehearing.

WARD, Circuit Judge. After our decision was handed down in this case the defendant in error moved for a rehearing on the strength of chapter 278, Laws of 1910, of the state of New Jersey, which had not been called to the attention of the trial court or of this court. We permitted briefs to be submitted on each side and have given the subject careful consideration. The act provides that when any one is injured or killed at a railroad crossing where the company has not installed safety gates, bells, or other devices to give warning to the traveling public:

"* * * The plaintiff in such action shall not be nonsuited on the ground of contributory negligence on his own part or on the part of the persons for whom such suit is brought, but in all such cases it shall be left to the jury to determine whether the person injured or killed was exercising due and reasonable care under the conditions existing at said crossing at the time of such injury or death, and if the jury shall determine that the person injured or killed was not exercising due and reasonable care under the conditions existing at said crossing at the time of such injury or death, the verdict shall be against the plaintiff and in favor of the defendant."

[6] The trial judge did actually try the case in accordance with this statute, because he submitted the question of the plaintiff's contribu-

tory negligence to the jury, whereas we held he should have disposed of it as matter of law and have directed a verdict in favor of the defendant. The act does apply to the crossing in this case, and if it regulated the cause of action we should feel bound to enforce it. The majority of the court, however, are of the opinion that it does not, but is a mere regulation of procedure. It does not abolish the defense of contributory negligence, or hold that the plaintiff may recover in spite of it, nor do more than provide that the plaintiff shall not be nonsuited by the court on this ground. This, we think, affects the remedy only. The Supreme Court of New Jersey evidently so regards it, because we are furnished with its opinion in the case of *Shoemaker v. Central R. R. of New Jersey*, 89 Atl. 517, decided March 3, 1913, but not officially reported, setting aside a verdict in favor of the plaintiff on the sole ground that he should have been held guilty of contributory negligence. In other words, it did not feel bound by the verdict of the jury on a question which it regarded as matter of law. As we have no power to set aside verdicts or to deal with anything but errors of law raised by exceptions, the act would have more far-reaching consequences in this state than in the state of its creation. The defendant there might have a verdict against it set aside, whereas here the verdict would be unassailable.

The motion for a rehearing is denied.

LOUISVILLE & N. R. CO. v. LANKFORD.

(Circuit Court of Appeals, Sixth Circuit. December 2, 1913.)

No. 2,365.

1. MASTER AND SERVANT (§ 286*)—DEATH OF SERVANT—RAILROADS—OPERATION—NEGLIGENCE.

Where defendant fell from the pilot of a railroad engine being used in switching operations and was killed, and it was shown that a switch engine with a front footboard instead of a pilot would have been more safe, and that the change on the engine in question could have been readily made, but that the road engine was used for switching for a considerable period prior to the accident, whether defendant was negligent in so using it was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 288*)—DEATH OF SERVANT—RAILROADS—OPERATION—ASSUMED RISK—QUESTION FOR JURY.

Where decedent, a switchman, was jarred from the narrow rim of the pilot of a road engine at night while it was being used for switching, resulting in his death, whether he assumed the risk of riding thereon under such circumstances was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1088; Dec. Dig. § 288.*]

Assumption of risk incident to employment, see note to 38 C. C. A. 314.]

3. NEGLIGENCE (§ 101*)—DEATH OF SERVANT—EMPLOYERS' LIABILITY ACT—INSTRUCTIONS.

In an action under the Employers' Liability Act for the death of a switchman by being jarred from the pilot of a road engine being used for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes—209 F.—21

switching purposes, a request to charge that decedent's act in riding on the pilot with knowledge of the apparent and obvious danger, and without necessity, should imperatively reduce the damages to a nominal sum was properly refused, since, under the express provisions of the act, the damages recoverable in case of decedent's negligence bear the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164; Dec. Dig. § 101.*]

4. MASTER AND SERVANT (§ 286*)—DEATH OF SERVANT—RAILROADS—OPERATION—DEFECTIVE TRACK—NEGLIGENCE—QUESTION FOR JURY.

In an action for the death of a switchman by being jarred from the rim of the pilot of a road engine used for switching, evidence held to require submission to the jury of the question whether defendant was negligent in permitting low places in the track which the jury might find was the cause of a lurch of the engine which caused decedent to fall.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

In Error to the District Court of the United States for the Western District of Tennessee; J. E. McCall, Judge.

Action by Ike Lankford, as administrator of the estate of Robert McClure, deceased, against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jno. B. Keeble, of Nashville, Tenn. (W. W. Farabough, of Memphis, Tenn., of counsel), for plaintiff in error.

Sweeney & Sweeney, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. On the night of December 6, 1910, the intestate, while employed in defendant's railroad yards at Paris, Tenn., as a switchman, in making up an interstate train was run over by the engine in use for such switching. When last seen before the accident he had just set the switch, which was on the left-hand, or fireman's side of the engine and was apparently proceeding to cross the track 5 or 6 feet in front of the engine. He was found about 15 or 20 feet further up the track, just outside the left-hand rail, one foot cut off and his body badly crushed. It was plaintiff's theory, stated in the declaration and relied upon at the trial, that deceased stepped upon the pilot and was thrown therefrom through a lurch caused by the engine passing over a "low joint" in the track. The engineer and another witness testified that decedent told them that in trying to turn on the pilot he slipped and fell off. He died within an hour after the accident. The grounds of defendant's negligence relied on, as far as submitted to the jury, were the use for switching purposes of a road engine carrying a pilot, and without a front footboard, instead of a switch engine, which has a front footboard and no pilot, and an out-of-repair and unsafe condition of the track. The defenses were a denial of negligence on defendant's part and assumption of risk and contributory negligence on the part of deceased. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

suit was brought under the Employers' Liability Act.¹ At the close of the testimony defendant moved for peremptory instruction in its favor, which was denied, and the case submitted to the jury. Verdict was rendered for plaintiff, on which judgment was entered. The errors argued relate to the refusal to direct verdict, the denial of several requested instructions, and the submission of the alleged defective condition of the track as a ground of defendant's negligence; the criticism here being that there was no evidence tending to show either that the engine lurched or that there was any condition of the track which might have caused such lurching. It is not contended here that a maintaining of the track in the condition last stated would have no tendency to prove negligence.

[1] 1. The motion to direct verdict was properly denied. There was testimony tending to show negligence on defendant's part in using a road engine for switching purposes. There was evidence (including the construction of the pilot, referred to later) from which the jury might properly infer that decedent was expected to ride on the pilot during switching movements. Notwithstanding defendant's evidence to the contrary, a question of fact for the jury was presented. There was evidence that a road engine was less safe for this purpose than a switch engine, because of the lack of front footboard, the pilot having no foot room except a narrow "rim" perhaps $3\frac{3}{4}$ inches wide, which was less secure than a footboard; that defendant had then and there shops at which the road engine could have been properly equipped for switching purposes by taking off the pilot and putting on a front footboard, which required not more than one to two hours at the most; and that the road engine had been in use for switching purposes at least part of the preceding night, all of the day before the accident, and from 7 o'clock in the evening until the accident, which occurred about midnight. The effect (upon the motion to direct verdict) of the alleged failure to prove that a defect in the condition of the track contributed to the accident need not be considered, in view of what is said in a later portion of the opinion as to the proof on that subject.

[2] The defense of assumption of risk presented at least questions of fact for the jury. *Texas & Pacific R. R. Co. v. Swearingen*, 196 U. S. 51, 62, 25 Sup. Ct. 164, 49 L. Ed. 382; *Sterling Paper Co. v. Hamel* (C. C. A. 6th Cir.) 207 Fed. 300, 304. It is conceded that, if plaintiff has a right of action, the suit is properly brought under the Employers' Liability Act, by which the defense of contributory negligence as a complete bar is abrogated. The question of such negligence as reducing recovery was submitted to the jury.

[3] 2. If the record justified submitting the condition of the road-bed as a ground of negligence, it follows that the judgment must be affirmed. This is so as to the defense of assumption of risk, because the requests upon that subject (assignments 8, 9, 10, and 15) ignore the condition of the track and make decedent's acquaintance with the condition of the engine and its use bar recovery. An assumption of risk as to the engine obviously would not have the effect stated, provided other negligence, not assumed, proximately contributed to the

¹ Act April 22, 1908, c. 149, 35 Stat. 65, amended by Act April 5, 1910, c. 143, § 2, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325).

accident. Request No. 5 was properly denied. It not only ignored the condition of the roadbed as a ground of negligence but made riding on the pilot, with knowledge of apparent and obvious danger, and without necessity, imperatively reduce the damages to a nominal sum, in contravention of the terms of the Employers' Liability Act, which makes the damages recoverable by the employé bear "the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both." *Norfolk & Western Ry. Co. v. Earnest*, 229 U. S. 114, 122, 33 Sup. Ct. 654, 57 L. Ed. 1096. Request No. 7 is not only subject to the same criticism of ignoring the condition of the roadbed as contributing to the accident but, so far as applicable, was in effect covered by the charge actually given.

[4] We are thus brought to the question whether there was evidence tending to show that the defective condition of the track proximately contributed to the injury. There was no testimony that the engine "lurched." There was, however, evidence to the effect that the track had been torn up, in the course of repairs, for a considerable distance, including the entire space from the switch mentioned to and including the place where the deceased fell; that the ties merely rested upon the ground, no ballasting having been done, the spaces between the ties being left entirely open. Defendant's counsel concedes that "the jury were warranted in finding that the track was not level nor filled in at the point where McClure stepped upon the engine and was thrown off." The engineer, who was a witness for defendant, in answer to a question, put upon cross-examination, whether he did not know that "it is customary to have low joints in tracks where there is no ballast, particularly in switching yards such as that track was," said, "Well, the low joints were there, but I could not say anything about this track for they had just repaired it just a short time before;" adding however, that the repairs were not completed. The jury might, we think, properly infer from all the evidence, taken together, that the inequalities mentioned had not been corrected.

Can it then be said that there was no evidence from which the jury was at liberty to infer that the unevenness of the track contributed to the accident? In other words, does the record support only a conclusion that the deceased would have slipped and fallen regardless of the unevenness of the track? The test of the propriety of submitting the condition of the track as a contributing cause of the accident is whether reasonable men would differ in the conclusion to be drawn in that respect from the evidence. *C. & E. R. R. Co. v. Ponn* (C. C. A. 6th Cir.) 191 Fed. at page 689, 112 C. C. A. 228, and cases cited. The testimony showed that the engine was running at but from one to two miles an hour when the accident occurred. There was testimony tending to show that the engine had a handhold accessible to one standing on the pilot rim, but not as conveniently effective as from the front footboard of a switch engine; also that the pilot rim was of metal, "hacked" or "punched," inferably for the purpose of roughening it, so as to make footing more secure. The mere fact that the spaces between the rails were not filled in is not alleged or shown to have contributed to the accident. The unevenness of the track (re-

sulting in an alleged lurch of the engine) is, however, claimed to have contributed to the decedent's fall; and while the proof of such fact may not be allowed to rest on mere conjecture, yet it is not essential that there be express testimony to that effect. It is enough if the testimony makes an inference more reasonable that the unevenness of the track contributed than otherwise; in other words, that such contribution is supported by the greater weight of probability. *Louisville & Nashville R. R. Co. v. Bell* (C. C. A. 6th Cir.) 206 Fed. 395, 398. For illustrative cases, see *Felton v. Newport* (C. C. A. 6th Cir.) 105 Fed. 332, 334, 44 C. C. A. 530; *Pittsburgh, etc., Ry. Co. v. Scherer* (C. C. A. 6th Cir.) 205 Fed. 356, 358. Assuming that the unevenness of the track was not shown to be such as to disturb the equilibrium of one securely standing, under usual conditions, on a footboard, it by no means follows that such unevenness would have no natural effect upon a precarious footing on a narrow metallic pilot rim, especially in view of the snowy condition of the ground from which the switchman must step. The question is largely one of probative effect. The force of given language of a witness frequently depends to a considerable degree upon emphasis placed upon different words. The trial judge, who saw and heard the witnesses, must have regarded the testimony as warranting a finding that the unevenness of the track contributed to the accident, for he not only disregarded the exception challenging such sufficiency but overruled the motion for new trial, which embraced, as one ground, the criticism we are discussing. We cannot say that the record gives "rise to a clear conviction" that error was committed in submitting the question of the condition of the track as a factor contributing to the accident. *Chicago Junction Ry. Co. v. King*, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173; *Seaboard Air Line v. Moore*, 228 U. S. 433, 435, 33 Sup. Ct. 580, 57 L. Ed. 907. The judgment of the district court is affirmed, with costs.

IN RE SNODGRASS.

PUGH v. SNODGRASS et al.

(Circuit Court of Appeals, Sixth Circuit. November 4, 1913.)

No. 2,366.

1. APPEAL AND ERROR (§ 1010*)—REVIEW—PRESUMPTIONS—FINDINGS OF COURT.

The conclusion of a trial judge on a question of fact, based on evidence taken before him, is entitled to great weight and will not be reversed unless there is a decided preponderance of evidence against it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. BANKRUPTCY (§ 303*)—FRAUDULENT TRANSFER OF PROPERTY—SUFFICIENCY OF EVIDENCE.

A decree of the District Court refusing to set aside as fraudulent transfers of property made by a bankrupt to his wife before the claims of any of the bankruptcy creditors accrued *held* sustained by the evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

In the matter of Silas L. Snodgrass and Clinton W. Snodgrass, doing business as S. L. Snodgrass & Son, bankrupts. Petition by William J. Pugh, trustee, against Blanche W. Snodgrass, Silas L. Snodgrass, and others. From a decree dismissing the petition, the trustee appeals. Affirmed.

The trustee filed a petition alleging that Silas Snodgrass, a member of the bankrupt partnership, had, in anticipation of bankruptcy and in fraud of creditors, transferred to his wife, Blanche Snodgrass, a piece of real estate which was their home, \$12,000 in money which was the proceeds of a manufacturing company stock which had stood in his name on the corporate books, and \$2,500 (in value) of the capital stock of the Helvetia Savings & Banking Company, which stock stood in his name on the bank books. These transfers were sufficient to change the situation of the partners from solvency to insolvency. Mrs. Snodgrass answered, claiming that the corporate stock and the bank stock had in fact been hers long before the bankrupt partnership was formed, and that, for the real estate, she paid an ample consideration and took it over in good faith. The issue so joined was tried by oral testimony before the District Judge, so that he saw and heard the witnesses. He found that Mrs. Snodgrass was right in her positions; and, from the resulting decree, the trustee appeals.

Burch, Peters & Connolly and James M. Stone, all of Cincinnati, Ohio (O. G. Bailey, of Cincinnati, Ohio, of counsel), for appellant.
C. W. Baker, of Cincinnati, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] In accordance with our settled practice, we must give great weight to the conclusion of the trial judge. If Mr. and Mrs. Snodgrass told the truth in their testimony, the petitioner had no case. Their veracity was the controlling question, and this may be so far judged by their manner and by the atmosphere, which cannot be reproduced in a printed record, that only when "there is a decided preponderance against the judgment" will an appellate court reverse such a decree. *Cleveland v. Chisholm* (C. C. A. 6) 90 Fed. 431, 434, 33 C. C. A. 157; *Monongahela v. Schinnerer* (C. C. A. 6) 196 Fed. 375, 379, 117 C. C. A. 193.

[2] As to the manufacturing company stock, their testimony is that from time to time, as Mr. Snodgrass acquired this stock in installments, he took the certificates home and gave them to his wife; that she put them away and always kept them; and that she did not know that it was necessary or advisable to have them transferred on the corporate books. This was the condition when, in 1906, negotiations were had between Mrs. Snodgrass and the manager of the corporation for the sale of this stock by her to him. It was of the par value of \$14,500, and the tentative sale price was \$20,000. In this situation, the corporation brought suit against Mr. Snodgrass, claiming a large indebtedness, and levied on the homestead and on this corporate stock standing in his name. Mrs. Snodgrass then demanded that the corporation reissue the stock to her and, on its refusal, brought

suit against the company as for conversion. This litigation and cross-litigation continued in the Ohio trial and appellate courts until March, 1910, when all controversies were settled. Mrs. Snodgrass turned over the certificates of stock and released all claim against the corporation. It paid her \$12,000 and released Mr. Snodgrass from its claims, and released also the levy upon the homestead. Simultaneously Mr. Snodgrass deeded the homestead to his wife. His equity in the homestead, above incumbrances and exemptions, was not worth more than \$2,000 or \$3,000, and Mrs. Snodgrass' acceptance of \$12,000 for the stock, instead of \$20,000, its claimed value, in accomplishing her desire to have her husband released from these claims, makes the consideration for the transfer of the home coming to her. This story, as it reads in the printed record, is of the class always subject to suspicion. In their first testimony before the referee, Mr. and Mrs. Snodgrass made statements difficult to reconcile with their testimony before the District Judge; but they gave an explanation of the discrepancy which the judge evidently accepted as sufficient. Under such circumstances, the doubt and suspicion which the printed record raises are not sufficient; the decree of the trial court cannot be overturned merely because we are not sure that it is right.

The trustee's position, in attacking this transaction, is much weakened by the fact that he represents only creditors of the bankrupt firm who gave credit two or three years after Mrs. Snodgrass' claimed ownership of this stock had received great local notoriety and after she had done everything that she could do to appear as its legal owner.

As to the Helvetia stock, the testimony is far from satisfactory, but it tends to show that just at the beginning of the now bankrupt business, and for the purpose of raising money which was put into the business, Mr. Snodgrass borrowed \$2,500 upon a term endowment policy, payable to himself, but in which Mrs. Snodgrass was beneficiary in case of his death during the term, and that, as a condition of getting Mrs. Snodgrass to sign the necessary release, he gave to her the Helvetia stock or such portion as was not already equitably hers. As against creditors then existing, the consideration for this transaction would have been of doubtful sufficiency; but taking into account the date the transaction occurred, the use made of the money, the common and natural feeling that life insurance equitably belongs to the family, no matter what the form of policy, and the absence of any probable motive at that time to defraud the subsequent creditors whom the trustee now represents, we think the decree below should not be disturbed in this particular.

The decree will be affirmed, with costs.

CAREY v. DONOHUE.

(Circuit Court of Appeals, Sixth Circuit. December 2, 1913.)

No. 2,368.

1. BANKRUPTCY (§ 306*)—DEED BY BANKRUPT—VACATION—MODE OF REVIEW.

A decree in a suit by a bankrupt's trustee to set aside an instrument in form a deed from the bankrupt conveying certain described real estate was reviewable by appeal and not by writ of error.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 306.*]

Appeal and review in bankruptcy cases, see note to 43 C. C. A. 9.]

2. BANKRUPTCY (§ 306*)—REVIEW—GROUNDS FOR REVERSAL—PREJUDICE.

Where, in a suit by a bankrupt's trustee to set aside a deed by the bankrupt, the bill as amended did not clearly show whether it was intended to charge that the instrument was given with the intent to defraud creditors or was a preference, but defendant understood the trustee to charge the execution of a preference, and the case was so tried without challenge, a decree would not be reversed because of omission to charge that the grantee had reason to believe that it was intended to give a preference forbidden by law, since the only effect would be to reverse and remand for the amendment of the bill and re-entry of the decree.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 306.*]

3. BANKRUPTCY (§ 303*)—TRANSFER—PREFERENCE—EVIDENCE.

In a suit by a bankrupt's trustee to set aside a conveyance of real property as a preference, evidence *held* to warrant a finding that the bankrupt, at the time he executed the instrument, was insolvent; that the instrument, if sustained, would grant a preference to the grantee; and that the latter had reasonable cause to believe that the transfer would, if carried out, effect the preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

4. BANKRUPTCY (§ 166*)—PREFERENCES—INSOLVENCY—NOTICE TO GRANTEE.

In general, mere suspicion on the part of a creditor that his debtor is insolvent, or that the effect of a given transaction with him will amount to a preference, is insufficient to impute notice to the creditor so as to invalidate the transfer, nor is the general reputation of the debtor's solvency a safe test of the creditor's good faith.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

5. BANKRUPTCY (§ 166*)—PREFERENCES—NOTICE TO CREDITOR.

One of the tests to determine whether a notice that a transfer of property by a bankrupt to his creditor would operate as a preference should be imputed to a creditor is to determine whether reasonable cause to believe that such would be its effect actually existed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

6. DEPOSITIONS (§ 83*)—VACATION—QUESTIONS—REFUSAL TO ANSWER.

Where a bankrupt, who was a fugitive from justice, testifying by deposition, refused to answer certain cross-interrogatories on the ground that his answers might incriminate him, subsequent to the repeal of Rev. St. § 860 (U. S. Comp. St. 1901, p. 661), granting immunity by Act May 7, 1910, c. 216, 36 Stat. 352, and the answers thereto, even if made, would have been immaterial on the issue as to whether a conveyance by the bankrupt constituted a preference except so far as they might have tended to affect the bankrupt's credibility, his refusal to answer was not ground for the suppression of his entire testimony, nor did it furnish ground for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its exclusion in determining whether the grantee had reason to believe that the transaction, if sustained, would operate as a preference.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 219-226; Dec. Dig. § 83.*]

- 7. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONFLICTING EVIDENCE—REVIEW.**
Findings of the trial judge on conflicting evidence will not be disturbed on appeal unless overborne by the clear weight of the evidence as disclosed by the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

- 8. BANKRUPTCY (§ 161*)—TRANSFER—RECORD—TIME.**

Under Rev. St. Ohio 1908, § 4134, requiring the transfer of real property to be recorded, where an alleged preferential transfer of real property by a bankrupt was executed more than four months before bankruptcy but was recorded within the time, it was subject to vacation by the bankrupt's trustee and was not barred by the four months' provision of Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

Appeal and Error from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit by E. Reeder Donohue, trustee in bankruptcy of John E. Humphreys, against Walter J. Carey. Decree for complainant, and defendant appeals and brings error. Writ of error dismissed, and decree reversed, with directions.

Michael G. Heintz, Benton S. Oppenheimer, and Morrison R. Waite, all of Cincinnati, Ohio (Waite & Schindel, of Cincinnati, Ohio, of counsel), for appellant.

Willis G. Durrell and David Davis, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was a suit brought by the trustee against the appellant and others, in the District Court, to set aside an instrument, in form a deed, from the bankrupt to the appellant, conveying certain described real estate. All the respondents except appellant were dismissed during the trial. Appellant conveyed the property to certain of the respondents, who were found to have been innocent purchasers; and decree was entered in favor of the trustee for the value of the property in question, as fixed by the verdict of a jury, which was impaneled only for that purpose.

[1] The case was brought to this court upon appeal and error. Counsel are all agreed that appeal was the proper proceeding, and this is so clearly right that the error proceeding will be dismissed. The principal objections made to the decree will be stated as we progress.

[2] 1. It is urged that the bill and its amendments do not sustain the decree. These pleadings fail to disclose with certainty upon what theory the suit was instituted; that is to say, whether the design was to charge that the instrument was given with intent on the part of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the bankrupt to hinder, delay, or defraud his creditors and so was null and void under section 67d of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3449]), or whether it was meant to charge the execution of a preference within the meaning of section 60 of the act. It would seem that the purpose was to charge the commission of these acts alternatively, and the trial court appears to have given permission so to do; but, apart from any question of right thus to plead, the bill and the amendments alike state conclusions of law rather than specific facts. However, the appellant appears to have understood the trustee to charge the execution of a preference, for, after denying knowledge of insolvency of the bankrupt, appellant averred that he "had no reasonable cause to believe that he (the bankrupt) was insolvent, and did not know and had no reasonable cause to believe that said conveyance from said John E. Humphreys to Walter J. Carey would create a preference over any other of the creditors of the said John E. Humphreys." In spite of this it is contended that appellant was not "notified that he must answer to the charge that, at the time he accepted the deed from Humphreys, he had reasonable cause to believe that the enforcement of the transfer would effect a preference." No objection was made on this ground to the bill and its amendments, and indeed their sufficiency was in no wise challenged. Besides, the case was tried upon the theory of preference, and this was also the basis of the decree.

It is true, as counsel claim, that this court has held that, in a suit to set aside a voidable preference, it is necessary to allege that the person receiving the transfer had reason to believe that it was intended to give "a preference forbidden by law." In *re Leech*, 171 Fed. 622, 625, 96 C. C. A. 424. While that decision was rendered before, and the present transaction occurred since, the amendment of 1910 (Act June 25, 1910, c. 412, § 11, 36 Stat. 842 [U. S. Comp. St. Supp. 1911, p. 1506]) to section 60b, yet the element of reasonable belief of the creditor remains as a fact necessary in substance to allege. However, if the case made is otherwise sound, the most that could be accorded appellant would be to reverse and remand the cause for the purposes only of further and appropriate amendment to the bill and re-entry of the decree. *Page v. Rogers*, 211 U. S. 575, 581, 29 Sup. Ct. 159, 53 L. Ed. 332; *Dietz v. Horton Mfg. Co.*, 170 Fed. 865, 872, 96 C. C. A. 41 (C. C. A. 6th Cir.); *Newcomb v. Burbank*, 181 Fed. 334, 336, 104 C. C. A. 164 (C. C. A. 2d Cir.). This could work no injury to any material right of appellant, and to do more than this would clearly prejudice the rights of the trustee and the creditors. It has been aptly said that "the bankruptcy act is remedial and should be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and to promote justice" (*Botts v. Hammond*, 99 Fed. 916, 920, 40 C. C. A. 179 [C. C. A. 4th Cir.]); and in working out these ends the bankruptcy courts have not indulged in technicalities wherever a liberal procedure was consistent with the substantial rights of the parties in interest.

[3] 2. It is contended that the evidence does not sustain the decree. The decree recites that the evidence was "adduced in open court," and after finding that the "paper writing, purporting to be a

deed" for the real estate in dispute, bears date August 6, 1910, and was recorded November 15, 1910, "within four months before the adjudication of John E. Humphreys, a bankrupt," it proceeds:

"* * * The court finds that the said John E. Humphreys was insolvent on August 6, 1910, and that said Walter J. Carey had at that time reasonable cause to believe that such a transfer to him, if made, would effect a preference, being given in payment of an antecedent debt. The court finds that said deed from Humphreys to said Carey, whether regarded as a transfer of title or as security for debt, is invalid."

All the witnesses except the bankrupt testified in open court, and irrespective of his testimony it is plain enough from the record that the finding should be sustained as to the fact of his insolvency at the date named; and it is equally clear that the effect of any enforcement of the transfer in issue would be to enable appellant to obtain a greater percentage of his debt than any other of the creditors of his class. A more difficult question arises respecting the existence of reasonable cause on the part of appellant at the date of the instrument to believe that his transaction with the bankrupt would, if carried out, effect a preference. Every question of this kind is necessarily controlled by the facts and circumstances of the particular case. Aside from some principles that have general application, it rarely happens that the facts and circumstances of other cases, even though kindred in character, are helpful in solving the question in hand.

[4] Thus it is a general rule that mere suspicion on the part of the creditor that his debtor is insolvent or that the effect of a given transaction with him would amount to a preference is not enough (*First National Bank v. Abbott*, 165 Fed. 852, 859, 91 C. C. A. 538 [C. C. A. 8th Cir.]; *Stucky v. Masonic Savings Bank*, 108 U. S. 74, 75, 2 Sup. Ct. 219, 27 L. Ed. 640), for, in the absence of substantial evidence in that behalf, his suspicions are fairly consistent with the ordinary desire of the creditor to assure himself of safety respecting the debt. On the other hand, general reputation for solvency of a debtor is not always a safe test of the good faith of his creditor who obtains or receives from him a transfer of property, because the relations between them and the circumstances of the transaction itself may satisfy every impartial mind that the particular creditor had abundant reason to believe that his debtor's financial reputation was false, while this might not be true at all in the debtor's transactions of an ordinary character with other persons. We say this both because of the claim made here touching the bankrupt's reputed solvency and of its apparent explanation of some of the transactions that are in evidence, though not involving a transfer of any of his own property, and in which not even a suspicion of insolvency was aroused.

[5] One way of testing the belief that should be imputed to the creditor receiving either a payment in money or a transfer of property in discharge of a past-due debt is to inquire whether reasonable cause to believe actually *existed*. Thus in *Hewitt v. Boston Straw Board Co.*, 214 Mass. 260, 101 N. E. 424, 425, decided April 1, 1913, the Supreme Judicial Court of Massachusetts, when considering a

transfer alleged to be a preference under section 60 of the Bankruptcy Act, said:

"Where there is reasonable cause to believe that at the date of transfer within the statutory period the debtor is insolvent, and payment is accepted of a debt overdue, it is immaterial whether the creditor actually believes what may have been disclosed as to the true state of affairs. If he prefers to draw inferences favorable to himself and to ignore information which would have led to knowledge that his debtor was in failing circumstances, he cannot set up his own judgment to the contrary, even if honestly entertained, as a reason why he should be permitted to retain a prohibited advantage."

[6] It is strenuously urged that, in considering the question of appellant's reason to believe in the existence of facts amounting to a preference, the testimony of the bankrupt shall be excluded. His testimony was taken in Honduras upon direct and cross interrogatories, but he declined to answer some of the cross-interrogatories for the reason, as he stated, that they "might tend to incriminate" him; and a motion was made to suppress all his testimony because of his refusals to answer such cross-interrogatories. The motion was overruled, and we think rightly. It is to be observed that section 860 of the Revised Statutes (U. S. Comp. St. 1901, p. 661) was repealed before such refusals were made (Act May 7, 1910, c. 216, 36 Stat. 352); and this of course removed the foundation of that class of decisions which enforced answers by reason of the immunity the section afforded. Hence the bankrupt was at liberty to avail himself of the ancient rule that a witness shall not be compelled in any proceeding to give testimony which will tend to criminate him. *Counselman v. Hitchcock*, 142 U. S. 547, 563, 565, 12 Sup. Ct. 195, 35 L. Ed. 1110; *State v. Thaden*, 43 Minn. 253, 255, 45 N. W. 447; 3 *Wigmore on Ev.* § 2271, p. 3141. And to exclude all testimony the witness could give without incriminating himself would be at once to penalize the exercise of the privilege and to invest the adversary party with an obviously undue advantage. Illustration of the practical effect of such a course is presented here through the fact that the deposition was taken in a foreign country and filed January 20, 1912, while the motion to suppress was made the 25th of March following, just two days before commencement of the trial. To say the least of such a situation, some regard should be given to the relevance and materiality to the case of the particular questions declined and of any responsive answers that could have been made to them. The main, if not the sole, object of the interrogatories the bankrupt refused to answer was to discredit his testimony in chief; and it is not at all certain that if he had answered he would have discredited his testimony any more than it was by witnesses who testified before the court concerning transactions which they, either for themselves or for others, had had with the bankrupt; and it is conceded on all hands that he had fled and was living in Honduras at the time he gave his testimony. Apart from the bankrupt's credibility, these cross-interrogatories did not call for answers that were relevant to the transactions in issue; and so the testimony sought must be regarded as immaterial. Where this appears, an entire deposition cannot be suppressed any more than it could if the immaterial interrogatories had in all re-

spects been irrelevant. *H. Scherer & Co. v. Everest*, 168 Fed. 822, 826, 94 C. C. A. 346 (C. C. A. 8th Cir.); *White v. Solomon*, 164 Mass. 516, 519, 42 N. E. 104, 30 L. R. A. 537.

Such testimony as the bankrupt gave, if believed, tends strongly to establish the preference; but appellant on the witness stand denied the most important parts of the bankrupt's statements in that behalf; and still it must be said that there are features of the record that tend to corroborate the bankrupt and, aside from his testimony, to show grounds for reasonable belief on the part of appellant. It can serve no useful purpose, however, to recite the details of the testimony given either by the bankrupt or the other witnesses. The trial judge had the advantage of seeing and hearing all of the witnesses except the bankrupt; and every experienced lawyer knows what this means. While equal advantage exists here as respects the deposition of the bankrupt, yet this is not so as to the testimony of appellant; the important element of demeanor of the witness, like that of every other witness who testified before the court, is of course lacking.

[7] Indeed, the rule in such circumstances is not to disturb the judgment of a district court unless it is overborne by the clear weight of the evidence as disclosed by the record. *Pugh v. Snodgrass*, 209 Fed. 325, decided by this court November 4, 1913; *Monongahela River Consol. C. & C. Co. v. Schinnerer*, 196 Fed. 375, 379, 117 C. C. A. 193; *L. & N. R. Co. v. Lankford*, 209 Fed. 321, decided by this court December 2, 1913; *The Printz Eitel Friedrich*, 206 Fed. 898 (C. C. A. 2d Cir.). And see language of the present Mr. Justice Lurton, when speaking for this court, in *City of Cleveland v. Chisholm*, 90 Fed. 431, 434, 33 C. C. A. 157. It results that, upon all the facts and circumstances of the case, we cannot set aside the findings of the decree.¹

[8] 3. It is insisted that recovery is barred by the four months' provisions of sections 60a and 60b. The argument is that the instrument in dispute is a deed of conveyance which, although recorded within four months of the bankruptcy, was effective from its delivery as against every person except a bona fide purchaser. The basis of this is the deed-recording statute of Ohio (2 Ann. Ohio Gen. Code, § 8543, p. 48), and the rule laid down in *Wright v. Bank*, 59 Ohio St. 80, 51 N. E. 876, construing old section 4134, which was like the present section 8543 (2 Bates, p. 2295). It was held in that case (syl. 6):

"As against subsequent bona fide purchasers without notice, a deed of conveyance of land, duly executed, must be recorded as provided in section 4134, Revised Statutes, but such record is not required as against other parties."

And it is then urged that the present case is governed by the principle settled in *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and the cases following it. This argument ignores the broad distinction between cases like *York Mfg. Co. v. Cassell* and the one now under review. The class of decisions to

¹ Attention is called to the facts which were regarded as sufficient to charge preferred creditors with reasonable belief, etc., in *Nat. City Bank v. Hotchkiss, Trustee in Bankruptcy*, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. —, and also *Mechanics' & Metals' Nat. Bank v. Ernst, Russell & Marshall, Trustees in Bankruptcy*, 231 U. S. 60, 34 Sup. Ct. 22, 58 L. Ed. —, decided by the Supreme Court November 3, 1913.

which that case belongs involved instruments which were free from inherent legal infirmities, and, as to setting them aside, the law then accorded to trustees only the rights of the bankrupts, while the present case concerns an instrument that is denounced by law as a voidable preference, and the trustee is distinctly empowered to avoid it for that reason. The distinction we seek to make clear is recognized in *Richardson v. Shaw*, 209 U. S. 365, at page 378, 28 Sup. Ct. 512, at page 516 (52 L. Ed. 835, 14 Ann. Cas. 981), where Mr. Justice Day, in passing upon an alleged preference and the rights of the trustee in bankruptcy touching a certificate of stock which had been held in pledge under contract and delivered by the pledgee upon demand and payment, said:

"Consistently with the terms of the contract, as understood by both parties, the broker could not have declined to thus redeem and turn over the stocks, and, when adjudicated a bankrupt, his trustee had no better rights, *in the absence of fraud or preferential transfer, than the bankrupt himself.*" (Italics ours.)

Again, in *Rouse v. Ottenwess & Huxoll*, 208 Fed. 881, decided by this court November 11, 1913, Judge Knappen stated the distinction thus:

"The doctrine that the bankruptcy trustee 'stands in the shoes of the bankrupt' has no application to transactions which the trustee is, by the express terms of the act, authorized to avoid."

Moreover, upon like reasons it would seem clear, though we need not decide, that *Wright v. Bank*, supra, 59 Ohio St. 80, 51 N. E. 876, would not be applicable to a case of preference if tested under and according to the Ohio statutes alone. For sections 11104 and 11105 of the Ohio statutes (5 Ann. Gen. Code, 449, 460) denounce preferences under stated conditions and authorize the appointment of trustees to institute suits to recover the property transferred and administer it for the equal benefit of all the creditors. In short, the state policy is in substantial accord with the national policy respecting the avoidance of preferences and the ultimate distribution of their proceeds. In *re Farrell*, 176 Fed. 505, 510, 100 C. C. A. 63 (C. C. A. 6th Cir.).

It remains to consider the effect of the four months' provisions of sections 60a and 60b. We look to the deed-recording act of the state for the purpose of determining whether, under that act, recording of the instrument under review was required. Concededly this was so as to bona fide purchasers; and the principle is settled in this court that, through the operation of section 60 upon a voidable transfer falling within such a state requirement, the trustee may avoid the transfer if registered within the four months' period. *Loeser v. Savings Deposit Bank & Trust Co.*, 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233. And in addition to the cases cited and commented on in the opinion in that case, see *In re Beckhaus*, 177 Fed. 141, 100 C. C. A. 561 (C. C. A. 7th Cir.). Counsel endeavor both to distinguish the *Loeser* Case and to show that it should not be followed. While we are satisfied from the evidence that in equity the instrument should be treated as a mortgage, yet we do not attach importance to this feature, because it has been held in Ohio that an instrument in form like this, unlike a legal mortgage, operates

upon delivery to transfer title and so is required to be recorded as a deed. *Kemper v. Campbell*, 44 Ohio St. 210, 218, 6 N. E. 566.² Now in applying the *Loeser* decision we observe that the instrument there under review was a chattel mortgage, while the one now in question is a deed. We also recognize the right in Ohio to fasten a lien upon property covered by an unregistered chattel mortgage as against the mortgagee, and the absence of such a right as to real estate held by an unrecorded deed; but a bona fide purchaser could acquire a better right to the property than that possessed by the holder of either of such unregistered instruments. In applying the rights of a trustee in bankruptcy to this situation, he stood no better than the bankrupt at the date of the *Loeser* decision, provided the initial transactions and the instruments representing them, the chattel mortgage in the one and the deed in the other, were free from any inherent legal infirmities such as fraud or voidable preference.

When the registration provision of section 60a was applied to the chattel mortgage involved in the *Loeser* Case, the court was confronted with the question whether the word "required" was sufficiently comprehensive to include an unregistered chattel mortgage. This could not be determined without considering all the means which were then open to creditors to fasten liens upon, and to bona fide purchasers to acquire title to, the property described in the chattel mortgage, for plainly the chattel mortgagee was bound to take the risk of such liens and purchases. This presented classes of persons as to whom registration was obviously "required," but there was no risk as to bankruptcy unless the transaction was tainted with fraud or voidable preference. In *re Klein*, 197 Fed. 241, 116 C. C. A. 603. The situation, then, evidently demanded of the court an interpretation of the word "required" broad enough to embrace all transactions that could displace the rights of the holder of an unregistered chattel mortgage. Anything less than this would have rendered the word "required" meaningless.³

There can be no difference, then, between the ruling demanded in the *Loeser* Case and the principle that should govern the instant case. Concession that a creditor could not through attachment or the like have acquired a right superior to that of appellant under his unrecorded deed (*Wright v. Bank*, *supra*) only results in diminishing the classes of persons against whom record was required, for it is manifest that the class of possible bona fide purchasers none the less remained. How, then, can it be that the difference between a deed and a chattel mortgage, as respects form and classes against whom registration is required, amounts to a distinction between this case and the *Loeser* Case? Further, the form of the present instrument

² Whether, in view of later decisions, the rule of that case will be adhered to in Ohio does not require present consideration.

³ We do not discuss the inference drawn by counsel from the amendment of 1910 to section 47a2 concerning the meaning of the word "required," because the change wrought by the amendment in the position of the trustee would, if counsel's inference be sound, place limitations upon both the words "transfer" and "required," and so operate to change their natural meaning and also the manifest intent of sections 60a and 60b; and yet there is nothing in the amendment itself of 1910 to section 47a2 to indicate any such purpose. Moreover, when the amendment was under consideration in Congress, the avowed object was simply to escape the rule in *York Mfg. Co. v. Cassell* (Cong. Rec. vol. 45, pt. 3, p. 2554).

and its inherent infirmities give to it every attribute that can be ascribed to a "transfer," as that term is used in either section 60a or 60b; and this was true as to that sort of an instrument, even as those sections stood at the date of the Loeser decision. The sections themselves make no distinction respecting the form or the subject-matter of the transfers they condemn; and hence the reason for avoiding such a deed is in every conceivable sense as clear and as strong as can exist in respect of a chattel mortgage. Page v. Rogers, supra, 211 U. S. at page 577, 29 Sup. Ct. 159, 53 L. Ed. 332.

It is vain to urge that the decision in the Loeser Case should not be followed. It is said that the reversal of this court in York Mfg. Co. v. Cassell impaired the strength of the Loeser decision; but, besides the obvious distinction between the cases, the decision in the latter was rendered more than seven months later than in the other. The claim that this court has decided (In re Klein, 197 Fed. 241, 116 C. C. A. 603) that, at the time the Loeser decision was rendered, the law required the existence of insolvency and reasonable cause to believe to be found as of the date of the transfer and not merely the date of the record is met by the fact that the Klein Case did not involve a preference, and also by the findings contained in the decree in this case.

Accordingly the writ of error is dismissed, and the decree below reversed, with direction to take proceedings in conformity with this opinion; but the costs incurred below in bringing the appeal and the proceeding in error to this court and the costs here will be divided.

BERRY BROS. v. SNOWDON et al.

In re GRAVES et al.

(Circuit Court of Appeals, Ninth Circuit. November 25, 1913.)

No. 2,286.

1. SALES (§ 4*)—SALE OR BAILMENT—CONSIGNMENT OF GOODS FOR SALE.

Claimant shipped to bankrupts, who owned a warehouse for the storage of goods and also a salesroom at a different place in the city where they sold goods, certain goods under a contract which stated that the goods were "consigned for sale." Pursuant to the terms of the contract claimant paid the freight on the goods, cartage to the warehouse where they were stored, and also storage and insurance thereon. An invoice or detailed statement of the goods was sent to bankrupts, who had the privilege of removing any of them to their store for sale when desired, sending a statement of the goods removed each month to claimant, which then sent them a regular invoice charging them with the goods so removed. From time to time claimant, with the knowledge of bankrupts, withdrew parts of the goods and sold them on its own account, and within four months prior to the bankruptcy it withdrew all that remained. *Held*, that the contract was not one of sale, either absolute or conditional, but of bailment, under which title did not pass to any of the goods except those removed by, and regularly billed to, bankrupts.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 7-11; Dec. Dig. § 4.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. SALES (§ 4*)—TITLE TO PROPERTY—EFFECT OF DELIVERY OF "INVOICE."

An invoice is not a bill of sale nor evidence of a sale and is as appropriate to a bailment as to a sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 7-11; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 4, pp. 3761, 3762.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

In the matter of Edwin L. Graves and George E. La Belle, copartners as Graves & La Belle and the Federal Paint & Wall Paper Company, and Edwin L. Graves and George E. La Belle, individually, bankrupts. Appeal from order affirming disallowance by R. S. Snowdon, trustee of Berry Bros., a corporation. Reversed.

Frank E. Green, of Seattle, Wash., for appellant.

Cassius E. Gates, Gates & Emery, McClure & McClure, and Walter A. McClure, all of Seattle, Wash., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. [1] The appeal in this case is from the judgment of the District Court confirming an order made by the referee in bankruptcy rejecting and expunging a claim made by the appellant against the bankrupts. The appellant is a corporation of the state of Michigan, and the bankrupts were at the time of their adjudication in bankruptcy doing business in the city of Seattle, state of Washington, having a warehouse for the storage of goods, and at a separate and distinct place in the same city a salesroom in and from which they sold goods. The agreed statement of the respective parties shows that, while the bankrupts were so carrying on their business, the appellant shipped them certain goods and merchandise of the aggregate value of about \$5,000 under and pursuant to this written agreement:

"March 18, 1912.

"Agreement between Berry Brothers, Limited, of Detroit, Michigan, party of the first part, and Graves & La Belle, of Seattle, Washington, party of the second part:

"The party of the second part hereby agree to store such goods that the party of the first part may ship on consignment to the party of the second part for the purpose of sale by said Graves & La Belle.

"The party of the second part agree to report on the first of each month the amount of goods sold by them from said stock for which party of the first part will render an invoice at the regular terms and prices of such goods according to the quantity sold.

"The party of the first part agree to pay the party of the second part the cost of cartage in Seattle from the car to their warehouse of each consignment of goods, and 3¢ per case per month for storage based on the stock on hand at the first of each month.

"The party of the first part will carry and pay for such insurance as they deem necessary for the goods on consignment.

"The party of the first part will render a memo invoice to the party of the second part of all goods shipped on consignment, and will credit to such consignment account the amount of goods that are sold each month from said stock, and the party of the second part agree to pay for such goods sold by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 209 F.—22

them, or taken from consigned goods while in their possession on the terms which they are billed by the party of the first part on their regular invoice.

"It is also agreed that this contract can be terminated at any time upon thirty days' written notice from either party.

"Berry Brothers, Limited,

"Jas. S. Stevens, Asst. Genl. Mngr.

"Graves & La Belle,

"By G. E. La Belle."

It was further stipulated by the parties that Berry Bros. paid the freight on the goods, the cartage thereon from the cars to the warehouse of Graves & La Belle; that the goods were thereupon placed in the said warehouse, in which were also goods, wares, and merchandise belonging to the said Graves & La Belle, and that Berry Bros., also paid the insurance and storage on the goods so shipped by them during the entire time those goods remained in the said warehouse; that Berry Bros., at the time of their said shipments, delivered to Graves & La Belle "detailed statements" covering the same, and that they (Berry Bros.) at various times thereafter withdrew parts of the goods so consigned by them and stored as aforesaid and sold the same on their own account, independent of, but with the knowledge of and without objection by, the said Graves & La Belle; that, whenever Graves & La Belle withdrew any portion of the said consigned goods from their warehouse, report of such withdrawal was made by them to Berry Bros., and "monthly statements were rendered by said Berry Bros. to said Graves & La Belle of the amount of stock so withdrawn during the preceding month"; that on or about November 16, 1912, "said Berry Bros., with knowledge of the financial condition of said Graves & La Belle, and with knowledge that bankruptcy proceedings might be instituted within a short time after said date, withdrew from said Graves & La Belle the goods, wares, and merchandise theretofore delivered by Berry Bros. then remaining in said warehouse of the value of about \$3,000; that some of the creditors of said bankrupts interposed objections to the return of said goods, but that in order to avoid litigation said objections were waived and Berry Bros. were allowed to retake said stock upon condition that they would, in case of bankruptcy proceedings within four months of said date, permit the question of their right to the possession of said goods (to) be submitted to the bankruptcy court of this district," the written agreement to that effect being inserted in the record.

The order of the referee confirmed by the court below, which disallowed and expunged the claim of Berry Bros. for \$1,861.50 against the bankrupts, was based upon the grounds:

"(1) That proper credits have not been allowed for payments made on said account.

"(2) That, subsequent to the first day of the four months immediately preceding the filing of the petition by the above-named bankrupts, the said Berry Bros., a corporation, claimant, with knowledge of the insolvency of the said Graves & La Belle, and without any present consideration therefor, received from said Graves & La Belle certain goods, wares, and merchandise, the same being the property of the bankrupts, of the value of approximately \$3,000, thereby obtaining a preference and enabling them to receive a larger proportion of their claim than the other creditors of said bankrupts of the same class; the said Graves & La Belle being then insolvent."

It will be seen from the foregoing statement that the proper disposition of the appeal depends upon the true character of the agreement between Berry Bros. and Graves & La Belle. The court below held that it constituted as to the creditors, if not an absolute sale, a conditional one, and that it was void as against the creditors because not recorded pursuant to a statute of the state of Washington requiring recordation of such sales. But we are unable to so regard the contract between the parties. We think it was not a sale of any kind. In more than one place in the agreement it is distinctly stated that the goods were to be consigned for sale, which is an altogether different thing. The true distinction between a sale and an option to purchase, said the Supreme Court in *Sturm v. Boker*, 150 U. S. 329, 14 Sup. Ct. 99, 37 L. Ed. 1093, is pointed out by the Supreme Court of Massachusetts in *Hunt v. Wyman*, 100 Mass. 198, 200, as follows:

"An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."

Such cases are strictly analogous to that now before us. If, as the court below in effect held, the title to the goods under the contract passed from Berry Bros. to Graves & La Belle, how comes it that the former were thereby required to pay the freight, cartage, storage, and insurance on the goods while in Graves & La Belle's warehouse? Such provisions in respect to payments by Berry Bros. are wholly inconsistent with the passing of the title to the property from them to Graves & La Belle. So, also, is that other provision of the contract by which the latter agreed "to pay for such goods sold by them or taken from consigned goods while in their possession on the terms which they are billed by the party of the first part on their regular invoice."

[2] The invoices, or "detailed statements" as they are called in the stipulation of the parties, did not change the terms of the written agreement under which the property was sent to the consignees. "An invoice," as said by the Supreme Court in *Dows v. National Exchange Bank*, 91 U. S. 618, 630 (23 L. Ed. 214), "is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale. * * * Hence, standing alone, it is never regarded as evidence of title." See, also, *Sturm v. Boker*, 150 U. S. 312, 328, 14 Sup. Ct. 99, 37 L. Ed. 1093.

And that neither of the parties to this contract considered that it was in truth anything more than it purported to be, to wit, a mere consignment of the goods for sale upon the terms and conditions therein stated, is very clearly shown by the agreed statement of facts, from which it appears, among other things, that Berry Bros. at various times "withdrew parts of the goods so consigned by them and stored as aforesaid and sold the same on their own account, independent of, but with the knowledge of and without objection by, the said Graves & La Belle"; and that, whenever Graves & La Belle withdrew any portion of the said consigned goods from their warehouse, report of such withdrawal was made by them to Berry Bros., and "monthly statements

were rendered by said Berry Bros. to said Graves & La Belle of the amount of such stock so withdrawn during the preceding month." It is manifest that such conduct of the parties is wholly inconsistent with the idea of a sale on the part of the one and a purchase by the other.

We think the contract clearly one of bailment, and that the bankrupts never acquired title to any of the consigned property that they did not purchase pursuant to the option given them by the contract. See *Sturm v. Boker*, 150 U. S. 328, 329, 330, 14 Sup. Ct. 99, 37 L. Ed. 1093. And while it is true that under the amendment of the Bankruptcy Act of June 25, 1910, a trustee in bankruptcy is vested with the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, the lien so given is a lien on the property of the bankrupts and not a lien on the property of third persons.

The conclusion to which we have come is, we think, supported by the cases of *Wood Mowing & Reaping Mach. Co. v. Vanstory*, 171 Fed. 375, 96 C. C. A. 331; *Southern Hardware & Supply Co. v. Clark*, 201 Fed. 1, 119 C. C. A. 339; *L. C. Smith & Bros. Typewriter Co. v. Alleman*, 199 Fed. 1, 117 C. C. A. 577; *In re Columbus Buggy Co.*, 143 Fed. 859, 74 C. C. A. 611; *In re Reynolds (D. C.)* 203 Fed. 162. The facts in the case of *Penny & Anderson (D. C.)* 176 Fed. 141, 23 Am. Bankr. Rep. 115, are quite different from those in the present case.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views above expressed.

McCLURG v. CRAWFORD.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1913.)

No. 3,919.

1. FRAUDS, STATUTE OF (§ 118*)—CONTRACT FOR SALE OF REAL ESTATE—CORRESPONDENCE.

A contract for the sale of real property, valid under the statute of frauds, may be made by correspondence. It is not necessary that every paper should contain all the necessary elements of the contract which may be authenticated and established through the medium of letters and separate writings and documents, provided they refer to each other and to the same persons and things and manifestly relate to the same contract and transaction.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 199, 262-265; Dec. Dig. § 118.*]

2. FRAUDS, STATUTE OF (§ 113*)—CONTRACTS FOR SALE OF LAND—REQUISITES AND SUFFICIENCY OF WRITING.

In the absence of a special provision in a contract for the sale of real estate respecting the payment of the purchase price, the law presumes that it is to be paid in cash at the close of the transaction or within a reasonable time when demanded by the seller, and the absence of such provision does not render the contract invalid under the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 239-241; Dec. Dig. § 113.*]

3. SPECIFIC PERFORMANCE (§ 66*)—CONTRACTS FOR SALE OF REAL PROPERTY—EQUITY JURISDICTION.

The vendor in a contract for the sale of real property has the right to come into a court of equity to enforce specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 197; Dec. Dig. § 66.*

Persons entitled to enforce specific performance, see note to *Lawyer v. Post*, 47 C. C. A. 493.]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit in equity by Ogden D. McClurg against Thomas B. Crawford. Decree for defendant, and complainant appeals. Reversed.

Pierpont Fuller, of Denver, Colo. (Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, and George A. H. Fraser, all of Denver, Colo., on the brief), for appellant.

John T. Barnett, of Denver, Colo., for appellee.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. April 30, 1912, appellant filed his bill of complaint against appellee praying a decree of specific performance of an alleged contract for the purchase from appellant of 45.075 acres of mining land known as the Jay Eye See group of claims in Ouray county, Colo. Appellant, complainant below, alleged complete performance on his part, tendered a deed to the land, and demanded judgment for the purchase price of \$10,000. An amendment to the bill, filed June 29, 1912, set forth the contract as embodied in correspondence filed as exhibits and lettered from "A" to "Y," inclusive. To the bill, as thus amended, the defendant interposed a demurrer, the material specifications of which are the following:

"(3) That said amended bill shows that no contract for the purchase and sale of the property described therein ever existed between the plaintiff and defendant, and that if any ever did exist, or was ever entered into, between the parties, it is so vague, uncertain, and ambiguous as not to be capable of specific execution through a decree of court.

"(4) Said amended bill fails to allege the time of performance of said alleged contract.

"(5) Said bill upon its face shows that the complainant has a complete and adequate remedy at law."

The demurrer was sustained, and the bill dismissed; and from this action of the trial court complainant prosecutes this appeal.

That part of the correspondence disclosing the contract declared upon may be said to consist of Exhibits A to I, inclusive, which are as follows:

Exhibit A.

"November 25th, 09.

"Messrs. York & Rathnell, Ouray, Colorado—Gentlemen: Your name is given us by the Hon. John T. Barnett, Attorney General.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Our client, Mr. Ogden T. McClurg, is the owner of the following described lode mining claims, situate in your county, namely:

Kremlin	Lode	— No. 2,570.
Stanley	"	— No. 2,571.
SW 14' Mono	"	— No. 2,213.
Jay Eye See	"	
Contact	"	
Carbonate	"	
Sunnyside	"	
Ajax	"	— No. 2,632.

"Mr. McClurg is very anxious to dispose of this property and if you think that you can handle the same for him, we should be glad to have you inform us on what terms you would be willing to do so.

"Your prompt reply would be appreciated.

"Yours very truly,

Rogers, Ellis & Johnson."

"JHS—H"

Exhibit B.

"Denver, Colorado, November 29, 1909.

"Messrs. Rogers, Ellis & Johnson, Denver, Colorado—Gentlemen: Your letter of the 25th to Messrs. York & Rathnell has been turned over to me and I wish you would advise me as to the least amount that Mr. Ogden T. McClurg would accept for his Jay Eye See group in the Red Mountain District. Also advise me as to whether an arrangement could be made with him for surface rights on the Carbonate Lode of this group. I own the Indiana Group at the top of the mountain and if I could make proper arrangements I would be tempted to drive a tunnel from near the railroad to cut the Indiana vein.

"Very truly yours,

Thos. B. Crawford."

Exhibit C.

"Dec. 7th, 09.

"Thos. B. Crawford, Esq., Century Bldg., City—Dear Sir: Property of Mr. Ogden T. McClurg. Pardon delay in replying to yours of the 20th ult. Same has been caused by pressure of important matters needing immediate attention.

"We hardly know what to say in response to your inquiry as neither we nor our client are sufficiently informed to fix a price which under all the circumstances the property should reasonably bring. Two or three years ago, when Mr. McClurg was approached upon the subject, he intimated that he would be willing to accept \$25,000, but we have no doubt that if the property is not, by reason of lack of development or for other reasons, in condition to justify such a high valuation, he will be glad to consider an offer of a lower sum.

"We should be very glad indeed if you would make us a proposition and upon receiving same, we will promptly submit it to Mr. McClurg, and if the amount you offer does not seem entirely below reason, we have no doubt that he will give the same his careful attention.

"Yours very truly,

Rogers, Ellis & Johnson."

"JHS—H"

Exhibit D.

"Denver, Colorado, December 8, 1909.

"Rogers, Ellis & Johnson, Denver, Colorado—Gentlemen: Your letter of the 7th just received. You might offer for me to Mr. McClurg \$10,000.00 for the claims at Red Mountain. There is absolutely nothing there at this time to justify even that price, but as I wrote you in my former letter it is my purpose, if I can properly arrange matters, to drive a tunnel from the foot of the mountain cutting through the property owned by Mr. McClurg and two claims (laying) beyond him and between my property and his.

"Nothing can be done up there until about May 1st in any event, but I would like to conclude the negotiations and know where I stand, because if I do not succeed in getting the properties I will abandon the idea of driving the tunnel.

"Very truly yours,

Thos. B. Crawford."

Exhibit E.

"Dec. 9th, 09.

"Thos. B. Crawford, Esq., 307 Century Bldg., City—Dear Sir: Ogden T. McClurg Property. We acknowledge receipt of your favor of the 8th inst., and note that in your behalf we may offer Mr. McClurg \$10,000 for the claims 'at Red Mountain.'

"In order that there may be no mistake as to what claims you refer to, we beg to ask whether, in writing your letter you had in mind the 'Kremlin' and 'Stanley' lodes, or the 'Jay Eye See' Group of claims. Presumably you referred to the former, but we would like to have a definite expression from you upon the subject and upon receipt of same will promptly advise Mr. McClurg of your offer.

"Yours very truly,
"JHS—H"

Rogers, Ellis & Johnson."

Exhibit F.

"Denver, Colorado, December 11, 1909.

"Messrs. Roger, Ellis & Johnson, Denver, Colorado—Gentlemen: Yours of the 9th with reference to the Ogden T. McClurg property received. I meant the Jay Eye See group of claims at the foot of the mountain. However, if Mr. McClurg is wise he will be like the Kansas homesteader who was deeding his property and discovered that the man to whom he was deeding it could not read. Instead of deeding him eighty acres as agreed, he put in the whole 160 acres, so I think it would be money in Mr. McClurg's pocket to deed all of it.

"Very truly yours,

Thos. B. Crawford."

Exhibit G.

"Dec. 21, 1909.

"Mr. Thomas B. Crawford, 317 Century Bldg., City—Dear Sir: Ogden T. McClurg Property. We are just in receipt of a letter from Mr. Ogden T. McClurg, authorizing us, in his behalf, to accept the offer contained in your favors of the 8th and 11th inst., to purchase the 'Jay Eye See' group of claims, Ouray county, Colorado, for \$10,000; and, we, therefore, for Mr. McClurg, do hereby accept your said offer, understanding, of course, that the sum named is to be paid in cash.

"Kindly call up Mr. Rogers by telephone upon receipt of this letter, and inform him what day and hour will meet your convenience for the closing of the transaction, and oblige,

"Yours very truly,
"JHS—H"

Rogers, Ellis & Johnson."

Exhibit II.

"December 22, 1909.

"Rogers, Ellis & Johnson, Denver, Colorado—Gentlemen: Yours of the 21st received and I will call you up just as quick as I hear from my friend in Ouray. I have written him this morning and should hear in the next four or five days.

"Very truly yours,

Thos. B. Crawford."

Exhibit I.

"January 7, 1910.

"Rogers, Ellis & Johnson, City—Gentlemen: I have just heard from my friend in Ouray and also from my friend in New York to whom I had written concerning the funds needed to take up the J. I. C. deed, and I am glad to report that I have made the arrangement, and in the course of the next few weeks will be able to deposit the money to your credit.

"I will keep you advised in the course of a couple of weeks as to just when we want the deed deposited and whether we want it deposited here or sent to New York City.

"I am also securing some other property in the same neighborhood, and the whole matter will come through at the same time. My friend advises me definitely and beyond question and assures me that I can make you this definite promise.

"Very truly yours,

Thos. B. Crawford."

[1] We think these letters make a complete, binding, and enforceable written contract for the sale of the real estate. The laws of Colorado relating to the sale of realty provide:

"Every contract for the leasing for a longer period than one year, or for the sale of any lands or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made.

"Every instrument required to be subscribed by any party under the last preceding section, may be subscribed by the agent of such party, lawfully authorized by writing." Rev. St. of Colorado, 1908, §§ 2662, 2663.

Messrs. Rogers, Ellis & Johnson, whose names are subscribed to the letters addressed to Messrs. York & Rathnell, and to the defendant, are alleged to be the duly authorized agents of complainant. The contract, which the parties have made, may be gathered from letters which have passed in correspondence between them. It is not necessary that every paper should contain all the necessary elements of the contract, which may be authenticated and established through the medium of letters and separate writings and documents provided they refer to each other and to the same persons and things, and manifestly relate to the same contract and transaction. *Beckwith v. Talbot*, 2 Colo. 639; s. c., 95 U. S. 289, 24 L. Ed. 496; *Crystal Palace Flouring Co. v. Butterfield*, 15 Colo. App. 246, 61 Pac. 479; *Brown on Statute of Frauds*, § 346b; *Wood on Statute of Frauds*, § 345, p. 645. It is held that the recitals of the contract should disclose the following essentials: (1) The names of the parties, vendor and vendee; (2) the terms and conditions of the contract; (3) the interest or property affected; (4) the consideration to be paid therefor. It is apparent that all these elements clearly appear in the quoted correspondence embodying the contract. The letters are neither vague, uncertain, nor ambiguous.

[2] In the absence of special provision respecting the payment of the purchase price, the law presumes that it is to be paid in cash at the close of the transaction; that is to say, within any reasonable time when demanded by the seller. The remaining letters filed as exhibits need not be considered here; they consist, in the main, of repeated insistence on the part of appellant that the transaction be closed by the payment of the purchase price, and repeated plausible explanations and excuses for delay on the part of appellee. Nothing in them can be construed as tendering or accepting any material modification of or departure from the previously completed contract. Additional time was repeatedly requested by appellee, and granted by appellant. Having invited, for his own accommodation, the delay which resulted, appellee cannot evoke therefrom the defense of laches amounting to waiver.

[3] The contention that the bill will not lie, because it shows upon its face that complainant has a complete and adequate remedy at law, cannot be sustained. The vendor had a right to come into a court of equity to enforce specific performance. *Cathcart v. Robinson*, 5 Pet. 264-278, 8 L. Ed. 120; *Raymond v. San Gabriel Land & Water Co.* (C. C. A.) 53 Fed. 883-885, 4 C. C. A. 89; *Nelson v. Husted et al.* (C. C.) 182 Fed. 921.

Our conclusion is that the trial court erred in sustaining the demurrer to the bill. The decree must be reversed, and the cause remanded, with directions that the demurrer be overruled, and that further proceedings be taken in accordance with the views herein expressed.

AMERICAN TEMPERANCE LIFE INS. ASS'N OF CITY OF NEW YORK
v. SOLOMON et al.

(Circuit Court of Appeals, Third Circuit. November 25, 1913.)

No. 1,756.

1. TRIAL (§ 105*)—DOCUMENTS—PROOF BY SUBSCRIBING WITNESSES—WAIVER—ADMISSION WITHOUT OBJECTION.

Where an application for life insurance, alleged to have been executed by decedent before subscribing witnesses, was admitted in evidence without objection, it was in the case for all purposes as though it had been proved by the subscribing witnesses, and it could not thereafter be objected that the party introducing the same did not call such witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

2. TRIAL (§ 105*)—FALSE REPRESENTATIONS—PROOF—PRIOR APPLICATION—INSTRUCTIONS.

Where a prior application for life insurance, alleged to have been executed by insured by a mark before witnesses, and rejected by the insurer, was admitted in evidence without objection, and without proof of its execution by the subscribing witnesses, to show the falsity of an answer in a subsequent application by insured, in which he stated that he had never been rejected, an instruction, submitting to the jury the question whether defendant had proved that such alleged prior application was in fact executed by insured because the subscribing witnesses had not been called to testify, and further instructing that, if the jury should find that insured did not sign such application, then it was not his application, was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Action by Louis Solomon and others, as administrators of Max Solomon, deceased, for use, etc., against the American Temperance Life Insurance Association of the City of New York. Judgment for plaintiffs, and defendant brings error. Reversed, and new trial ordered.

George R. Wallace, of Pittsburgh, Pa., for plaintiff in error.

George H. Quail, of Lima, Ohio, and Weil & Thorp, of Pittsburgh, Pa., for defendants in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, the plaintiffs, the administrators of the estate of Max Solomon, citizens of Pennsylvania, brought suit against the American Temperance Life Insurance Association, a corporate citizen of New York, to recover on a policy

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of insurance, issued by said company on the life of Max Solomon. The company defended, *inter alia*, on the ground that decedent in his application for said policy had stated that no proposal to insure his life had ever been postponed or declined, when in truth and fact he had applied to the Hartford Life Insurance Company for life insurance and been rejected. To sustain such defense the defendant had the officers of the Hartford Company produce from its files a prior printed and written application for insurance on his life by Max Solomon, which that company had rejected. The printed indorsement on the form stated it was an "application for insurance to the Hartford Life Insurance Company, Hartford, Connecticut." This application was signed by a mark, purporting to be that of Solomon, and was witnessed by A. Kann, the agent of the Hartford Company. The defendant, in connection with the testimony of the officers of the Hartford Company, then offered the application in evidence. Whereupon, as the record shows, "counsel for plaintiffs offer no objection to Exhibits A and B, being the application and the medical examination."

[1] In the absence of any objection to the admission of the application thus offered, this pertinent and material paper was thus placed in evidence with the same force and effect as though the subscribing witness had been called and duly proved its execution by Solomon, the applicant. That on objection to the admission of a writing, proof by the subscribing witness is necessary, is a recognized rule of evidence. 3 Greenleaf (14th Ed.) § 569, and the reason of such rule is—

"that a fact may be known to the subscribing witness not within the knowledge or recollection of the obligor, and that he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction. The party, to whose execution he is a witness, is considered as invoking him, as the person to whom he refers to prove what passed at the time of attestation."

On the other hand, if a writing to which there is a subscribing witness is offered in evidence, and no objection to its admission or requirement of proof of its execution is made, it is equally clear that the proponent of the paper is not required to call the subscribing witness, for, in reason, no such proof is required. *Laing v. Kaine*, 2 B. & P. 85, cited in 1 Greenleaf, § 572. The application of Max Solomon being, therefore, thus in evidence by the consent of the plaintiffs and without insistence, when offered, that the subscribing witness be called, such paper evidentially stood as proof of the act of Max Solomon, and he was chargeable with all legal consequences that followed his making the same.

[2] Such being the course followed by the parties in adducing the evidence, and such the evidential status of the application thus admitted without objection and by consent, the court, referring to Solomon's application to the defendant company said:

"Now, I have said to you, gentlemen of the jury, that the first misrepresentation is as to a policy of insurance in another company; and, so that we may have that clearly before us, I will read the question and answer raising that issue:

"Question 10. Has any proposal to insure your life ever been postponed or declined? If so, by what company, association or society, and for what reason? The answer being, 'No.'

"Has any proposal or application to insure your life or for membership ever been made to any company, association, society or agent, upon which a policy of insurance or certificate of membership has not been received by you in person for the full amount and kind and at rate applied for?" The answer to which is, 'No.'

"Now, it is alleged by the defendant that at the time this answer was made upon this policy, dated the 25th of April, 1906, the applicant, Max Solomon, had applied for insurance in the Hartford Life Insurance Company, and that his application had been rejected, or, at least, that he had not received a policy, and that, either if it was rejected, or if he had not received a policy, then his answer to question 11 was untruthful. Now, the burden was upon the defendant to establish that, because that is the only policy that it is alleged he had concerning which the issue could be raised as to the truth of this answer. Now, the defendant undertook to prove that, by producing a certain application made to the Hartford Life Insurance Company in the name of Max Solomon for a policy of insurance. Now, did the defendant establish that that application was made by Max Solomon? The application was signed with a mark, and therefore it was not possible to produce any evidence as to the signature, but the evidence would have to be by persons who were present at the time the mark was made. The defendant claims that his application, having been made in his name, he having been examined by Dr. Shildecker as to his health—which is written by Dr. Shildecker in this application, that he was present there—that all these circumstances, together with the fact that it was signed by a mark, show that this application was made by Max Solomon to the Hartford Life Insurance Company. The plaintiffs claim that this does not come up to proof by the weight of the evidence that this application was made; that application may have been made, and I believe counsel concedes that application likely was made in the name of Max Solomon for this policy, but it is insisted that the proof is not sufficient to satisfy you that it was made by Max Solomon. And therefore you take into consideration all the evidence offered on both sides, remembering that the burden is upon the defendant to satisfy you that Max Solomon did make this application to the Hartford—because that is the answer which showed the untruth of his answer in the application to the policy in suit.

"You will very carefully consider that evidence, and you have a right to take into consideration the fact that the agent who signs as a witness is not produced. Mr. Kann is not produced—the one witness who would be able to testify, who, having been a witness, should be able to testify to whether or not Max Solomon signed the application. *Because, you see, gentlemen of the jury, if he did not sign the application, then it was not his application.*"

It goes without saying that if the jury followed this instruction of the court, the evidential status of the Hartford application, created by its unchallenged admission in evidence, was swept away. The case was made to turn on the question whether Solomon had physically executed the paper, a fact that was not in issue, since the plaintiff had in effect eliminated that question by admitting the application in evidence without proof. And not only so, but the fact that defendant had not taken on itself the needless calling of the subscribing witness to prove an uncontested execution was called to the jury's attention as an omission which weighed against the defendant. These instructions, we are clear, involved such grave error against the defendant as called for the application of our rule 11, by virtue of which, "the court at its option may notice a plain error not assigned."

The judgment below is reversed, with a venire.

NICHOLAS TRANSIT CO. v. PITTSBURGH S. S. CO.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 24.

COLLISION (§ 95*)—STEAM VESSELS MEETING—SHEER.

A collision between the steamship Glidden, passing down through the St. Clair Flats Ship Canal, which at that point is 294 feet wide, and the Magna, passing up in tow of the steamship Empire City, *held* not due to any fault on the part of the Empire City or her tow, but solely to the sheering of the Glidden from some unknown cause, which took her across into the eastern side of the channel, where she narrowly missed the Empire City and struck the Magna.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Western District of New York.

This cause comes here upon appeal from a decree of the District Court, Western District of New York, which held that no fault was proved on the part of either the Empire City or Magna, both owned by respondent, contributing to a collision of the last named vessel with the Glidden. The collision occurred in the St. Clair Flats Ship Canal on the morning of October 9, 1903; the Glidden was bound down, the Empire City with the Magna in tow was bound up. The opinion of the District Judge will be found in 196 Fed. 60.

H. D. Goulder and F. S. Masten, both of Cleveland, Ohio, for appellant.

H. A. Kelley and Hoyt, Dustin, Kelley, McKeehan & Andrews, all of Cleveland, Ohio, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The locality, the signals, and movements of the vessels and the respective contentions of the parties are so fully set forth in Judge Hazel's opinion that it is unnecessary to restate them here.

A controlling factor in the determination of the controversy is the place of collision. Was it east or west of the middle of the channel? in the Magna's water or in the Glidden's? That it was east of mid-channel we are entirely satisfied. The channel was 294 feet wide. To the easterly bank was made fast the bow of a pile-driver, which projected out into the stream 70 feet to 75 feet. It is not disputed that the towing vessel, Empire City, and the Glidden passed each other about off the stern of the pile-driver. Two witnesses apparently entirely disinterested, although one of them at least seemed from the manner in which he gave his testimony to be quite friendly to the libellant, testified on its behalf as to this passing. They were standing on the pile-driver, one at the bow and the other at the stern, watching the ap-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proaching Empire City, which was evidently about to pass the pile-driver so closely that unless she were carefully steered she might collide with it. One of them testified that the Empire City passed the pile-driver at a distance of 20 feet; the other put it at 18 to 20 feet. Each of them, however, a day or so after the accident, which happened over two years before he testified, upon being questioned as to this same distance, gave it as 8 to 10 feet, and signed a written statement to that effect.

It is frequently said that estimates of distance on the water are rarely, if ever, accurate, which is true enough as to such distances as 100 yards, or 175 feet, or two lengths, or a quarter mile. But when a person who is standing on solid ground, or its equivalent, sees a vessel pass him as close as the Empire City did, his estimate of distance cannot be much out of the way in total feet, even though his percentage of error may be high. The testimony of those on the Empire City puts the distance at about 10 feet, and we feel sure that the distance was not more than 15 feet; it may be assumed, however, to be 20 feet. These three figures, 75, 20, and 48, aggregate 143, and this method of determining the location of the Empire City seems much more satisfactory than deductions as to actual location at the time of passing, drawn from prior positions and courses which are themselves in dispute. The line of mid-channel was 147 feet from the east dyke.

It is a fact, accepted by both sides, that as the bow of the Glidden passed the stern of the Empire City the Glidden was on a sheer eastward, that sheer continued till she struck the Magna, the Glidden's master admitting that the broadest part of her sheer, $1\frac{1}{2}$ to 2 points, was at the moment of impact. Her master says she cleared the stern of the Empire City by about 25 or 30 feet; the helmsman makes it 35 feet. The towing hawser to the Magna was 600 feet. Passing the stern of the Empire City at so short a distance and with such a sheer, and the position of the Empire City being as stated above, we see no escape from the conclusion that the Glidden must have been well within the east half of the channel by the time she struck the Magna.

That being so, it becomes unnecessary to decide some of the other controversies in the case. Whether the initial sheer of the Glidden—her “dropping off,” as her master calls it—was overcome or not, the following facts are established by her own proofs: While the Empire City was still some ways below her, the Glidden was near the west dyke—40 feet at the bow, 25 feet at the stern, her master says. When her bow got so near the stern of the Empire City as to feel any effects of the suction, she was much nearer to the latter's course. That she got over there by some movement for which the Empire City was in no way responsible we do not doubt. If her bow was 40 feet from the west dyke, we find nothing in the testimony in this case, nor in any authority, which would justify the conclusion that the suction at the Empire City's stern, which would operate only when the stern came nearly opposite to the Glidden's bow, could draw that bow 100 feet across the west side of the channel. The master of the Empire City

was entitled to assume that the Glidden's course would remain where he saw it near the west dyke (not hugging it) until the vessels passed, and that it would not be altered so as to bring her within the reach of his own boat's suction. It makes no difference in this suit whether the Glidden came over to the eastward through her master's error in navigation, or because she was a bad steerer, or because of inevitable accident; if the cause be not one for which the Empire City is responsible, she cannot be held to blame. Nor can the Magna, which was struck, as we have seen, in her own water.

The decree is affirmed, with costs.

GUARANTY STATE BANK & TRUST CO. v. OKLAHOMA COAL CO.

(Circuit Court of Appeals, Fifth Circuit. December 1, 1913.)

No. 2,568.

BANKS AND BANKING (§ 138*)—UNAUTHORIZED PAYMENT OF CHECKS—LIABILITY TO DEPOSITOR.

A bank *held* liable to a corporation depositor for the amount of checks paid which were drawn without the authority of the corporation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 398-405; Dec. Dig. § 138.*]

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action at law by the Oklahoma Coal Company against the Guaranty State Bank & Trust Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. T. Henry, of Dallas, Tex., for appellant.

Joseph Manson McCormick, of Dallas, Tex., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. In the court below the trial judge directed a peremptory verdict for the plaintiff.

We have carefully considered all the evidence, and on principle, and in the light of well-adjudged cases, we are clear that the trial judge was correct in his ruling. *Morse on Banking*, § 440; *Zane on Banking*, § 135; *Havana Cent. R. Co. v. Central Trust Co.* (C. C. A.) 204 Fed. 550; *Merchants' Nat. Bank v. Nichols & Shepard Co.*, 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752; *Honig v. Pacific Bank*, 73 Cal. 464, 15 Pac. 58.

Judgment affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

AMERICAN MALTING CO. v. KEITEL.

(Circuit Court of Appeals, Second Circuit. November 20, 1913.)

No. 155.

1. JUDGMENT (§ 648*)—RES JUDICATA—CRIMINAL CONVICTION.

A conviction of defendant for criminal libel in 1911 because of a circular dated January 6, 1910, and put out by him was not res judicata in a civil suit based on alleged libelous statements made in subsequent circulars.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1309, 1310; Dec. Dig. § 648.*]

2. INJUNCTION (§ 98*)—EQUITY JURISDICTION OVER TORTS—LIBEL.

Equity has no jurisdiction, in the absence of statute, to restrain the future publication and issuance of alleged libelous circulars, though the false statement may injure complainant in his business or as to his property, in the absence of acts of conspiracy, intimidation, or coercion.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 169-171; Dec. Dig. § 98.*]

3. INJUNCTION (§ 63*)—GROUNDS OF RELIEF—BREACH OF CONTRACT.

Equity has jurisdiction to restrain a third person from inducing another to break a contract with complainant for the purchase and sale of merchandise.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 63.*]

4. INJUNCTION (§ 176*)—PRELIMINARY INJUNCTION—CONTINUANCE.

Where, in a suit to restrain defendant from issuing printed circulars alleged to contain matter tending to injure complainant's business, credit, and property, it appeared that complainant was designated by name only in rare instances in the circulars, and defendant by sworn affidavit denied that the statements referred to complainant, he would not be harmed by the continuance of an interlocutory injunction until final hearing, subject to a provision that it should not apply to future circulars containing a provision in terms that the aspersions were not directed against complainant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 389, 395; Dec. Dig. § 176.*]

5. INJUNCTION (§ 176*)—PRELIMINARY INJUNCTION—RELIEF TO ONE NOT A PARTY.

Where complainant sought an injunction restraining defendant's publication and issuance of certain circulars containing matter injurious to complainant's business, it was error to add a provision to an interlocutory injunction that it should not apply to future circulars, provided defendant incorporated therein a provision that the charges did not apply to another corporation that was not a party to the suit.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 389, 395; Dec. Dig. § 176.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the American Malting Company against Adolph Keitel. From an order granting an injunction pendente lite, defendant appeals. Modified and affirmed.

Ralph B. Ittelson, of New York City, for appellant.

O'Gorman, Battle & Vandiver, of New York City (Almuth C. Vandiver, Isaac H. Levy, and J. Joseph Lilly, all of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ROGERS, Circuit Judge. The plaintiff seeks to restrain the defendant from issuing printed circulars alleged to contain matters which tend greatly to injure the business, credit, and property of the plaintiff. The American Malting Company is a corporation organized under the laws of the state of New Jersey. Its capital stock is \$30,000,000. It does a business of from \$7,000,000 to \$12,000,000 a year; the amount of its business varying with the price of barley. It is said to be the largest manufacturer of malt in the United States. The defendant is a citizen and resident of the state of New York and holds no stock in the complainant company. The circulars complained of began to make their appearance in 1907 and since July, 1912, have been issued at intervals of a week. They have been mailed to brewers and consumers of malt throughout the United States, as well as to banks and to complainant's stockholders. The corporate name of the plaintiff is mentioned in only a few of the circulars. They contain references, however, to the "gold-brick swindle," the "gold-brick pool," "trust," "malt combine," which plaintiff says were intended to be understood to refer to it, and it alleges that they are so understood by the persons to whom they were sent. The defendant denies that the circulars show that the complainant was mentioned to its damage or that it can be said that the plaintiff in fact was intended. The plaintiff claims that defendant is persistently attempting maliciously to interfere with its existing contracts, is seeking maliciously to induce parties to refrain from dealing with plaintiff and to resist the payment of their debts to it, and is endeavoring maliciously to destroy its business credit and property.

[1] The defendant was convicted of criminal libel in 1911 because of a circular dated January 6, 1910, which he issued. But that conviction is not res adjudicata as to statements made in the subsequent circulars. And we have no exact knowledge as to what the statements were in the January 6, 1910, circular which the jury found to be libelous. The subsequent circulars are unquestionably full of libels on various persons if the allegations they contain are false. They are not libelous so far as the allegations are true. The campaign he is evidently engaged in is against the combination of malters which he alleges is illegal. He charges the combination with keeping up the price of malt by false statements and artifices and with inducing brewers to contract for future delivery at unreasonable prices. He advises brewers not to buy for future delivery and those who have purchased in the season of 1911-1912 to repudiate their contracts. He charges the American Malt Corporation with trying to get the stockholders of the American Malting Company to exchange their stock by means of false representations and also perhaps that the officers of the malting company have made false statements in circulars about its financial condition. The American Malt Corporation is a separate organization distinct from the American Malting Company, and is also organized under the laws of New Jersey, and at the time of this suit held 98 per cent. of the capital stock of the American Malting Company. It is alleged that the American Malt Corporation does not own or control the stock of any other corporation.

The court below awarded a very drastic injunction *pendente lite*, restraining the publication of the circulars. It, however, added a clause to the effect that, if defendant would accompany each future circular with the statement that his charges were not directed against this particular plaintiff, he might continue issuing them. As one ground of his defense is that the charges are not against the plaintiff, his purpose would not be thwarted by embodying such a statement in each subsequent circular. But he appeals to this court, and it becomes necessary to consider whether the court below had jurisdiction of the subject-matter. If it had not, the preliminary injunction should be vacated and the bill dismissed. This makes it necessary to inquire what power the courts of equity possess to restrain the publication of libels.

[2] Courts of equity like courts of law follow established precedents. They cannot usurp powers they do not possess. We recognize the fact that equity is an elastic system; that its procedure is progressive and is capable of accommodating itself to the changing emergencies and demands of the age. If it were otherwise it could not so well have met the needs of our civilization. At the same time courts are not to usurp powers they do not possess. In a country which has constitutional guaranties of freedom of speech and of the press and of trial by jury, courts of equity should be slow to assume that they possess a power to deal with the publication of libels that the High Court of Chancery in England disclaimed.

Lord Chancellor Eldon in 1818, speaking of the powers of the equity courts, said:

"The doctrines of this court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are [not] to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot." *Gee v. Pritchard*, 2 Swanton, 428.

Lord Chancellor Hardwicke in 1742 (*Huggonson's Case*, 2 Atk. 469) declared that:

"Notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognizance of it, for, whether it is a libel against the public or private persons, the only method is to proceed at law."

It should be said, however, that in that case equity was asked to punish a past tort, not to restrain a future one. Lord Ellenborough in 1810, in a common-law court (*Du Bost v. Beresford*, 2 Camp. 511), said, in speaking of a picture, that, if it was a libel upon the persons introduced into it, "upon an application to the Lord Chancellor he would have granted an injunction against its exhibition." But this dictum is known to have excited much astonishment in the minds of all practitioners in the court of chancery. Thus matters stood in England until 1869, when Vice Chancellor Malins granted injunctions against libels. *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551; *Dixon v. Holden*, L. R. 13 Eq. 355. These decisions were, however, speedily overruled in 1875 in *Prudential Assurance Co. v. Knotts*, L. R. 10

Ch. App. 142. In *Collard v. Marshall* (1892) 1 Ch. 571, Chitty, J., said that, before the Judiciary Act, equity had no power to try a libel. In *Monson v. Tussands Limited* (1894) 12 B. 671, Lopes, L. J., said:

"Prior to the Common-Law Procedure Act 1854, no court could grant any injunction in a case of libel. The Court of Chancery could grant no injunction in such a case, because it could not try a libel. Neither could courts of common law until the Common-Law Procedure Act of 1854, because they had no power to grant injunctions. Whether they had power to grant interlocutory injunctions after 1854, I think doubtful. As a matter of practice they never did."

The Common-Law Procedure Act of 1854 conferred on the English courts of common law the power to grant injunctions in all personal actions of contract or tort, with no limitation as to defamation. And by the Judicature Act of 1873 a power was conferred upon the Chancery Division of the High Court to grant injunctions in cases of libel. But prior to these acts neither courts of law nor courts of equity could issue injunctions in England in such cases. The English law courts began to exercise such jurisdiction in 1878, and about the same time the equity courts began in like manner to exercise theirs. But it is understood that they interfere only in the "clearest cases," and especially by interlocutory injunctions. See *Bonnard v. Perryman* (1891) Ch. 269 (C. A.); *Kerr on Injunctions*, 5, 6. For 150 years it has been understood in England that equity had no jurisdiction to enjoin a libel, and the power of the courts of that country to do so rests upon statute.

In the United States a like view of the matter has been taken. In *Pomeroy's Equity Jurisprudence*, vol. 6, § 629, it is laid down that:

"Equity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may be. This is the universal rule in the United States and was formerly the rule in England. The present rule in England rests on statute."

In *High on Injunctions* (4th Ed.) § 1015, that writer states that the doctrine which seems most in accord with the principles governing the jurisdiction of equity by way of injunction is that, the preventive jurisdiction being limited to the protection of property rights which are remediless by the usual course of procedure at law, courts of equity will not restrain the publication of libels or works of a libelous nature, even though such publications are calculated to injure the credit, business, or character of the person aggrieved, and that he will be left to pursue his remedy at law. In a case in the Supreme Court of the United States (1885), *Francis v. Flynn*, 118 U. S. 385, 56 Sup. Ct. 1148, 30 L. Ed. 165, Mr. Justice Field said:

"If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law."

In 1886 the question arose in the Circuit Court for the Third Circuit in *Kidd v. Horry*, 28 Fed. 773. An injunction was asked to restrain the defendants from publishing certain circular letters concerning the business of the complainants. The injunction was refused. The opinion was by Mr. Justice Bradley, who said:

"But neither the statute law of this country nor any well-considered judgment of the courts has introduced this new branch of equity into our jurisprudence. There may be a case or two looking that way, but none that we deem of sufficient authority to justify us in assuming the jurisdiction. * * * We do not regard the contrary decision in *Croft v. Richardson*, 59 How. Prac. [N. Y.] 356, as of sufficient authority to counteract these cases or to disturb what we consider to be the well-established law on the subject. That law clearly is that the court of chancery will not interfere, by injunction, to restrain the publication of a libel. * * * We do not think that the existence of malice in publishing a libel or uttering slanderous words can make any difference in the jurisdiction of the court. Malice is charged in almost every case of libel, and no cases of authority can be found, we think, independent of statute, in which the power to issue an injunction to restrain a libel or slanderous words has ever been maintained, whether malice was charged or not. Charges of slander are peculiarly adapted to and require trial by jury; and exercising, as we do, authority under a system of government and law which by a fundamental article secures the right of trial by jury in all cases at common law, and which by express statute declares that suits in equity shall not be sustained in any case where a plain, adequate, and complete remedy may be had at law, as has always heretofore been considered the case in causes of libel and slander, we do not think that we should be justified in extending the remedy of injunction to such cases."

In 1886 the question came before the Circuit Court of the First Circuit (*Baltimore Car-Wheel Co. v. Bemis*, 29 Fed. 95), and the injunction was denied; the court saying:

"There is no jurisdiction in a court of equity to enjoin libel on the rights of title of the complainant. We understand this to be the settled law both in England and in this country, in the absence of statutory provisions conferring such jurisdiction."

In 1909 the question arose in the Fifth Circuit (*Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.* [C. C.] 171 Fed. 553), and the court held that equity had no jurisdiction to enjoin a libel or slander defaming the credit and business standing of an individual or corporation. The court said:

"The difficulties in the way of affording such relief are unsurmountable. They grow alike out of constitutional provisions and want of jurisdiction in the court of equity."

In 1907 the question arose in the Eighth Circuit (*Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Assoc.* [C. C.] 150 Fed. 413), and the court refused the injunction, saying:

"In the jurisprudence of the United States there is no remedy for the abuse of this right (to freely speak, write, and publish) conferred by the Constitution, except an action at law for damages or a criminal proceeding by indictment or information."

In 1912 the question was before a District Court in Missouri (*Vassar College v. Loose-Wiles Biscuit Co.*, 197 Fed. 982). The bill was dismissed; the court saying:

"In this country a court of equity is without jurisdiction to restrain the publication of a libel."

The state courts in a number of cases have held that the jurisdiction of equity did not extend to libels and have refused injunctions to restrain their publication. *Boston Diatite Co. v. Florence Mfg. Co.*,

114 Mass. 69, 19 Am. Rep. 310 (1873); *Marlin Firearms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310 (1902); *Baltimore Life Ins. Co. v. Gleisner*, 202 Pa. 386, 51 Atl. 1024 (1902); *Mayer v. Journeyman Stone-Cutters' Assoc.*, 47 N. J. Eq. 519, 20 Atl. 492 (1890).

In *Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 492, 19 S. W. 804, 16 L. R. A. 243, 33 Am. St. Rep. 476, the court held that the question of libel should be determined by a jury in an action at law, and that after a verdict for the plaintiff he might have an injunction to restrain the further publication of that which the jury found to be actionable libel or slander.

The fact that the false statements may injure the plaintiff in his business or as to his property does not alone constitute a sufficient ground for the issuance of an injunction. The party wronged has an adequate remedy at law.

In all that has been said we have not lost sight of the fact that the courts have sometimes issued injunctions to restrain the publication of false statements injurious to business or property. The cases in which such a jurisdiction has been assumed have been those which have involved conspiracy, intimidation, or coercion. In 22 Cyc. 900, it is laid down:

"A court of equity has no jurisdiction to restrain a mere libel or slander. Nor does the fact that the false statement may injure plaintiff in his business or as to his property constitute a sufficient ground for an injunction, in the absence of acts of conspiracy, intimidation, or coercion."

And see *Beck v. Ry. Teamsters' Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; *Casey v. Cincinnati Typographical Union (C. C.)* 45 Fed. 135, 12 L. R. A. 193. To this class belongs the case of *Emack v. Kane (C. C.)* 34 Fed. 46 (1888), where District Judge Blodgett issued an injunction to restrain one from issuing circulars threatening to bring suits for infringements against all customers dealing in a competitor's patented article. The gravamen of that case was the attempted intimidation of the complainant's customers by threatening them with suits which the defendants never intended to prosecute. The doctrine announced in that case has been followed in numerous cases and by this court in *Adriance, Platt & Co. v. National Harrow Co.*, 121 Fed. 827, 58 C. C. A. 163 (1903). But the complainant does not in terms charge the defendant with being engaged in any conspiracy or in any attempt to intimidate or coerce the complainant or its customers. And the alleged false statements and objectionable matter contained in the circulars do not amount to coercion or intimidation in law, either of the complainant or its customers. The customers may be deceived by false statements, but they are left free to form their own judgment and make their own choice. They are not coerced or intimidated or frightened. The circulars contain no threats of violence to the property of the complainant. He threatens to bring no suits either against the complainant or its customers. It is true that, where proper grounds exist for assuming jurisdiction, equity does not refuse jurisdiction because there is incidentally involved the restraining of a libel. A court of equity may restrain

a boycott if the boycott is sought to be accomplished by the publication of circulars or printed matter; such a publication may be restrained without a violation of constitutional rights. That was made clear by the decision of the Supreme Court of the United States in *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

It is said that a man has a property right in his business and that an injunction may issue to protect that right against fraud and misrepresentation, notwithstanding the fact that the fraud and misrepresentation may be contained in a libelous publication. That was, as we understand it, the very question which was submitted to the English Court of Appeals in Chancery in 1875 in *Prudential Assurance Co. v. Knott*, *supra*. The defendant had published a pamphlet which the plaintiff corporation claimed falsely represented it as being managed with reckless extravagance and as being in a state of insolvency and unable to fulfill its engagements, whereas the company was in an exceedingly prosperous and thriving condition, abundantly solvent and earning large profits, and was managed without extravagance. The bill further charged that the continued publication of the pamphlet would be very injurious to the company's credit and reputation. It accordingly prayed that its publication might be restrained. The injunction was refused. Lord Cairns said:

"It is attempted to give a color to the application by saying that these are libelous publications which will injure property, and then, when that proposition is further defined, it is said that the business of the company, the good will of the company, is property; that the company in its trade will be injured; and that therefore the interference of the court is asked for the protection of property. But, with regard to nine out of ten libels, the same thing might be said. The cases in which actions are brought for libel are usually cases where things are written of men or corporations which have an effect upon their character and upon their trade or business or their character as connected with trade or business; but no case can be produced in which, in these circumstances, the Court of Chancery has interfered. Not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction."

He then quotes from the decision of Vice Chancellor Malins in *Dixon v. Holden*, *supra*, this passage:

"In the decision I arrive at, I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement, or other document which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation."

And says:

"I am unable to accede to these general propositions: They appear to me to be at variance with the settled practice and principles of this court. * * *"

Lord Justice James and Lord Justice Mellish stated that they were of the same opinion.

But while the courts of equity have no jurisdiction to restrain the publication of a libel as such, and while we do not think the facts in the case take it out of the general rule because of any conspiracy, intimidation, or coercion or because of any incidental injury to property

rights arising merely from the publication of libelous matter, a court of equity may nevertheless possess the power to restrain the defendant from an unjustifiable and wrongful interference with the plaintiff's contracts, if it shall appear that he is engaged in such an undertaking. See Joyce on Injunctions, § 440a.

[3] It is an actionable wrong for a third person without justification to induce a party to a contract to break his agreement. This was decided in England in the leading case of *Lumley v. Gye*, 2 El. & Bl. 216, where the contract was one of hiring. The judges in that case were not agreed whether the principle was applicable to contracts other than those of hiring. But the House of Lords in *Quinn v. Leatham*, (1901) App. Cas. 495, thought the principle applicable to all contracts, although the contract in question was one of employment. The Supreme Court of the United States in *Angle v. Chicago & St. Paul Ry. Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55, held it actionable for a third person to induce another to break his contract. And see *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 394, 31 Sup. Ct. 376, 55 L. Ed. 502. That the principle is applicable to all contracts is stated to be the law in the decisions of Massachusetts (*Beekman v. Marsters*, 195 Mass. 205, 210, 80 N. E. 817, 11 L. R. A. [N. S.] 201, 122 Am. St. Rep. 232, 11 Ann. Cas. 332), and in those of some of the other state courts. In *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588, and in *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869, it is held to be a tort for a third person willfully to induce a breach of contract of sale. In California and Kentucky it is held not actionable to induce a breach of contract which is not one of employment. *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165. See Page on Contracts, vol. 3, § 1329.

The federal courts seem to have inclined to regard such wrongs as actionable and have in a number of cases issued injunctions to prevent a third party from inducing one of the parties to a contract to violate it; the contract not being one of employment. *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.* (C. C.) 128 Fed. 800; *Miles Medical Co. v. Goldthwaite* (C. C.) 133 Fed. 794; *Dr. Miles Medical Co. v. Platt* (C. C.) 142 Fed. 606; *Hartman v. Park* (C. C.) 145 Fed. 358; *Wells & Richardson Co. v. Abraham* (C. C.) 146 Fed. 190; *Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.* (C. C.) 171 Fed. 553. In the last case an injunction issued restraining defendant from inducing complainant's customers from breaking their contracts with complainant by agreeing to indemnify them against liability for damages in so doing.

In *American Law Book Co. v. Edward Thompson Co.*, 41 Misc. Rep. 396, 84 N. Y. Supp. 225, an injunction was asked to restrain the defendant from attempting to induce the subscribers to the plaintiff's cyclopedias to decline to receive and pay for the books; the defendant agreeing to indemnify any of plaintiff's subscribers against claims for damages for their breach of contract and to pay the expenses of the defense of any actions brought against the subscribers for the breach of such contracts. The court thought there was no adequate remedy

at law and issued an injunction. Mr. Justice Bischoff in the course of his opinion said:

"The defendant admits the making of the agreements in question but asserts that the plaintiff has no remedy in equity upon the allegations of the complaint; the contention being that the plaintiff has his remedy at law for each contract broken, that the party to that contract has the right to break it and pay damages, and that what the party can do another person may ask him to do without restraint by injunction. It is also argued that the cases in which an injunction has been granted to prevent the solicitation of a breach of contract are found to have involved only contracts for personal services, and that there is no precedent for such an injunction as the plaintiff seeks. If there be no exact precedent for this injunction, none is needed. The complaint avers, and the affidavits support the averment, that the defendant is engaged in an attempt to obtain business which the plaintiff has secured, having no regard to fairness of competition but with resort to trick and device.

"Whether the subscribers are in each instance actually led by the defendant's misrepresentations to break the particular contracts is not important and is not an essential averment of the complaint. Intentional false statements, made with a view to obstruct the plaintiff's business and to divert it to the defendant, are charged, and the solicitation of the subscriber's breach of contract is but a more active step in the same scheme of unfair competition. * * *

"That an action for damages would not afford an adequate remedy is obvious. The loss of business and the injury to business reputation resulting from the defendant's acts of obstruction, and from the consequent litigation between the plaintiff and its delinquent subscribers, could not be estimated nor proven with any degree of certainty for the purposes of a recovery; nor could the plaintiff properly estimate the additional burden of the future litigation with subscribers, whose defense would (as it is to be inferred from the past) be conducted by the defendant at great pains and expense, bearing no relation to the amount of the claim, but solely in the interest of obstruction and for advertising purposes. The invasion of a legal right being apparent, and the inadequacy of relief at law being clear, a case for injunctive relief is made out; and, indeed, direct authority for an injunction upon a very similar state of facts is not wanting. *Stoddard v. Key*, 62 How. Prac. [N. Y.] 137."

In *Flaccus v. Smith*, 199 Pa. 128, 48 Atl. 894, 54 L. R. A. 640, 85 Am. St. Rep. 779, an injunction issued to a third person, an officer of a labor union, restraining him from enticing the plaintiff's apprentices to break their contract of employment; they having agreed at the time of their employment not to become members of a union while working for the plaintiff. The court below had found as a fact that, if the interference was allowed to continue, it would ruin the plaintiff's business.

We fail to discover any satisfactory distinction between an attempt to induce employes to break a contract of employment and an attempt to induce customers to break their business contracts for the purchase or sale of goods. In the case before us the plaintiff claims that, if the contracts for the delivery of malt had been broken as the defendant advised, there would have resulted a loss to it of over a million dollars. A man's business may be as effectively ruined by inducing his customers to break their contracts as by inducing his employes to leave his employment. If it appears that this defendant without justification and by means of fraudulent misrepresentations is seeking to induce plaintiff's customers to break their contracts, he is seeking by fraud to ruin the plaintiff's business. If the plaintiff's allegations are true, the defendant is engaged in a guerilla warfare on its business. It is ab-

horrent to one's sense of justice that this wrong should be permitted to continue until the mischief has been accomplished and the business ruined, as might be the case if there be no remedy except through an action at law for damages.

[4] The question, however, remains whether the preliminary injunction was properly granted on the facts as they appear in the record. The rule is that preliminary injunctions will not issue except in the clearest cases. *Odgers on Libel and Slander* (5th Ed.) 426. In *Bonnard v. Perryman* (1891) 2 Ch. 269, the defendant in his affidavit swore that the statements complained of were true, and the court refused an interlocutory injunction. It said:

"We cannot feel sure that the defense of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded."

In the present case the defendant denies the plaintiff's allegations; and the supporting affidavits presented on behalf of the plaintiff seem too indefinite to justify an interlocutory injunction. The defendant denies, under oath, that the circulars which he issued contained other than facts. He swears that they were published without malice, in good faith, and in order to serve the interests of the consumers of malt. The bill is verified by plaintiff's secretary, and an issue is raised between the two. The plaintiff has presented, in addition to the affidavit of its secretary, the affidavits of three other persons. These affidavits go to show that there are false statements in the circulars. They fail to show that the false statements relate to the complainant. Mr. Loewer's affidavit states that the circulars contained mistaken statements concerning malt market conditions. Mr. Bermuth's affidavit refers to "false statements" but does not specify that any statements which are false relate to the plaintiff. There are numerous statements in the circulars reflecting upon persons other than plaintiff. Some of these statements, if false, are libelous upon the individuals named, but that does not help plaintiff's case. Mr. McCarthy's affidavit refers to the "false representations" and attributes to them a loss of business on the part of the plaintiff. He refers to "the false information conveyed in the circulars issued by the defendant Keitel with reference to the plaintiff." This is not saying that "the false information" related to the plaintiff, only that it is contained in "the circulars issued by the defendant Keitel with reference to the plaintiff." It may have related to the American Malt Corporation, which is a distinct organization and is mentioned by name, or to individuals who are also assailed by name. The plaintiff is mentioned by name only in rare instances. But the court below embodied in the injunction a clause to the effect that, if the defendant would accompany each future circular with the statement that his statements were not directed against the plaintiff, he might continue his publications. Since one ground of his defense is that his statements are not directed against the plaintiff, we cannot see that he will be in any way harmed if the interlocutory injunction continues in force until final hearing. To do so will preserve the present status, as he contends it is, until at the final hearing on the pleadings and proof it can be determined what the real facts of the case may be.

[5] The disclaimer, however, which the District Judge required is too broad. It requires the defendant to disclaim any charges against the American Malt Corporation. As that corporation is not a party to the suit and therefore is in no position to ask for relief, the injunction order should be modified by omitting any reference to it.

The cause is remanded to the court below, with directions to modify the injunction order by omitting reference to the American Malt Corporation, and to its officers and directors as such, and to the management and business of that corporation, as well as all other matters except advices to the plaintiff's customers to break their contracts.

McCLINTOCK v. CITY OF PAWTUCKET. †

(Circuit Court of Appeals, First Circuit. December 9, 1913.)

No. 1,028.

EQUITY (§ 447*)—BILL OF REVIEW—INFRINGEMENT SUIT.

The order of the District Court denying a petition for leave to file a bill of review, with reference to *McClintock v. City of Pawtucket*, which denial is reported in 180 Fed. 320, affirmed.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 1091-1094; Dec. Dig. § 447.*

Leave of court to file bill of review, see note to *Lewis v. Holmes*, 116 C. C. A. 412.]

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Suit in equity by John N. McClintock against the City of Pawtucket. From an order denying his petition for leave to file a bill of review, complainant appeals. Affirmed.

For opinion below, see 180 Fed. 320.

John N. McClintock, of Boston, Mass. (Benjamin Phillips, of Boston, Mass., on the brief), for appellant.

William R. Tillinghast, of Providence, R. I. (Edward W. Blodgett, City Sol., of Pawtucket, R. I., on the brief), for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. There is so much literature touching the subject-matter of this appeal, and the issues are so peculiar and so unlikely to form any precedent, that it would only be a burden to the parties and to the profession to recite the facts more than as they appear in our opinions in *American Sewage Disposal Co. v. Pawtucket*, passed down on June 13, 1905, 138 Fed. 811, 71 C. C. A. 177, for which see also 199 U. S. 609, 26 Sup. Ct. 750, 50 L. Ed. 332, and on August 15, 1906, in 146 Fed. 753, 77 C. C. A. 243. As the result of the rehearing represented by the latter opinion, we denied the petition of the appellant therein for permission to apply to the Circuit Court for leave to reopen the case; but subsequently, on December 8, 1911, we entered an order granting leave to the Circuit Court in its discre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 15, 1914.

tion to allow the appellant to file a bill in the nature of a bill of review without prejudice to any question involved. Such an application was made; and on February 5, 1913, the District Court, wherein the Circuit Court had then been merged, disposed of the application for leave to file a bill of review, with the following opinion and order:

"Brown, J. Upon consideration of this petition and of the affidavits annexed, it is very clear that the so-called new evidence could be of no advantage to the petitioner. The facts set forth in the affidavits, even if established upon a full hearing, could not alter or enlarge the terms of the patent in suit.

"Upon repeated hearings and full consideration, the Court of Appeals has determined the meaning of the description and claims of the patent in suit, and has decided that the defendant does not infringe the invention therein described and claimed.

"This must be regarded as conclusive and final.

"Petition denied."

From that denial an appeal was taken to us. Without committing ourselves generally to the right to such an appeal, we have taken cognizance of this appeal, both because no objection was made thereto, and especially because, in view of certain apparent facts, we have been very anxious, as is quite plain, to reach the merits and dispose of them carefully. We must, however, now give the parties to understand that, unless there is some development which we cannot anticipate, we have reached the end of this litigation. What would be in truth the elemental patent, if the claimant should prevail herein in any particular, issued on May 30, 1882; and the condition since that time has so altered, including the fact that the elemental patent expired in 17 years from 1882, that the public is now entitled to rest in peace beyond any further controversy.

We will say at the outset that we entirely agree with the conclusions of the learned judge of the District Court. Apparently the basis of the present application is certain experiments which have been made with much care and large expense since the opinions were passed down which we have referred to; but the pith of it all is that these experiments have developed no facts whatever which were not in effect disposed of, and which we may say the possibility of was not foreseen in the earlier stages of this litigation. The difficulty from the beginning has been that, if Glover was the discoverer of what is called herein the septic action, and the inventor of everything in connection therewith, that discovery and invention cannot, under any rule of law which we are allowed to administer, be brought within the terms of either Glover's first or second patent, so far as to be efficient under the statutory patent system.

Apparently the complainant does not appreciate this proposition, because at the present time it submits to the court the following proposition as one of the fundamental ones on which he bases his present application:

"The newly discovered fact that Mr. C. F. Brown, the patent solicitor, who drew up and secured the issue of both the first and second Glover patent, can testify that Glover brought to him the W. E. McClintock plan (R. 661) and the Andover plan (R. 663) as illustrating Glover's ideas as to how a sewage apparatus to rapidly and completely purify sewage should be built,

which Glover desired to have covered by a basic patent, sets at rest Glover's intentions in the premises, and is of great value and importance in understanding the true meaning of the second Glover patent; for the experiments demonstrate that the W. E. McClintock and the Andover plans would utilize septic action, and could not otherwise operate."

It is a part of the A, B, C, of the patent law that nothing known by the patentee, or done by him or discovered by him, whether understood by him or not, can be protected by any patent unless it is covered on the face of the patent, according to the terms of the statute; and in our previous opinions we have shown with great care and undoubted logic that the facts alleged to have been discovered by Mr. Brown in the manner stated are not effective here for the reasons stated.

All we need to say with reference to the further alleged development of the complainant's experiments on which this present proceeding is based concerns what he says as follows:

"The petitioner contends that not only does the elaborate system of experiments conducted by himself and Prof. McMillan, one of the most eminent sanitary engineers of the United States, but also the affidavit of Prof. Phelps, submitted by the city of Pawtucket, conclusively show that a tank constructed and operating exactly like the so-called primary filter-bed of the Glover patent not only has some septic action, but must have a septic action and cannot operate in any other way."

But this was anticipated by our prior opinions, in the first of which we said as follows:

"It may be observed in this connection that, in the ordinary settling tank, the line between sedimentation and septic action cannot be strictly drawn, for if any portion of the sewage is permitted to remain for a considerable time in such a tank there will be more or less fermentation, and this would be true of the Glover tanks. The question, however, is not whether there may not be some septic action in these tanks, as there may be in all settling tanks, but whether this patent discloses, or was intended to disclose, the practical septic tank of the sewage art for the disposal of sewage by the septic process."

In the second of our opinions we referred to the claim by the complainant that:

"In the light of what is now known about septic tanks and septic action, both the tanks of the first patent and the primary filter-beds of the second patent are capable of the treatment of sewage by the septic process."

We said as to that as follows:

"It may be observed that the fact that the Glover apparatus described in his patents can be made to operate in the present state of the art by a process which he did not discover and does not disclose in his patents does not entitle him to a monopoly of that process under the patent laws of the United States."

We have listened attentively to the appellant's exposition of the present appeal. It all comes back to the fact that, under the rules of the law, the patents cannot be aided by any discoveries which the complainant claims to have been made. It is so plain that the law stands in his way that we are compelled to state anew that we are wholly unable to give the complainant any relief, and any further consideration of the appeal would result only in useless reiteration.

The decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

A. R. MOSLER & CO. v. LURIE.

(Circuit Court of Appeals, Second Circuit. November 11, 1913.)

No. 31.

1. PATENTS (§ 66*)—ANTICIPATION—DRAWINGS IN PRIOR PATENT.

A patent for a mechanical combination is not anticipated by a drawing in a prior patent which incidentally shows a similar arrangement, which is not essential to the first invention, and was not designed, adapted, or used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second inventor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. § 66.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—IGNITER FOR GAS, OIL, OR VAPOR ENGINES.

The Canfield patent, No. 612,701, for an igniter or sparker for gas, oil, or vapor engines, *held* not anticipated, valid, and infringed.

3. PATENTS (§ 289*)—SUITS FOR INFRINGEMENT—RIGHT TO ACCOUNTING—LACHES.

Delay by the successive owners of a patent after the death of the patentee, none of whom were engaged in the business to which it related or made any use of it, in bringing suit for its infringement, of which they had no knowledge, while not constituting such laches as to defeat such a suit, *held* to bar the complainant from the right to an accounting, where infringements were extensive and had continued for several years.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467-469; Dec. Dig. § 289.*]

Accounting by infringer for profits, see notes to *Brickill v. Mayor, etc., of City of New York*, 50 C. C. A. 8; *Clark v. Johnson*, 120 C. C. A. 389.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, which dismissed bill of complaint, in an equity suit brought for infringement of patent. The patent is No. 612,701, issued October 18, 1898 (on application dated August 5, 1897), to Frank W. Canfield for an "igniter or sparker for gas, oil, or vapor engines." The opinion of the District Court will be found in 200 Fed. 433.

William A. Redding and William B. Greeley, both of New York City, for appellant.

Emerson R. Newell, of New York City (Fred E. Tasker, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The patentee in his specifications states that the object of his invention is to produce a method of insulating the electrodes of gas, oil, or vapor engines that will not foul injuriously, so that it will remain in working order, causing the igniting

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

spark to jump across the space between the points of the electrodes. He states that:

"It is a well-known fact that up to this time the fouling of the insulation of the electrodes * * * has been the greatest objection to the successful use of an electric current * * * to pass between the points of stationary electrodes placed in the cylinders or firing-chambers of [such] engines, said points not being in actual contact with each other."

This refers to the "jump-spark" system, not to the "make and break" system, of electric ignition.

"It is an established fact that when the insulation of the electrodes * * * gets foul the intense current will not pass between the points of the electrodes and make the required firing-spark, but follows the fouling of the insulation without making a spark of sufficient intensity to explode the charge * * * of combustible * * *; but when the insulations are not fouled and in good working order the electric current will jump across between the points of the electrodes, and thereby cause an electric spark of sufficient intensity to fire or explode the charge," etc.

The specification states that patentee's improvement consists—

"of a counterbore or recess around the electrode at a point where it enters the cylinder of a gas, oil, or vapor engine of such size and depth as will prevent the explosive mixture from cylinder or firing-chamber circulating into said cavity far enough to deposit the products of its combustion onto the insulator at the deepest part of the counterbore or recess. I find by actual test that a counterbore or recess for a quarter-inch electrode works satisfactorily by being half-inch diameter by one and one-quarter inches deep; but a counterbore or recess half-inch diameter by three inches deep is still more satisfactory, for the reason that it more completely prevents circulation. A counterbore or recess of larger diameter than its depth will not prevent circulation and consequent fouling."

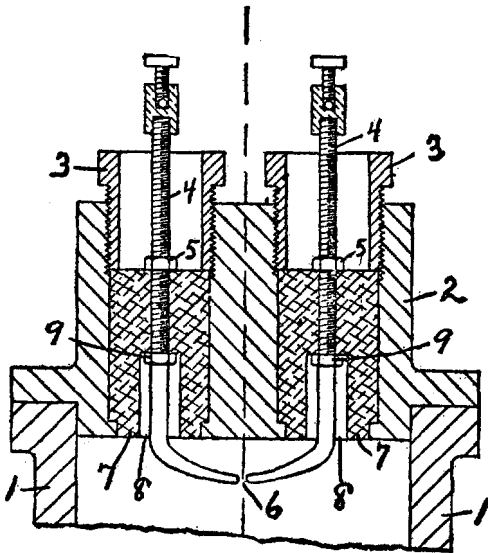
The combination of the patent is shown in Figure 1.

In this the electrodes are shown entering the firing-chamber, 6 showing the space where the electric current should form firing-spark; 7 shows the insulator and 8 the deep, small-diameter counterbore or recess. The specification closes with the statement:

"It is immaterial what shape or form the counterbore or recess is made in, so that it surrounds the electrode and of such size and depth that it prevents the circulation of the explosive mixture into the deepest part of the same."

The claims are:

"1. In a gas, oil, or vapor engine igniter or sparker, a recess or counterbore around



the electrode or electrodes and above its or their sparking points when said electrodes are used vertically, for the purpose of preventing an injurious accumulation of the products of combustion or other foul matter on the insulation of said electrodes, substantially as and for the purpose set forth.

"2. In a gas, oil, or vapor engine igniter or sparker, a recess or counterbore of such size and depth as to prevent the explosive mixture used in the cylinder from circulating into said counterbore or recess far enough to come in contact with its deepest part around the electrode or electrodes at or near the point where said electrode or electrodes leave the insulator to enter the cylinder or firing-chamber, for the purpose of preventing an injurious accumulation of the products of combustion or other foul matter on the insulation of said electrode, substantially as and for the purpose set forth."

That air at the bottom of a deep narrow recess would be "trapped," so that there would be no circulation at the bottom when there was disturbance in the space into which the recess opened, was a fact in physics well known long before there were any gas engines. That circumstance, however, would not defeat this patent, since Canfield, so far as this record discloses, was the first to point out that, when a sparking-device of this type was so constructed as to secure the presence of such a recess between the two electrodes, the fouling of insulation and the establishment thereby of a path for the electric current other than the one in the course of which there was a spark-jump would be avoided.

None of the various patents and publications introduced in evidence as showing the prior art have anything to say about the desirability of having such a recess between the electrodes. It is contended, however, that some of them show such a recess narrow and deep—that such recess would necessarily act as the patentee's does, because every such recess under the law of physics above referred to would trap the air at its bottom; and since the recess was there in the prior art, it makes no difference that the prior inventor who placed it there did not appreciate or announce the useful function it performed.

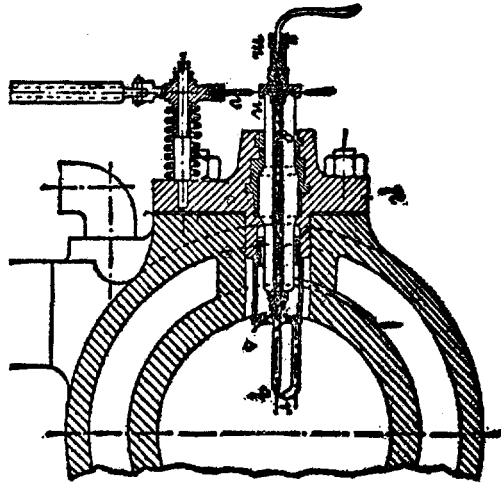
Reliance is had on a former decision of this court. *Consolidated Bunting Co. v. Metropolitan Brewing Company*, 60 Fed. 93, 8 C. C. A. 485. In that case the claim of the patent (for an automatic pressure relief) covered "a mechanical fit valve, in combination with a surrounding chamber, for containing water to prevent fouling." A prior patent disclosed a mechanical fit valve with a chamber above and surrounding the valve seat. Although the prior patentee said nothing about putting water in this chamber to prevent fouling or for any purpose, it was manifestly capable of holding water, and, being the identical mechanical combination of the patent sued on, it was an anticipation. But in the *Bunting Case* the presence of the chamber surrounding the valve was clearly pointed out in the specifications of the earlier patent; "the shell containing the valve which rests on the arm" clearly indicated a chamber with mechanical fit valve. Its presence was not inferred from an inspection of the drawings of the earlier patent.

[1] With a deliverance of the Circuit Court of Appeals for the Seventh Circuit (*Gray Telephone P. S. Co. v. Baird Mfg. Co.*, 174 Fed. 417, 98 C. C. A. 353) we fully concur. It reads as follows:

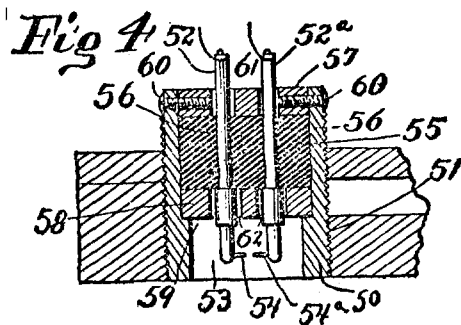
"A patent for a mechanical combination is not anticipated by a drawing in a prior patent which incidentally shows a similar arrangement which is not essential to the first invention, and was not designed, adapted, or used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second inventor."

[2] The prior publication especially relied upon is known as "Die Gas-Maschine." All that there is in it which is at all relevant is the following figure and description:

"The positive wire of the induction apparatus is attached at *m* to a brass button *n* seated on a porcelain cylinder *o*: this is set firmly into the cover *p*, which closes the hole leading to the cylinder. It is perforated and contains the wire *q* drawn out to a point. Opposite this stands the point of a second wire *r*, which is screwed into the brass case *s*, which, on its part, is seated in the cover *p*. The negative wire of the igniter is led onto the cylinder. If, now, a current circulates, the sparks will leap from *q* to *r*."



There is nothing in this description which calls for any recess at all. Referring to the drawing, we perceive that if the brass case *s* be an imperforate hollow cylinder there will be a recess between its interior and the porcelain cylinder *o*. But unless the brass case *s* be imperforate the recess will not trap air; and there is nothing to show that it is to be imperforate. Its only function is to seat the "second wire" which is screwed into it and it could perform that function perfectly if it were a framework casing. Moreover, assuming that the case were imperforate: From its outlet into the cylinder to the bottom of the recess the depth would about equal the diameter, which would not be the recess of the patent. If only that part of the recess which lies to the left of the head of the porcelain be considered, the drawing would indicate a recess considerably deeper than its width, but there is nothing anywhere to show that the proportions of the drawing are to be strictly adhered to. The brass which surrounds and supports the porcelain might be continued further to the right, or the brass case *s* might be of larger interior diameter, with the result that there would no longer be a recess of the sort described in the Canfield patent. There is nothing to show that the *proportions* of the drawing are other than accidental; the draughtsman would have correctly depicted "Die Gas-Maschine" of the prior art if he had proportioned the parts differently, showing a recess whose depth was no greater than its width.



The next reference to the prior art is a patent to Sainsevain (U. S., No. 461,802). Its Figure 4 and a brief excerpt from the specifications indicate the device:

"52 52a is a pair of posts, the lower ends of which project into the exploding-chamber 53 and carry platinum points 54 54a to produce the spark. The insulator-disk 55 fits snugly in the tube 50 and it securely holds the posts 52, 52a within its opening 56.

The insulator 55 is confined by means of an upper plate or disk 57 within the tube 50, and a lower plate or disk 58, that rests upon an interior ledge or shoulder 59, turned in the tube. The upper plate 57 is secured by means of screws 60, tapped through the tube or shell and into the same. The upper plate 57 and the lower plate 58 are provided with openings 61 62 respectively, which are large enough to leave spaces surrounding the posts 52 52a, thus preventing the contact of the latter. Line-wires lead from the electrical apparatus now to be described and are connected to the posts 52 52a."

Here there are recesses 62 with insulation at the bottom of them; as drawn they are much deeper than wide, but their proportions are apparently an accidental conception of the draughtsman. The specification is elastic; it provides that the spaces around the posts shall be large enough to leave spaces around the posts 52 52a thus preventing contact. Such spaces might be very much larger than Fig. 4 shows and still fit into the combination of the patent. So, too, the thickness of the lower plate 58 is the draughtsman's accidental selection. The specifications state merely that it is a lower plate or disk between the porcelain and a shoulder in the tube. It might just as well have been shown in the drawing as one-fourth the thickness indicated in Figure 4 and would then be all that the patent calls for. But if its thickness were reduced, the depth of the recesses would also be reduced, and with an enlargement of the clearance spaces the recess of Canfield would entirely disappear from the Sainsevain drawing, while the drawing would still remain a perfectly accurate picture of the description which Sainsevain gave of his invention.

To predicate anticipation on such accidental resemblances found in drawings only would be to extend the doctrine of the Consolidated Bunting Case, supra, too far. In that case mere shape and proportions were matters of no importance, the containing chamber of the patent there in suit, so long as it was capable of holding water around a valve, might be of any shape, or size, or proportions; therefore a prior containing chamber having that capability was a good reference, whatever its shape, or size or proportions. In Canfield's patent, however, the proportions of the recess constitute the gist of the invention. It will not be necessary to discuss in detail the other similar references to patents of the prior art. We do not find that any of them in the specifications and claims call for a recess between electrodes which enter a sparking chamber, the proportions of which recess are made

a feature of the patented structure, and which recess will, in fact, function as does that of the Canfield patent.

It is next contended that the patent in suit taught the art nothing of value, because it did not indicate what insulating material should be used. Porcelain was well known in this art as an insulator; it was used in prior devices and is used to-day. Naturally it would be the material which one skilled in the art would select if he were to build a spark-plug according to the instructions of the patent. Respondent's expert testifies that when made in large masses porcelain is neither electrically nor mechanically strong enough to meet the strains to which a spark-plug is exposed. The patent states, as we have seen, that a recess for a quarter-inch diameter electrode works satisfactorily by being half-inch diameter by one and a quarter inches deep. Assuming this to be the diameter of recess shown in the *drawings* of the patent and using it as a scale, the witness figured out that the size of the insulators of the patent would be some 3 to 4 inches in diameter and further testified that efforts to produce porcelain insulators of that size which would stand up to their work proved a failure. We find this evidence unpersuasive. If such large masses of porcelain did not work, the natural thing to do would be to reduce their size. The specifications do not require a slavish adherence to the proportions shown in the drawings. If a quarter-inch electrode requires a half-inch recess, an eighth-inch electrode would presumably be accommodated by a quarter-inch recess, which would reduce all other proportions by half. Moreover the patent is not restricted to two recesses, one around each electrode. The claim includes "a recess * * * around the *electrode* or electrodes."

The very "Gas-Maschine" so much relied on (assuming that its casings were imperforate) shows a recess surrounding one electrode (which electrode is embedded in porcelain of apparently the small dimensions of that in the modern spark plug) while the other electrode is seated on the metal casing. The teaching of the patent is that there shall be a recess of proportions to trap air *between* the two electrodes. It seems to us that a skilled mechanic, familiar with the prior art as shown in this record, would have had no difficulty in securing such recess and at the same time using a porcelain insulator of a size small enough to be stable.

As to infringement: We do not understand that there is any real contention as to infringement of the first claim. All the spark-plugs of defendant which are complained of have the specific recess of Canfield. It is asserted that some of them nevertheless get foul, which to us seems immaterial. Much of the briefs is devoted to a discussion as to the meaning of the second claim. It is unnecessary to consider it, since infringement of the first claim is sufficient to entitle complainant to whatever relief it may be entitled to.

It is further contended that relief should be denied the complainant because of the laches of his predecessors in title; he was prompt enough himself, but, of course, is affected by any laches of prior owners. The patent was granted October 18, 1898. Canfield died March 12, 1899, and the patent was held by his administrator till March 13,

1901, when it was transferred to patentee's brother, Charles J. Canfield. He assigned it December 3, 1903, to E. D. Wheeler, who on March 12, 1906, assigned to Association Patents Company, a corporation not engaged in the business of manufacturing or selling engines or spark-plugs. The corporation assigned the patent to complainant March 25, 1909. Suit was begun in September, 1909.

[3] Infringement began in 1901 and was continuous thereafter by various manufacturers. One company sold 50,000 of one type between 1901 and 1904, and, though no specific figures are given of sales of other infringing types, there is evidence that such were sold in large quantities on the open market and were well known to the automobile trade. There is no direct evidence that any of the successive holders of the patent prior to complainant knew of these infringing sales; none of them was examined. Some were dead. There have been cases where all relief has been refused to patent owners who were negligent about enforcing their rights for a long period of time. *Richardson v. Osborne* (C. C.) 82 Fed. 95, affirmed by this court 93 Fed. 826, 36 C. C. A. 610. These cases have been such as presented "unusual conditions or extraordinary circumstances"; usually with knowledge of infringement the owner of the patent has stood by and, without objection or warning, has allowed the infringer to invest his money in a plant for manufacturing infringing devices. Under the principle enunciated in *Menendez v. Holt*, 128 U. S. 523, 9 Sup. Ct. 143, 32 L. Ed. 526, we find nothing in the case which would call for a denial of injunctive relief, postponed perhaps for some short period, such as 30 days, so as to give defendant opportunity to arrange its business accordingly.

As to any claim for profits and damages, however, the case is peculiar. As we have seen, there is no direct proof that any of the successive owners actually knew of infringement. It is argued that they could not have known of open and notorious infringement, because they were none of them in the business of making and selling engines or spark-plugs. In that respect the case is peculiar. Usually patents are held by persons whose business is of a sort that the patent pertains to; here the owners were not engaged in any such business. The patentee was a lumberman; his administrator was a trust company; his brother was a lumberman; Wheeler was a mechanical engineer; the Association Patents Company was a mere holding company. None of these successive holders made any use of the patent, except that the patentee made two or three spark-plugs for use in his own power pleasure boat. None of them manufactured any of these spark-plugs, nor did they procure any to be manufactured, nor did they sell any, nor did they, as far as appears, make the slightest effort to induce any one engaged in the automobile industry to make such plugs on some basis of royalty. During this long period the successive owners treated this patent as if it were of no importance whatever, of no use to any one. Apparently they made no effort even to ascertain if there were any infringements of it, or to caution or warn anybody against infringement. The infringement was not an act done in a corner; had the owner taken the trouble to send a competent man to the warerooms of a few dealers in automobile supplies (of this sort), or to any of the

periodical automobile shows, where manufacturers send their devices and point out their claimed advantages, there can be little doubt that infringement would have been discovered years ago. An advertisement in some of the trade papers to the effect that the owners of this patent would prosecute infringers might have warned the trade that this patent was not, by its owners, regarded as a thing of no account, in which they took no interest. It might well be that, had some such announcement been made, infringing manufacturers would long ago have modified their devices so as to avoid infringement, as they could easily do by making the depth of the recess less and its width greater, thus avoiding the specific proportions which constitute the essential part of the patentee's claim.

Where owners have remained thus supine for many years, shutting their eyes to what was going on in the art to which the patent belonged, and thus leading defendants and others to suppose that they intended to make no claim that their patent dominated a portion of that art, it seems to us inequitable that they should come at this late day and insist on being granted an accounting for damages and profits during their long period of inaction.

The decree is reversed, with half costs of this appeal, and cause is remanded, with instructions to decree in favor of complainant on the first claim, with an injunction, but without any accounting for profits or damages, and one-half costs to complainant.

In re JULIUS BROS.

Ex parte LEWIS FRANK & SONS et al.

(District Court, S. D. New York. October, 1913.)

BANKRUPTCY (§ 407*)—DISCHARGE—TRANSFER OF PROPERTY WITH INTENT TO DEFAUD CREDITORS.

A sale and assignment by an insolvent within four months prior to his bankruptcy of all of his property, the purchase price to be paid to his attorney and distributed as a dividend to such creditors as would agree to compromise their claims for the amount received, is a transfer in fraud of creditors, which debars the bankrupt from the right to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.*]

In the matter of Julius Bros., bankrupts. On application for discharge, Lewis Frank & Sons and others filed objections. Denied.

This is an application for a discharge in bankruptcy. The referee has reported against the discharge upon the ground that the bankrupts conveyed their property within four months of the bankruptcy, with intent to hinder, delay, or defraud their creditors. The bankrupts made an assignment of all their assets to a corporation in exchange for \$1,550, which was to be paid to their attorney, who also represented the creditors' committee appointed at a meeting of all creditors, with directions to distribute it as a dividend to all creditors who should agree to compromise their claims for that amount. The two objecting creditors refused to compromise, and the attorney, with the bankrupts' assent, and that of the creditors' committee, thereupon appropriated their dividends in payment of his services. Bankruptcy afterwards followed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Malcolm Sundheimer, of New York City (A. Maurice Levine, of New York City, on the brief), for bankrupts.

Harry L. Herzog, of New York City, for objecting creditors.

HAND, District Judge. It is undoubtedly a question of some uncertainty whether an assignment for the benefit of creditors will bar a discharge, and if the bankrupts in this case had unconditionally assigned their assets for distribution among their creditors I should feel some doubt of the correctness of the master's report. *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171. However, they did nothing of the sort. They sold their assets to a corporation made up of their relatives, and gave the purchase price to their attorney to distribute, upon condition that each creditor should compromise his debt on getting his dividend. If he refused, as these creditors did refuse, he was to be totally excluded, and in fact his share finally went to the bankrupts' attorney. This is a wholly different thing from an assignment for the benefit of creditors, which leaves the debts outstanding precisely as they were, save the amount paid as dividend.

It seems to me perfectly clear that such a transfer is fraudulent, however much the bankrupt may think he has the right to make it, because fraud is not synonymous with personal sin, and a man may honestly justify quite illegal purposes. Nor is it one's inward justification of his conduct which counts, for this is not a court of conscience. It is wholly a question of whether the things proposed did in fact result in depriving the creditors of their rights. In *re Condon* (D. C.) 198 Fed. 947. Of course the creditors must show that the bankrupt knew the result of his act would deprive them of their rights—that is, the element of intent—but it is quite irrelevant whether in his own mind he had an honest justification. If the authorities cited by the bankrupts must be interpreted as meaning that every bankrupt will be discharged, no matter what his conduct, provided he believes it honest, I shall not follow them, since none is authoritative in this district.

If, therefore, conscious wrongdoing be not necessary to fraud, and if the determination of guilty intent depends upon the actual effect of the actor's purposes, then a fraudulent intent existed in this case, because the purpose was to coerce the creditors into a compromise under penalty of getting nothing at all. No bankrupt may exact of his creditors any such consideration as a condition upon giving them their dividend from his property. *South Danvers National Bank v. Stevens*, 5 App. Div. 392, 39 N. Y. Supp. 298.

Nor does it in the least matter that the bankrupts might be in any case entitled to a discharge in bankruptcy. Certainly it is one thing to get a discharge after one has submitted oneself to the bankruptcy court, and another to get it out of hand upon such statement and examination as one may accord *sua sponte*. No doubt an extortionate creditor has it in his power to abuse an honest bankrupt by insisting upon his getting his release from the bankruptcy court. That is a penalty for an unworthy bar, but a court cannot permit the creditors to be coerced into accepting the bankrupt's statement of his resources, even when the statement eventually turns out to have been correct. The transfer was therefore in fraud of the creditors' rights,

in that it compelled them to surrender their debts upon pain of getting nothing at all. It deprived them of their rights as much as though the whole of the proceeds had not been distributed.

Finally, it is of no consequence that the plan was that of the attorney for the bankrupts and the creditors' committee, and not the bankrupts' plan personally. Though they did as he said, they knew what they did, and if the result, however well meaning, is not tolerable in law, they have done what the law will not tolerate. As between them and their creditors, his acts are theirs, unless he deceived them, which nobody claims.

Report confirmed, and discharge denied. No costs.

THE EUREKA.

(District Court, N. D. California, First Division. November 7, 1913.)

No. 15,438.

MARITIME LIENS (§ 25*)—LIEN FOR SUPPLIES—FEDERAL STATUTE.

Under Act June 23, 1910, c. 373, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1191), which gives a lien for repairs or supplies furnished to a vessel on the order of the owner or a person authorized by him, but provides that it shall not be construed to confer a lien when the furnisher of the repairs or supplies knew, or by the exercise of reasonable diligence could have ascertained, that the person ordering the same was without authority to bind the vessel, one furnishing supplies on the order of the president of a company in possession of a vessel under an option to purchase, which expressly provided that no liens should be incurred thereon, is not entitled to a lien where he was told that the vessel had not been paid for, and knew the owner, whose place of business was in the same city, and for which he had furnished supplies to the vessel for many years, and made no inquiry as to the contract.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 31-36; Dec. Dig. § 25.*]

In Admiralty. Suit by the W. S. Ray Manufacturing Company against the steamer Eureka; the North Pacific Steamship Company, claimant. Decree for respondent.

Ira S. Lillick, of San Francisco, Cal., for libellant.

Chas. H. Sooy, of San Francisco, Cal., for respondent.

DOOLING, District Judge. The steamer Eureka is now and for years has been owned by claimant, North Pacific Steamship Company. From June 10 to August 1, 1912, she was run by the South Coast Steamship Company under an option to purchase from the claimant. This option was in writing and provided that the South Coast Steamship Company should have possession of the vessel, and might use her, but should not incur any lien upon her, nor make any purchases on her account. While she was so in possession of the South Coast Company, Capt. Woodside, the president and manager of the company, purchased from libellant, for the use of the steamer, the articles in suit, including, among other things, a life boat, a life raft, and a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bread tank, saying that he had bought the boat, but had not wholly paid for her, but was to pay for her in installments. The articles were put on board the vessel, and there remain at the present time.

Libelant had for years furnished supplies to the Eureka for claimant, and knew that claimant was her owner at least up to the time that Capt. Woodside said that he had bought her. The home port of the vessel is San Francisco, where libelant's place of business is situated, and where, too, is located the place of business of claimant, as well as of the South Coast Company. For years libelant had transacted business with claimant in furnishing supplies for the Eureka, and could have ascertained without difficulty, simply by telephoning to claimant's office, just what the arrangement was under which the South Coast Company had obtained possession of her. This was not done, but the articles were furnished upon the assurance of Capt. Woodside that his company had bought the vessel, in conjunction with the fact that such company was actually running her. The bills were first sent to the South Coast Company. This company did not exercise its option to purchase, but returned the vessel to claimant with the articles on board. This is a libel against the vessel for their purchase price.

The act of June 23, 1910 (36 Stat. 604, c. 373 [U. S. Comp. St. Supp. 1911, p. 1191]), provides that any person furnishing repairs or supplies to a vessel upon the order of the owner of such vessel, or of a person by him authorized, shall have a maritime lien on the vessel, and need not allege or prove that credit was given to the vessel. Section 2 provides that any person to whom the management of the vessel at the port of supply is intrusted shall be presumed to have authority from the owner to procure such repairs or supplies, and section 3 provides that an owner *pro hac vice*, or an agreed purchaser in possession of the vessel, may appoint the persons mentioned in section 2, so as to create the presumption of authority therein mentioned, but also provides that nothing in the act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the agreement for sale of the vessel the person ordering the repairs or supplies was without authority to bind the vessel therefor. The act upon which libelant relies defeats his right to a lien.

If Capt. Woodside falls within the class mentioned in section 2, as one intrusted with the management of the vessel at the port of supply by the owner *pro hac vice*, or by an agreed purchaser in possession, yet by the exercise of the slightest diligence libelant could have ascertained that because of the terms of the agreement for sale of the vessel Capt. Woodside was without authority to bind the vessel for any repairs or supplies.

The remedy of libelant is against the South Coast Steamship Company, and not against the vessel, and the libel must therefore be dismissed.

HOFFMAN v. LE TRAUNIK.

(District Court, N. D. New York. December 8, 1913.)

1. COPYRIGHTS (§ 85*)—INFRINGEMENT—OLD MATERIAL—PRELIMINARY INJUNCTION.

Where complainant complained that defendant appropriated disconnected sentences or lines with "gags" from complainant's copyrighted monologues and used them in different monologues of a similar character following the same general idea, but defendant answered under oath that the lines and expressions so appropriated were not originated by complainant but had been used on the stage prior to the writing of complainant's monologues, complainant was not entitled to a preliminary injunction; his damage not being serious and no public interest being involved.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 78; Dec. Dig. § 85.*]

2. COPYRIGHTS (§§ 12, 16, 17*)—MATTERS SUBJECT TO COPYRIGHT—REQUISITES.

To be entitled to copyright, matter must be original, meritorious, and free from illegality or immorality, and though a new and original plan, arrangement, or combination of materials will entitle the author to copyright, whether such materials in themselves are new or old, the work must be original in the sense that the author has created it by his own skill, labor, and judgment without directly copying or evasively imitating the work of another.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 14, 15, 17, 18; Dec. Dig. §§ 12, 16, 17.*]

3. COPYRIGHTS (§ 58*)—INFRINGEMENT—COPYING.

Copying the whole or a substantial part of a copyrighted work is an essential element of infringement; it being sufficient that mere words or lines have been abstracted.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 54; Dec. Dig. § 58.*]

In Equity. Suit by Aaron Hoffman against Sam Le Traunik, sued as Francis Murphy and Jean Bedini, for alleged infringement of copyright in the use of monologues. On motion for preliminary injunction pendente lite. Denied.

Nathan Burkan, of New York City, for complainant.

Dittenhoeffer, Gerber & James, of New York City, for defendants.

RAY, District Judge. The complainant sues to enjoin the defendants from reciting and causing to be recited in public, vaudeville, or elsewhere the following:

"My dear Friends and People Workers: It give me great pleasure and joy to stand and undress myself before this large aggravation. You know, my friends, that I do not come out here before you as other political speakers, with falsehoods and lies in one hand and the stars and stripes in the other. I stand before you with an open face and a free mind, a poor, honest, sterilized citizen. I am for the public and against the people. I am glad I am capable of being a Philospede, and that I am pickled out to be a ———. This country is the finest country in the whole United States, a country full of mountains, valleys, and bluffs. Look at the wonderful men we have in this country. Rockefeller says anybody can live on \$18 per week. He don't have to tell us that. Let him tell us how to get the 18. The poor man has the same privileges as anybody else, run around in automobulls. Look at our streets. You don't see half the poor people on the streets that you used to see. Half

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of them are run over and the other half are afraid to come out. Look at our battle ships, the largest invention in the world. There is the great boat Muretania and the Lusitania with all the latest style equipments, two kinds of steam, hot and cold; we got telephones and elevators on the boats. If the boat is out in the middle of the ocean and starts to sink, the passengers don't have to drown; all they have to do is to take the elevator and go upstairs. Look at the wonderful big navy that the United States had got. We may not have the biggest navy in the world, but look at the big oceans we got. Last year we appropriated \$4,000,000 for the navy. There are million people in the United States. Now that figures up to be a nickel a piece. What the hell kind of navy can you expect for a nickel. Look at the great men we have in the House of Misrepresentatives. We got men getting \$5,000 a year, and what do they do. They set around and tell jokes to each other, and out of the salary of \$5,000 per year they spend \$6,000, and by the end of the year they have \$100,000 saved up. Look at our weather bureau department, a man who tells us what kind of weather we are going to have, and by golly he doesn't know himself. If he did, he would lose his job. He gets \$10,000 a year for telling us when it is going to rain. He gets up in the morning, enjoys breakfast, and smoke nice fat cigars and looks out of the window and says possibly nice weather to-day and then takes his umbrella and goes out for a stroll. Look at the large principals we got. As soon as a child reaches the age of six we send him off to school and he granulates, goes to scolllege for ten years, and when he gets through he gets a job as school teacher at \$60 per month, and when the janitor of the same school is getting \$90 a month. Look at the high cost of living now. Eggs 60¢ a dozen and rotten ones at that. Eggs are so scarce now that when we get good healthy ones we think there is something wrong with them. It is alright to pay that much for good eggs, but not when they are in their second childhood. Look at the price of meat. Meat is getting so high that it will soon be worth a lot more money, and pretty soon we won't have any money, instead we will be carrying around pieces of meat. You go into the bank, and instead of depositing a hundred dollars we will deposit a sirloin steak and for change we will be getting pork chops and sausages. This shows you what a chance a poor man has got in court. If the poor man steals a couple of dollars, he gets ten years and bread and water. If a corporation steals \$10,000,000, they get 10 lawyers and a banquet. But there is one thing I can say in favor of our judges. If a poor man is arrested for committing a crime and he hasn't got a lawyer to defend him, of course the poor man gets the prosecuting attorney and he tries to push him in. The judge looks around and picks out a lawyer for him, you know, one of them good shyster lawyers, 90 years old and never won a case, but without that lawyer a prisoner has a chance to go free, but with such a lawyer the least he can get is life. That's why so many criminals confess, because they don't want to take a chance with one of those lawyers. Look back in the olden times in 1492 when Christopher Columbum—when Christman Col—the time of 1492 when Christopher Cockeye Columbus— Do you know what I am talking about? I don't. Every time I come to say that my tongue gets twisted around my eye tooth and I can't see what I am talking about. You know the time, the time when Warrington was washing the Hellaware, you know the father of Christenphor Cockeye Cucumbers. Look in the olden times, look at the great men what we have, Abraham Washington, George Lincoln, and Useless Grant. These three men fought for eight long years with England to give us back our freedom and think of it, if it wasn't for these men there would be 80,000,000 people walking around the streets to-day without a Constitution. Look back to the time of Adam and Evil. There's a man what had everything his heart desired and the damn fool had to get lonesome. Now that election time is over, we have elected a new president; we got to admit Wilson made a good race. Roosevelt said he made Wilson win. Wilson said Bryan made him win. At the time of the convention at Baltimore, Bryan got up and says, 'My friends, if you don't nominate Wilson for President I will run;' and they thought he might take a chance so they nominated Wilson. But we must all agree Roosevelt beyond a doubt was the greatest President

this country ever had. There is no doubt of it. He admitted it himself. You know Roosevelt says he never drinks, but look at all the animals what he seen in Africa. Look how hard it is to live now-a-days; you can't even rent a flat. When you do rent one look at the trouble what you got. Roosevelt says, 'Increase the population, have children;' but the landlord won't allow it. What's the use of making a fool out of the flats. Roosevelt says he don't believe in race suicide. He believes that all young people should get married and raise large families, and then he wants the credit for it. Then the report comes out that Chas. Murphy isn't going to drink any more. He says he isn't going to drink unless he has Sulzer on the side. Now comes the Prohibitionists' Party. The Prohibitionists say, 'Down with drink.' Well, that's alright, down with it, but keep it down. The Prohibitionists are progressing more and more every day. They are closing up every saloon in the country. You can't get in any saloon on Sunday. It is impossible; its too crowded. You know it is drink that breaks up many a home. At last a woman comes out with a great idea, a wives' union, think of it, a union for wives. A young couple gets married and just as they get settled down a walking delegate comes out and orders a strike. Just imagine hundreds and thousands of wives walking the streets and scabs taking their places."

[1] The complainant has copyrighted the monologues in parts 1 to 14, inclusive, entitled "The German Senator" and "The German Politician." Each part is a separate and distinct monologue, and each part consists of some seven or more typewritten pages, of what the moving papers call "gags" and "jokes." These are literary productions in the sense that they consist of written matter. They come within no definition of "literature" proper but come under the head probably of "light literature," which is said to be "books or writings such as can be understood and enjoyed without much mental exertion; writings intended primarily for entertainment, relaxation, or amusement." These monologues "jump," so to speak, from one thing or subject to another. They contain such expressions as (see Monologue 1, p. 3), "I tell you when I look back to the early hysterics of this country, it fills my heart up with indigestion," etc.; and some of the expressions used suggest good things, but most of them suggest the opposite.

The complainant alleges that he not only originated or composed these disjointed monologues as a whole but that he is the author of all these expressions, etc. He does not claim that defendants have taken and recited or produced any one monologue or any considerable part of any one of these monologues, but that they have taken and substantially reproduced by publicly reciting same, a line or two from one, and two or three lines from another, and so on, thus making up the monologue above quoted, and thus and thereby appropriating the most valuable part of several of these monologues.

An examination of the complainant's monologues, referred to, shows that the monologue recited by defendants (Exhibit O) is made up in large part of sentences or lines found in these various monologues in substantially the same or similar words. These sentences, the complainant claims, were original with him. The defendants emphatically deny this and allege that these sentences, expressions, and ideas were old and well known when complainant made his monologues, and that they originated with others and were and are common property. There is no claim that the complainant's monologues as a whole were old or common property, and there is no claim that defendants have appropri-

ated or recited or used any one or all of them. There is no similarity between the complainant's monologues and the monologue used by the defendants, aside from the particular phrases or sentences gathered from all in the manner referred to. In monologue 3, page 1, line 1, complainant says, "My dear friends and people workers"; and in lines 2 and 3, "I am overstewed with pleasure to have the honor to stand here and undress myself before you;" and in monologue 14, page 1, lines 1 and 2, he says, "It affords me pleasure to be disabled to stand up here and distress such a large congregated aggravation." Defendants' monologue contains the following: "My dear friends and people workers," and also, "It gives me great pleasure and joy to stand and undress myself before this large aggravation."

The complainant claims to have originated the idea "people workers" and of using the word "undress" for "address" and "aggravation" for "aggregation." The complainant says (monologue 6, page 1, lines 4 and 5), "I do not come before you like other political speakers with false pride in one hand and a star strangled banana in the other," while the defendants say, "You know, my friends, that I do not come out here before you as other political speakers with falsehood and lies in one hand and the stars and stripes in the other." In monologue 11, page 1, line 9, complainant says, "I come before you as a sterilized citizen of the greatest country in the universe," while defendants say, "A poor, honest, sterilized citizen." The complainant claims the merit of first applying the word "sterilized" to "citizen." In monologue 12, page 11, lines 20 and 21, the complainant says, "They want to elect an Indian to misrepresent them in Congress, in the House of Misrepresentatives." The defendants say in their monologue, "Look at the great men we got in the House of Misrepresentatives." Complainant claims to have originated the idea of using "misrepresentatives" for "representatives" in speaking of the lower house of Congress. So, in speaking of rotten eggs, this condition is described by complainant (monologue 2, page 15, lines 8 and 10, and monologue 4, page 12, lines 6 and 9) as "second childhood," and defendants do the same. The merit claimed is in applying the words "second childhood" as descriptive of decayed eggs. These are samples of the similarities.

It may be proved on the trial that the complainant originated all these expressions, and the court may be of the mind that no one but the author and his licensees should be permitted to use them; but, so long as the defendants aver under oath that they were not new with complainant but common property and used on the stage prior to the writing of complainant's monologues, it seems to me that a preliminary injunction should not issue. No public interest is involved, and the damage to the complainant will not be very serious. The answers are served, and a term of court will be held at Albany February 10th, when the suit can be tried if the parties desire. In *American Malting Co. v. Adolph Keitel*, 209 Fed. 351, decided November 20, 1913, the Circuit Court of Appeals, in this Second Circuit, reiterates the familiar doctrine that "the rule is that preliminary injunctions will not issue except in the clearest cases." It appears from the moving papers that defendant Murphy at one time had a license agreement for using one

or all of these monologues. He thus, it is claimed and not denied, became familiar with complainant's monologues. It is claimed the defendants took therefrom the most valuable thoughts or expressions. This may be true, but if it be also true that these expressions used by defendants and found in defendants' monologue were not new with complainant, not originated by him, then the defendants are guilty of no wrong in using them as they do, for there is no pretense that any one of the complainant's monologues, as a whole, is used or that any substantial part of any one of those composite ones is used.

[2] To be entitled to be copyrighted, the composition must be "original, meritorious, and free from illegality or immorality." And "a work, in order to be copyrighted, must be original in the sense that the author has created it by his own skill, labor, and judgment, without directly copying or evasively imitating the work of another." However, "a new and original plan, arrangement, or combination of materials will entitle the author to a copyright therein, whether the materials themselves be new or old."

[3] But here the defendants have not copied substantially the plan, arrangement, or combination of materials found in complainant's monologues or in any one of them. Conceding literary or artistic merit in the complainant's monologues growing out of some original matter combined with old matter in a new and an original plan, arrangement, or combination, the defendants do not infringe, not having used that plan, arrangement, or combination, unless they have abstracted and used some of the complainant's new matter and so much of it as to authorize the finding that there has been a copying or a taking.

"Copying the whole or a substantial part of a copyrighted work constitutes and is an essential element of infringement. It is not confined to literal repetition or reproduction but includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced with more or less colorable alteration to disguise the piracy. But, on the principle of *de minimis non curat lex*, it is necessary that a substantial part of the copyrighted work be taken." 9 Cyc. 939, 940.

If there is any piracy in this case, it consists in the taking and use of these isolated expressions or "gags," as they are called, and to constitute infringement it must be established by the complainant that they were original with him. The burden is on him to show this, and with complainant making affidavit one way and the defendants the other, and a sworn answer also interposed, a clear and satisfactory case on such a subject is not made for the drastic use of a preliminary injunction.

The motion is denied, but the defendants must be ready for trial at the Albany term of this court or the motion may be renewed on the same and additional papers.

LOUISVILLE & N. R. CO. v. BOSWORTH et al.

(District Court, E. D. Kentucky, Frankfort Division. September 22, 1913.)

No. 729.

1. STATES (§ 191*)—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE.

The right to maintain a suit in a federal court against state officers to enjoin them from taking action which they threaten to take in the name of and for the state, is not limited to cases where such action is to enforce or pursuant to an unconstitutional statute; but such suit is not one against the state and is maintainable if for any reason the officers have no right to take such action and it will be a wrong to plaintiff such as equity will enjoin.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

2. STATES (§ 191*)—JURISDICTION OF FEDERAL COURTS—"SUIT AGAINST THE STATE."

The true test of the maintainability in a federal court of a suit to enjoin state officers from doing an act in the name of and for the state, as against the objection that it is a suit against the state, is to be found in the consideration of the relief sought therein. If it is relief against the state, the suit is not maintainable, since the state, although not made a party to the record, is an indispensable party to the suit; but, if the sole relief sought is relief against the officers, it is maintainable, although the state may be affected by the result and would be a proper party.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

For other definitions, see Words and Phrases, vol. 7, p. 6778; vol. 8, p. 7809.]

3. STATES (§ 191*)—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE.

A suit is maintainable in a federal court against the members of the State Board of Valuation and Assessment of Kentucky, the State Auditor and the Attorney General, and other law officers of the state charged with the duty of bringing and prosecuting actions to enforce payment of delinquent taxes, to enjoin the defendants from apportioning and certifying an assessment of complainants' property alleged to be unconstitutional and void, to the several counties and municipalities for local taxation and the taking of any action by defendants to enforce payment to the state of taxes levied on such assessment.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

4. TAXATION (§ 376*)—FRANCHISE OF RAILROAD COMPANY—KENTUCKY STATUTE.

The provisions of Ky. St. § 4081, as amended by Act June 9, 1893 (Laws 1891-92-93, c. 217), and Act March 15, 1906 (Laws 1906, c. 22), for the assessment of the franchises of railroad companies, etc., whose lines are partly within and partly without the state, and which provide that, after the valuation of the capital stock of the company has been fixed by the Board of Valuation and Assessment, "that proportion of the value of the capital stock which the length of the lines operated, owned, leased or controlled in this state bears to the total length of the lines, operated, owned, leased, or controlled in this state and elsewhere shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state," contemplate an assessment on a mileage basis, but are not exclusive of the making of a deduction from or addition to the part of the capital stock apportioned to the state on such basis if, owing to special circumstances, there is a proportional excess of value of tangible property elsewhere or within the state, as the case may require.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The proper procedure is for the board, after fixing the valuation of the entire capital and assets of the company, if no such special circumstances exist, to take such proportion of that valuation as the mileage within the state bears to the entire mileage, and from such sum deduct the assessed value of the tangible property of the company within the state, the remainder being the value of its franchise for taxation by the state and to be apportioned between the counties and municipalities through which its lines run according to mileage for local taxation. If by reason of special circumstances the tangible property of the company within the state is of greatly larger proportional value than that without the state, or the contrary, a proper addition to or deduction from the mileage proportion apportioned to the state should be made of the excess, so that all property within, but none without, the state, shall be taxed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631; Dec. Dig. § 376.*]

5. TAXATION (§ 376*)—FRANCHISE OF RAILROAD COMPANY—KENTUCKY STATUTE.

Where such excess value exists within the state, the statute affords no warrant for arriving at its value by taking an average of the mileage proportion of the property, the proportion of gross earnings, and the proportion of net income apportionable to the state as the proportion of the capital stock so apportionable, the last two elements having no relation to the value of the tangible property, and an assessment so made is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631; Dec. Dig. § 376.*]

6. TAXATION (§ 407*)—FRANCHISE OF RAILROAD COMPANY—ASSESSMENT—KENTUCKY STATUTE.

Ky. St. § 4083, which is a part of the statute providing for assessment by the Board of Valuation and Assessment of franchises of corporations, provides that "it shall be the duty of the Auditor immediately after fixing such value by said board to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation, and may introduce evidence. * * * " *Held*, that where the notice given to an interstate railroad company stated merely the valuation placed upon its property in the state, the assessed value of its tangible property, therein, deducted, and the resulting assessment of its franchise in the state, without giving the methods adopted or the steps taken in reaching such valuation, some of which were expressly prescribed by the statute, and the minutes of the board contained nothing whatever with respect to the preliminary assessment, so that the company was not advised as to whether or not the board had followed the statutory methods and requirements at the time of the hearing, it did not have the notice or hearing to which it was entitled under the statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 674; Dec. Dig. § 407.*]

7. TAXATION (§ 376*)—FRANCHISE OF RAILROAD COMPANY—ASSESSMENT.

In making an assessment of the franchise of a railroad company under such statute, the board did not have the right to use statistics taken from a report made by the company to its stockholders for an entirely different purpose without giving it an opportunity to explain the statements if desired.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631; Dec. Dig. § 376.*]

8. CONSTITUTIONAL LAW (§§ 211, 253*)—DUE PROCESS OF LAW—NATURE OF ACTS PROHIBITED.

The provisions of the fourteenth constitutional amendment prohibiting a state from depriving any person of life, liberty, or property without due process of law, or denying him the equal protection of the laws, is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

directed against the government and officers of the state, and not against the state itself, as a political entity, and the fact that an act of state officers done in the name of and for the state was not authorized by the state laws does not prevent it from being in violation of such provision.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 678, 732-735; Dec. Dig. §§ 211, 253.*]

9. CONSTITUTIONAL LAW (§ 229*)—DENIAL OF EQUAL PROTECTION OF LAWS—DISCRIMINATION IN ASSESSMENT.

Under the Constitution and statutes of Kentucky, which require all property in the state to be assessed at its actual cash value and that taxes on all property shall be uniform, the assessment of the franchise of a railroad company at not less than its fair cash value, while other property in the state, except perhaps other railroad franchises, is assessed at an average of 80 per cent., or less, of such value, although in part by different assessing bodies, is a denial to the company of the equal protection of the laws in violation of the fourteenth constitutional amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 685; Dec. Dig. § 229.*]

10. TAXATION (§ 610*)—PRELIMINARY INJUNCTION TO RESTRAIN COLLECTION OF TAX—CONDITIONS.

The granting of a preliminary injunction is a matter of discretion, and the court may attach any equitable conditions thereto; and, where it is sought to enjoin enforcement of a tax on the ground of the invalidity of the assessment, a proper condition is the payment of so much of the tax as would be due on a fair assessment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1244; Dec. Dig. § 610.*]

11. TAXATION (§ 376*)—LEVY AND ASSESSMENT—CORPORATE FRANCHISE—"CAPITAL STOCK."

The words "capital stock," as used in Ky. St. § 4079, providing for the determination of the value of a corporate franchise for purposes of taxation, by taking the value of the capital stock of a corporation and deducting from that the assessed value of all tangible property assessed in the state, mean the entire property of the company, tangible and intangible.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631; Dec. Dig. § 376.*]

For other definitions, see Words and Phrases, vol. 1, pp. 959-967; vol. 8, p. 7595.]

In Equity. Suit by the Louisville & Nashville Railroad Company against H. M. Bosworth, Thomas S. Rhea, and C. F. Crecilius, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky, H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky, G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky, James Garnett, Attorney General of the State of Kentucky, C. H. Morris, First Assistant Attorney General of the State of Kentucky, M. M. Logan, Second Assistant Attorney General of the State of Kentucky, O. S. Hogan, Third Assistant Attorney General of the State of Kentucky, Robert B. Franklin, Commonwealth's Attorney for the Franklin Circuit Court of the State of Kentucky, and W. C. Marshall, County Attorney of Franklin County, State of Kentucky. On motion for preliminary in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

junction and demurrer to bill. Demurrer overruled and injunction granted on condition.

See, also, 209 Fed. 465, 469.

Henry L. Stone, Helm Bruce, Ed. S. Jouett, Wm. A. Colston, and Robt. E. Fleming, all of Louisville, Ky., for complainant.

James Garnett, Atty. Gen., and M. M. Logan, Chas. H. Morris, O. S. Hogan, and D. O. Myatt, Asst. Attys. Gen., of Frankfort, Ky., and John L. Rich, of Covington, Ky., for defendants.

COCHRAN, District Judge. This cause is before me on motion for a preliminary injunction and demurrer to the bill. The plaintiff is a Kentucky corporation, and the defendants are citizens and officers of the state of Kentucky. The injunction sought is to restrain the defendants from taking certain action which they threaten to take in relation to an assessment of certain of plaintiff's property for taxation made by the Board of Valuation and Assessment of the State, August 31, 1912, for the year 1912. The defendants Bosworth, Rhea, and Crecilius are, respectively, Auditor, Treasurer, and Secretary of State and, as such, constitute the board which made the assessment. The action which they threaten to take is to apportion the assessment to the several counties, cities, towns, and taxing districts through which plaintiff's railroad runs in order to the collection of local taxes. This is the only further action which it is within their power to take in relation thereto in such capacity. That which the defendants Bosworth and Likens threaten to take in their capacities as Auditor and Assistant Auditor is to certify such apportionments to the county clerks of the several counties through which plaintiff's railroad runs, a further step essential to the collection of local taxes, to enter in account, as a demand payable at the treasury of the state, the taxes due to the state based on the assessment, to report to the Attorney General the delinquency on plaintiff's part arising from a failure to pay those taxes, and to cause proceedings to be instituted against it because of its failure to pay them. And that which the other defendants, to wit, Garnett, Morris, Logan, and Hogan, respectively, Attorney-General and Assistants Attorney Generals, the defendant Franklin, Commonwealth's attorney for the Franklin circuit court, and the defendant Marshall, county attorney of Franklin county, threaten to take in such capacities, is to institute and prosecute proceedings against plaintiff by indictment and civil action to recover such taxes and penalties because of its delinquency in failing to pay them. All of this action is action to enforce the assessment.

The plaintiff claims that the assessment is void, and that therefore the defendants have no right to take such action, and the taking thereof will be a wrong to it. The assessment was made by the board under sections 4077 to 4081, inclusive, and section 4083, of the Kentucky Statutes, the constitutionality of which is unquestioned. The plaintiff's property consists of its railroad, rolling stock, stations, terminal facilities, rights to be and to do, and its good will. All of these constitute a physical and organic unit. This unit covers 13 different states, including Kentucky. On a mileage basis, a larger part thereof

is in Kentucky than in any other state. That which was assessable by the board under these statutory provisions was the part of plaintiff's intangible property located in this state. Those provisions characterize it as its franchise or corporate franchise therein. The judicial phrase, therefore, is its intangible property so located. In the numerous cases which have arisen under these statutory provisions, the phrases "corporate franchise" and "intangible property" are treated as synonymous. I will hereafter refer to it as plaintiff's franchise in this state. These provisions have been the law of this state, substantially as they are now, for over 20 years. The assessment made by the board for the previous year, i. e., 1911, amounted to \$11,899,200. The state tax thereon was \$59,496, and the local taxes \$86,994.41, or the two together, \$167,644.37. The assessment that year was larger than it had been any previous year. The assessment complained of herein amounts to \$45,428,074. The state taxes thereon amount to \$227,140.37, and the local taxes to \$332,166.52, or, the two together, to \$559,306.89. By reason thereof, if it stands, the plaintiff will be compelled to pay \$412,816.48 more than it paid the previous year, and it is reasonable to expect that hereafter it will have to pay at least this increased amount each year of its existence. This increase is not due to any change in the value of the plaintiff's intangible property in this state. It is due solely to a change in the judgment of the board as to its value. It should be noted, however, that there has been a change in the constituent members of the board, and the one here in issue is the first assessment which has been made by the board as it is now constituted.

Mr. Justice Brewer, referring to an increase in the assessment of a railroad's property by an Indiana board in the case of *Pittsburg, etc., R. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, which he characterized as "a great increase," but which was not as great an increase as here, said that it suggested "that which is unfortunately too common—an effort to cast an unreasonable proportion of the public burden upon corporate property." He added, however:

"Still it must be borne in mind that a mere increase in the assessment does not prove that the last assessment is wrong. Something more is necessary before it can be adjudged that the assessment is illegal and excessive, and the question which is to be now considered is whether the testimony shows that the assessment made by the state board can be judged illegal."

And the court in that case upheld the assessment.

1. The plaintiff claims that the assessment is void on two grounds. One is that it violates the fourteenth amendment to the federal Constitution, in that it denies it the equal protection of the laws. The other is that the board did not follow the statute. It is because of the former claim that this court has essential jurisdiction of this suit. It would not otherwise have it. This is so because there is no diversity of citizenship between the parties hereto. Plaintiff, however, does not have to make this claim good. It is sufficient if the claim is not colorable, or, in other words, is made in good faith. As to this there can be no doubt.

The plaintiff, therefore, is entitled to the relief it seeks if it does no more than make good the other claim, to wit, that the board in

making the assessment did not follow the statute. *Siler v. L. & N. R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753.

[1] 2. But before I can consider this claim of plaintiff I must notice and dispose of a preliminary contention put forth by the defendants. It is that this is a suit against the state of Kentucky and forbidden by the eleventh amendment to the federal Constitution, and that therefore it is not maintainable, even though the assessment complained of is void on both grounds relied on by plaintiff. As heretofore stated, the relief sought herein is an injunction against the defendants restraining them from taking certain action which they are threatening to take in the name and for the state, under color of their respective offices. What that action is has also already been set forth in detail. This contention, then, is that a suit in a federal court against state officers to enjoin them from taking action which they threaten to take, in the name and for the state, and under color of their offices, to enforce an assessment made by a board under a constitutional statute, as the one involved here is, is a suit against the state and so forbidden, and hence not maintainable, even though the assessment is void. The plaintiff meets the contention with the cases of *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *W. U. Tel. Co. v. Andrews*, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430. It claims that they are conclusively against it. The defendants, on the other hand, say that, instead of this being so, these cases conclusively support their contention. This radical difference between the parties is not as to the thing decided in these cases. They agree as to what was decided in each. It was decided therein that a suit in a federal court against state officials to enjoin them from taking action which they threaten to take in the name of and for the state, under color of their offices, to enforce an unconstitutional statute, is not a suit against the state and so forbidden, and that such a suit is maintainable. The kernel of Mr. Justice Peckham's opinion in the *Young Case* is to be found in that portion thereof quoted by Mr. Justice Day in the *W. U. Tel. Co. Case*, which is in these words, to wit:

"The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a federal court of equity from such action."

Where they differ is as to what follows from this decision. According to defendants, it follows therefrom that such suit is maintainable only when the threatened action sought to be restrained is action to enforce an unconstitutional act of the Legislature, i. e., an unconstitutional statute. And it is because this suit is not a suit to enjoin threatened action of that character that they claim that these cases support this contention of theirs as to the maintainability of this suit. According to plaintiff, it follows therefrom that any suit where the threatened action sought to be enjoined is action to enforce an unconstitutional act of any state officer or officers, whether legislators or not, is main-

tainable. And it is because this suit is a suit to enjoin threatened action to enforce an unconstitutional act of the Board of Valuation and Assessment, to wit, the assessment complained of herein, though made under a constitutional statute, that they claim that these cases are against this contention. These two cases are not the only cases in the Supreme Court of the United States where the thing decided therein has been decided as there. There are quite a number of others. Such as the following, to wit: *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L. Ed. 204; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623; *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584; *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970.

In each of these eight cases, as in each of the other two, it was decided that a suit in a federal court against state officers to enjoin them from taking action which they threaten to take in the name and for the state, under color of their offices, to enforce or in pursuance to an unconstitutional statute, is maintainable. They, likewise, support or are against defendant's contention according to which of the parties is right as to what follows from such a decision. Here then are ten cases in that court which decide exactly the same thing, and there is a radical difference of opinion as to what follows therefrom. As I view the matter, the defendants are wholly wrong, and the plaintiff does not claim the whole truth. Defendant's position is wrong because it proceeds on the assumption that those cases cover the whole law on the subject of the maintainability of suits in federal courts against state officers to enjoin them from taking action which they threaten to take in their capacities as such and for and on behalf of the state. They do not cover the whole law thereon. On the contrary, what is within the principle underlying that which was decided therein is as much the law as what was decided. That the suit is maintainable where the threatened action sought to be enjoined is action to enforce an unconstitutional act on the part of any state officers or officer, as plaintiff claims, was decided by the Supreme Court in the case of *Reagan v. Farmers' Loan & Trust Company*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, cited and approved in the *Young Case*. There the threatened action sought to be enjoined was not action to enforce or in pursuance of an unconstitutional statute, but action to enforce transportation rates fixed by the Texas Railroad Commission under a constitutional statute empowering it to fix such rates, on the ground that the rates so fixed were confiscatory, and hence that the act of the Railroad Commission—not the statute—was unconstitutional. The suit was held to be maintainable. To the same effect is the case of *Prentiss v. Atlantic Coast Line R. R. Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150.

Plaintiff's position does not cover the whole truth, because the principle underlying the decision that the suit is maintainable if the threatened action sought to be enjoined is action to enforce an unconstitu-

tional statute is not limited to suits where the threatened action sought to be enjoined is action to enforce an unconstitutional act on the part of some state officers or officer. It gives that principle a too narrow range. And, if it has no wider scope, then this suit, in so far as it is based on the claim that the assessment complained of is void because the Board of Valuation and Assessment did not follow the statute, is not maintainable. If, then, defendants are wrong as to what follows from what was decided in those ten cases and what plaintiff claims follows therefrom is not the whole truth what is the whole truth that follows therefrom? An ascertainment of this will help us to correctly dispose of this contention of defendants. It is to be found in the principle underlying what was decided therein. What then is that principle? What was the ratio decidendi of what was decided therein? Why was it decided therein that the suit is maintainable if the threatened action sought to be enjoined is action to enforce or in pursuance to an unconstitutional statute? It was so decided because the sole basis of the action sought to be enjoined was the unconstitutional statute, and, this being so, the state officers sued had no right to take it, and the taking thereof would be a wrong to the plaintiff. In other words, it was so decided because the action which the defendants were threatening to take would, if taken, be a wrong to the plaintiff, or what they were sought to be enjoined from doing was the commission of a threatened wrong to plaintiff.

The threatened action sought to be enjoined in the Bank of the United States and the Tyler Cases was the seizure of the plaintiff's property in payment of a tax. The statute imposing the tax was unconstitutional. This being so, the defendants had no right to take the action, and the taking thereof would be a wrong to the plaintiff. It would deprive it of its property without right. One who deprives another of his property without right commits a wrong against him. That sought to be enjoined in the McComb Case was the delivery of a portion of a certain issue of state bonds in breach of a contract of the state with plaintiffs, holders of the other portion thereof. It was authorized by a statute which was unconstitutional as impairing the obligation of that contract. This being so, the defendants had no right to take the action, and the taking thereof would be a wrong to plaintiffs. It would depreciate the value of the bonds which they held, and hence would in this way deprive them of their property. That sought to be enjoined in the Gray and McConaughy Cases was the issue of land grants in the name of the state covering land previously granted to plaintiffs. The issue thereof was to be pursuant to a statute which was unconstitutional as impairing the obligation of the contract contained in the previous grants to the plaintiffs. The statute being unconstitutional, the defendants had no right to take the action, and the taking thereof would be a wrong to plaintiff. It would cast a cloud on the title to the land covered by his grant and thereby deprive him of his property. That in the Ames, Starr, Young, W. U. Tel. Co., and Chicago, R. I. & P. R. Co. Cases was the institution and prosecution of suits and other proceedings against the plaintiff for failure to comply with a certain statute. This statute was unconstitutional,

and hence the plaintiff was not liable to be so proceeded against for such failure. This being so, the defendants had no right to institute and prosecute the suits and other proceedings, and, because of the multiplicity thereof, the institution and prosecution thereof would be a wrong to plaintiff. In defending same it would be deprived of its property. It is possible for one to wrong another by instituting and prosecuting a suit or other proceeding against him. If he so does with malice and without probable cause, he can be made to respond in damages at law. If he institutes and prosecutes a multiplicity of suits, all involving the same question, and groundless, he also commits a wrong; and it is such as equity will enjoin. It was such a wrong as this, i. e., the institution and prosecution of a multiplicity of groundless suits, all involving the same question, that was sought to be enjoined in these five cases, and because thereof the suits were held maintainable. The suits and other proceedings enjoined were groundless because they were to enforce an unconstitutional statute, i. e., to recover penalties for failure to comply therewith. To no other extent did the unconstitutionality of the statute affect the maintainability of the suits.

Such then being the reason why it was decided in these ten cases that the suit was maintainable, it follows therefrom that any suit is maintainable in a federal court against state officers to enjoin them from taking any action which they threaten to take if they have no right to take such action and the taking thereof will be a wrong to the plaintiff. It is not essential that the action be to enforce, or in pursuance of, an unconstitutional statute. Nor is it essential that it be action to enforce or in pursuance to an unconstitutional act on the part of some state officers or officer. It is sufficient that they have no right to take the action and that the taking thereof will be a wrong to the plaintiff. But the wrong must be such as equity will enjoin. It is not otherwise material what may be the character of the action. Such then I take to be the whole truth as to what follows from what was decided in those ten cases. The same principle which underlay what was decided therein underlies what was decided in the Farmers' Loan & Trust Co. and Atlantic Coast Line Co. Cases, and the same result follows therefrom. The threatened action sought to be enjoined therein was the institution and prosecution of suits and other proceedings for failure to comply with the act of a Railroad Commission under a constitutional statute, which was unconstitutional because confiscatory, and thereby to enforce such act. The act of the Railroad Commission being unconstitutional, the plaintiff was not liable to such suits and proceedings, the defendants had no right to institute and prosecute them, and the institution and prosecution thereof would be a wrong to plaintiff and that such as equity will enjoin. It was on this ground that the suits were held maintainable. Here then are twelve cases in the Supreme Court from the decisions in which it follows that a suit is maintainable in a federal court against state officers to enjoin them from committing a threatened wrong to the plaintiff if the wrong is such as equity will enjoin.

That in order to the maintainability of the suit there is no other essential characteristic of the threatened wrong than that it be such as

equity will enjoin is made certain by the following cases in that court, to wit: *Allen v. Baltimore & Ohio Railroad Company*, 114 U. S. 311, 5 Sup. Ct. 925, 962, 24 L. Ed. 200; *Scully v. Bird*, 209 U. S. 481, 28 Sup. Ct. 597, 52 L. Ed. 899; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570, in each of which, except the *Philadelphia Company Case*, a suit in a federal court against state officers to enjoin action which they threatened to take in the name and for the state and under color of their offices was held maintainable. In the *Philadelphia Company Case* the suit was not against state officers but against United States officers. Though the eleventh amendment could not apply to such a case, the common-law rule that a sovereign is not suable could, and this raised the same question as to the maintainability of the suit. It was held to be maintainable. The threatened wrong sought to be enjoined in the *Baltimore & Ohio Railroad Company Case* was the seizure of the rolling stock, etc., of a railroad to collect a valid tax after a tender of tax receivable coupons in payment thereof. The threatened wrong sought to be enjoined in the *Scully Case* was the taking of certain action by a dairy and food commissioner under cover of his office, but alleged to be a violation of the state laws, which if taken would injuriously affect the reputation and sale of certain products manufactured by plaintiff. And the threatened wrong sought to be enjoined in the *Philadelphia Company Case* was the institution and prosecution of criminal proceedings against the plaintiff because of its reclamation and occupation of its land within certain harbor lines in the harbor of Pittsburgh, Pa. It is to be noted as to this case that an injunction against such proceedings was not the only relief sought therein. It was also sought to have the harbor lines which had been established by the Secretary of War set aside. In so far, no doubt, the suit was not maintainable. But no notice seems to have been taken of this. The fact is that a suit in a federal court against state officers to enjoin them from committing a threatened wrong in the name and for the state and under color of their offices depends as to its maintainability on no more than what is essential to the maintainability of a suit against them to enjoin them from committing a threatened wrong in their individual capacities. In such a suit it is essential that the wrong be such as equity will enjoin. This and nothing more is required. That they are threatening to commit the wrong in the name and for the state, under color of their offices, without any personal interest in the matter, is of no significance whatever.

The conclusion thus reached as to the maintainability of suits against state officers in a federal court to enjoin them from taking action which they so threaten to take has been reached from a consideration of the case in the Supreme Court involving such action. The same conclusion follows from a consideration of two other classes of cases in the Supreme Court—those involving past action on the part of state officers, in the name and for the state and under color of their offices, and those involving present action of this character. Cases belonging to the first of these two classes are the following, to wit: *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Bates v. Clark*, 95 U. S. 234, 24 L. Ed. 471; *White v. Greenhow*, 114 U. S. 307, 5 Sup. Ct. 923, 962,

29 L. Ed. 199; *Chaffin v. Taylor*, 114 U. S. 310, 5 Sup. Ct. 924, 962, 29 L. Ed. 198; *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243. In each of these cases, except the *Hopkins Case*, the suit was against an officer or officers, state or federal, to recover damages for action which they had so taken. The action taken had been taken in the name and for the state and under color of their offices, believing in good faith that they had the right to take it. They had no personal interest in the matter whatever. But in each case also they had no right to take the action and the taking of same was a wrong to plaintiff. The *Hopkins Case* was not a suit against state officers, but against a private corporation, which may be said to have been a state agent, which had acted in its own name, but under authority of the state and possibly may be said to have acted on its own behalf. The suit was held maintainable in each case. In the *Clark Case* Mr. Justice Miller said that one cannot protect himself "by orders emanating from a source which is itself without authority." In the *Schild Case* the claim for damages was asserted in a suit for an injunction against threatened action, and the decision was that it should have been asserted at law.

Cases belonging to the other class are as follows, to wit: *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; *Tindal v. Wesley*, 167 U. S. 204, 17 Sup. Ct. 770, 42 L. Ed. 137. In each of these cases present action on the part of the officer or officers sued was complained of. It consisted of withholding from plaintiff the possession of property to which he was entitled and the withholding of which was a wrong to him. In the *Lee* and *Wesley Cases* the property withheld was real estate and in the *Poindexter Case* personal estate. The withholding was in the name and for the state and under color of their offices in the belief in good faith that they had a right to withhold it. They had no personal interest in the matter whatever. The suit was to recover possession of the property withheld. In each case it was held that the suit was maintainable. The Bank of the United States Case, heretofore placed in the class having to do with threatened wrongs, also belongs here, in so far as the amended bill against the State Treasurer to compel him to restore to the plaintiff the \$100,000 in money which the Auditor's appointee had, after the preliminary injunction was granted against him, on the original bill, forcibly taken from it and turned over to the Treasurer, but which the latter had not mingled with the state's funds, was concerned, which was held maintainable.

Now here are three classes of cases exactly alike in certain particulars. In each class the action complained of is action on the part of the officers sued in the name and for the state and under color of their offices in the belief that they had or have the right to take it and without any personal interest in the matter whatever. And in each class that action was a wrong against the plaintiff of which he had a right to complain. They differed only in this: That in one class

of cases the action was threatened; in the other, past and over; and, in the other, then on hand. There is nothing whatever in this difference that could have any bearing on the question of the maintainability of the suit in relation thereto except that, as the relief against the threatened action sought in the first class of cases could only be obtained in equity, the action had to be such as equity will enjoin. It is therefore a legitimate inference from the maintainability of suits having to do with past and present wrongs that suits having to do with threatened wrongs are maintainable if the wrongs complained of are such as equity will enjoin. They are no more suits against the state and forbidden by the eleventh amendment than are suits which have to do with past or present wrongs.

Thus far I have limited myself to cases in the Supreme Court in which suits in a federal court against state officers have been held maintainable and have gathered from them that such a suit is maintainable to enjoin them from taking action which they threaten to take in the name and for the state and under color of their offices, if they have no right to take such action and the taking thereof will be a wrong to plaintiff, such as equity will enjoin. There are a number of cases in which suits in a federal court against state officers have been held not to be maintainable. It should be considered whether these cases or any of them are against this conclusion. Such are the following cases, to wit: *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805; *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; *Christian v. Atlanta & N. C. R. Co.*, 133 U. S. 233, 10 Sup. Ct. 260, 33 L. Ed. 589; *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535; *Smith v. Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140; *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 24 Sup. Ct. 820, 48 L. Ed. 1134.

I have heretofore considered the *Schild Case*, in so far as it had to do with the right to recover damages for a past wrong. It is classed here so far as it had to do with the right to enjoin a future or threatened wrong. The decisions in these cases that the suits were not maintainable do not conflict with the cases heretofore considered, and they are not against the conclusion which I have gathered therefrom, except the *Schild*, and possibly the *Postal Supply Cases*. As I read the *Schild Case*, the relief sought, other than for damages, was against the continued use of the patented caisson gate, for the past use of which the damages were claimed, and the destruction thereof. In so far as the relief sought included the destruction of the gate, undoubtedly plaintiff was not entitled to it. The gate had been made by the Union Iron Works of San Francisco, and then put in place and continued to be used by the defendants acting on behalf of the United States. Though the making and use of the gate was an infringement of the patent, and therefore wrongful, the title to the gate was in the United States. It owned the gate and was entitled to its possession, subject to the right of destruction which plaintiff had. It had this

right in order to prevent its use in derogation of the patent. It, however, was a right which plaintiff could not assert in a suit against the United States, because it was not suable; and it was not a right which could be asserted against the officers sued in that case, because they had no interest in the matter whatever, and the decreeing of destruction of the gate would not be the granting of relief as against them, the only relief which could be granted. But I am unable to see why the plaintiff was not entitled to the injunction against the continued use of the gate by the officers sued. The use thereof was a wrong to plaintiff for which in the past it was held they were liable in damages.

The case so far seems to be based on the English case of *Vavasour v. Krupp*, L. R. 9 Ch. Div. 351. It was there held by the Chancery Court of England that a suit was not maintainable by an English patentee against the agents of a foreign sovereign stationed in England and in possession of shells, the making and use of which was an infringement of the patent, to enjoin the agents from delivering them to the sovereign. But a delivery of the shells to the sovereign was not a use of them in violation of the patent. The foreign sovereign owned the shells and was entitled to their possession. The patentee's sole right was to have the shells destroyed. But that was a right which could not be asserted in a suit against the agents. This case supports the decision in the *Schild Case* in so far as it held that the plaintiff was not entitled to a destruction of the gate. It does not support it in so far as it was held that the officers sued were not enjoined from further using the gate. The *Postal Supply Company Case* was based on the decision in the *Schild Case*. Mr. Justice Holmes approved the holding therein that a patentee is not entitled to an injunction against the officers of the United States enjoining them from using an article infringing a patent. In referring to the *Schild Case*, he said:

"It was pointed out that the defendants had no personal interest in the continuance of the use, and that so far as the injunction was concerned the suit was really against the United States. Of course, if those defendants were enjoined, other persons attempting to use the caisson gate would be, and thus the injunction would practically work a prohibition against its use by the United States."

But this is what happened in all cases above referred to in which suits have been held maintainable against the officers of a state enjoining them from acting on behalf of the state. The injunction granted in effect prevented the state from so acting, or rather its officers from so acting, on its behalf. The *Postal Supply Company Case*, however, apart from this feature of it, would seem to have been decided right. It appeared that the Syracuse postmaster, who was sued, had himself never used the canceling and postmarking machine. It had only been used by two subordinates in the office. Of course, if any one was to be enjoined, it should have been those guilty of using it, and not the postmaster.

In none of the other cases had the state officials sued either committed any wrong against the plaintiff, or were they then committing any wrong against them, or were they threatening to commit any wrong against them. In the *Cunningham* and *Christian Cases* no relief even

was sought against the state officers sued. In each case the suit was to subject property, the title to which was in the state, to the payment of an indebtedness on its part. In the Cunningham Case the property was the railroad which the state of Georgia had purchased under the first mortgage and the title to which it had acquired, and it was sought to be subjected to the payment of second mortgage bonds indorsed by the state. In the Christian Case the property was stock in a certain railroad and dividends thereon owned by the state and in the possession of the State Treasurer, and they were sought to be subjected to payment of the bonds of the state to whose payment they had been pledged. Such relief was not relief against the Governor and Treasurer of the state, defendants in the one case, or against the Treasurer of the state, defendant in the other case; but in each case the relief sought was against the state whose officers or officer alone had been sued.

In the Jumel, Southern, and Smith Cases, though relief was sought against the state officers sued, it was not to make compensation for a past wrong or to cease withholding property owned by plaintiff and which they were withholding from him, or to enjoin them from committing a threatened wrong. It was to compel the state officers to do something which the plaintiffs had no right to have them do, i. e., to take funds of the state over which they had more or less control and pay the state's debts with them. There was no statute in force imposing the duty on the state officers sued of doing that which it was sought to compel them to do. The relief sought was to compel the state whose officers were sued to pay their debts by acting on those officers.

The Ayers and McGhee Cases, of all these cases where it was rightly held that the suits were not maintainable, are probably the most difficult to distinguish from those where it has been held that the suit was maintainable. The Ayers Case is one of a number of cases in the Supreme Court of the United States known as the "Virginia Coupon Cases." The state of Virginia had issued bonds containing a provision that the bonds and coupons should be receivable in payment of taxes due on it. The state desired to repudiate the bonds, and, in order to understand the Ayers Case, a brief résumé of the means resorted to by the Legislature of the state to embarrass and prevent the use of the coupons cut from these bonds in payment of taxes will be helpful. The first step was an enactment that only gold or silver coin or United States treasury or national bank notes should be receivable in payment thereof. This act was held unconstitutional by the Supreme Court of Virginia. The Legislature then enacted that the bonds should be subject to a certain tax and the tax collectors should deduct this tax from the coupons when tendered and credit only balance of the coupons on the taxes. This was overthrown by the Supreme Court of the United States in the case of *Hartman v. Greenhow*, 102 U. S. 672, 26 L. Ed. 271. The suits in which the legislation down to this last act had been invalidated were suits in mandamus, and by them, notwithstanding such legislation, the tax collectors were compelled to accept the coupons in payment of taxes. The Legislature then directed

its attention to suits in mandamus in such cases. It provided for troublesome proceedings for the establishment of the genuineness of the coupons before the writ could issue. This legislation was upheld by the Supreme Court of the United States in the case of *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. Ed. 468. The result was that the taxpayers quit resorting to mandamus proceedings. They tendered their coupons and then rested on their oars. This forced the tax collectors to take action, for the state wanted its taxes. Suits could not be brought to collect them, for there was no legislation authorizing suits, and there had to be such legislation in order that suits might be brought. The only action which they could take was to distrain and levy for taxes, and this they did.

Thereupon arose the *White and Chaffin Cases*, hereinbefore cited, which were suits in trespass by taxpayers against the tax collectors to recover damages, and the *Poindexter Case*, hereinbefore cited, which was a suit by a taxpayer against the tax collector to recover the property levied on, which suits were held maintainable as heretofore shown. It was evidently these decisions which brought about the legislation out of which arose the *Ayers Case*. That legislation authorized suits to be brought for the recovery of taxes in the name of the state and provided further that, if the defendant relied on a tender of coupons as payment of the taxes, the burden should be on him to prove both the tender and the genuineness of the bonds. The legislation was valid. No fault was or could have been found with it. The collection of taxes by suit may be authorized, and the taxpayers had no right to tender in payment of their taxes coupons unless they were genuine. There had been, however, previous legislation providing that in suits where the tender of coupons was involved the taxpayer should produce the original bonds from which they were cut, and that expert evidence as to genuineness was not admissible, and the claim on behalf of the state was that this legislation applied to suits for the collection of taxes authorized by this subsequent legislation. Thereupon a suit was brought in the United States Circuit Court for Virginia against the Attorney General of that state and certain other officers charged with the bringing of such suits to enjoin them from so doing, on the ground that the previous legislation practically cut off the defense that genuine coupons had been tendered, and hence impaired the obligation of the contract under which they had been issued and accepted. That court having granted a restraining order and confined the Attorney General for disobeying it, the matter was brought before the Supreme Court by writ of habeas corpus. It held that the lower court had no right to make the restraining order and released the Attorney General.

It is to be noted that the suit had been brought, not by any taxpayer, but by an Englishman who had bought up the coupons on a speculation and sold them to taxpayers. He therefore had no direct interest in the matter of enjoining the bringing of the suits against the taxpayer. His interest was consequential solely—the effect that the right to bring such suits and to hamper the defense to them would have upon the coupons which he still had. He had no right to bring the

suit, as had been held in the previous case of *Marye v. Parsons*, 114 U. S. 325, 5 Sup. Ct. 932, 962, 29 L. Ed. 205. But, this apart, the Attorney General and other prosecuting officers had the right to bring suits the bringing of which was sought to be enjoined. The statute authorized it and was valid. The tender of the coupons was a good defense only in case the coupons tendered were genuine and the state had the right to litigate the matter. The question of the application of the previous legislation as to the production of the bonds from which the coupons had been cut and exclusion of expert evidence and the validity thereof could come up in these suits and there be disposed of. The suits, therefore, which the officers were sought to be enjoined from bringing, were not groundless suits, but suits which they had a right to bring. In bringing them no wrong would be done the taxpayer. The threatened action which was sought to be enjoined would not, if taken, be a wrong to the plaintiff. Besides each taxpayer was threatened with but a single suit. Hence it was properly held that suit against the state officers was not maintainable. The ground of the decision, therefore, was not that the suit was against the state, but because the state officers were not about to do that which would be a wrong to the plaintiff.

In the *McGhee Case* the Legislature of Alabama had passed an act fixing maximum rates of toll for passage over a certain bridge and provided penalty for any charge in excess thereof, recoverable by the person overcharged. No other than the person overcharged had any right to sue for the penalty. There was a general statute making it an offense for any bridge company, or any of its officers or agents, to charge tolls in excess of those authorized by its charter, or, if the charter did not specify the amounts to be charged, in excess of a reasonable toll, and prescribing a fine for so doing. Prosecutions under this statute were by indictment in the name of the state. After the passage of the special act, a large number of indictments—100 or more—were found against the bridge company's tollgate keeper. They were and could only have been found under the general statute. The suit as originally brought was against the state of Alabama, the Governor and Attorney General thereof as such—they being called on to answer on behalf of the state—and the state's attorney for the county wherein the indictments were found. The bill claimed that the special act was unconstitutional in that the rates fixed thereby were confiscatory. Subsequently the case was dismissed as to the state, and the call on the Governor to answer on behalf of the state was stricken out. Pending the suit, a preliminary injunction was granted against the Attorney General restraining him from instituting proceedings in mandamus to compel the bridge company to charge tolls in accordance with the special act or forfeiting its charter for charging in excess thereof and also one against the state's attorney restraining the prosecution of the indictments. The final decree adjudged the special act unconstitutional and made the preliminary injunctions perpetual. The decree was reversed and the lower court directed to dismiss the bill. The sole ground upon which it was held that the plaintiff was not entitled to a decree against the state's attorney having in charge the pros-

ecution of the indictments enjoining him from prosecuting them was that they were criminal proceedings. This much of the holding was not placed on the ground that, in so far, the suit was one against the state of Alabama. It might also have been placed on the ground that the state's attorney had the right to prosecute those indictments. The statute under which they had been found was not, and was not claimed to be, unconstitutional. What he was about to do, therefore, was not a wrong to the plaintiff. The ground upon which it was held that plaintiff was not entitled to any relief as to the Attorney General does not so clearly appear. The confusion, if such there is, grows out of the uncertainty as to what relief other than an injunction restraining the prosecution of the indictments the bill was construed as seeking. There is room to think that all the other relief which the bill was construed as seeking was an adjudication that the special act was unconstitutional. Of course, if such was the case, no relief whatever was sought against the Attorney General; and as was said by Mr. Justice Peckham in the Young Case:

"A state superintendent of schools might as well have been made a party."

It is possible, however, that it was construed as seeking an injunction against the Attorney General in the matter of suits to recover penalties for excess charges of tolls under the special act and further restraining him from instituting a proceeding in mandamus to compel obedience to the act or one forfeiting its charter for disobedience thereof. If it was construed as seeking an injunction against him in the matter of suits to recover the penalties, the ground upon which it was held—that the suit, in so far, was not maintainable—undoubtedly was that the Attorney General had and could have no connection with the bringing of those suits. The penalties were recoverable only by the person overcharged. That the bill should have been construed as seeking an injunction against the Attorney General restraining him from instituting mandamus or forfeiture proceedings cannot be questioned, for the bill expressly prayed therefor, and one of the preliminary injunctions made perpetual was to that effect. The doubt as to whether the bill was construed as seeking such an injunction is due to the fact that no mention of this feature of the bill is made in Mr. Justice Harlan's opinion. If it was so construed, the ground upon which it was held that the plaintiff was not entitled to such relief must have been that such a proceeding was a single proceeding which the plaintiff had no equity to prevent being instituted. Though groundless, it was not an equitable wrong to plaintiff for the Attorney General to bring it, and hence not enjoinable. There is nothing in the Young Case against this holding in this particular being sound. For, though in that case the Attorney General disclaimed any intention to institute any proceedings besides the mandamus proceedings, it was possible for him to subject the plaintiff to a multiplicity of suits and he had no right to expect plaintiff to rely on his intentions. In the McGhee Case it was not possible for the Attorney General to institute any proceeding but the single proceeding in mandamus or forfeiture. There is therefore nothing in the Ayers and McGhee Cases in conflict

with the cases involving suits against state officers having to do with past, present, or threatened action on their part constituting a wrong to plaintiff. Possibly there are expressions in the opinions therein which it may be difficult to harmonize with those cases. But in so far as those expressions are in conflict therewith they will have to be ignored.

A consideration, therefore, of all the cases in the Supreme Court of the United States in which the question as to the maintainability of a suit in a federal court against officers of a state has arisen—in many of which the suit has been held maintainable, in others of which it has been held not maintainable—leaves no room for doubt as to the maintainability of such a suit where the relief sought is against a threatened wrong such as equity will enjoin, just as much so as where it is based on a past or present wrong. The whole matter is well put by Mr. Justice Lamar in the Hopkins Case. He there said:

“But immunity from suit is a high attribute of sovereignty, a prerogative of the state itself, which cannot be availed of by public agents when sued for their own torts. The eleventh amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law.”

Again he said:

“The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers.”

And again he said:

“Neither a state nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In such cases the law of agency has no application; the wrongdoer is threatened as a principal and individually liable for damages inflicted and subject to injunction against the commission of the acts causing irreparable injury.”

And in this connection it is to be distinctly noted that the maintainability of the suit in such a case to no extent depends upon whether the state will be affected by its maintenance. In all the cases where complaint was made of a threatened wrong and in which it was held that the suit was maintainable, it was so held notwithstanding the state was so affected by the granting of the relief sought that no action at all, in such particular, could be taken on its behalf. The state was also seriously affected in the suits where complaint was made of the present wrong of withholding property from plaintiff and in which the suit was held maintainable. Its officers were deprived of the possession of the property which they held for it. It was only in the cases where complaint was made of a past wrong that the state was not affected by the maintainability of the suit. It was not otherwise affected than thereby other state officers would be deterred from committing like wrongs on its behalf. In order then for a suit in a federal court against state officers seeking relief against threatened wrong not to be maintainable, it is not sufficient that the state be affected thereby, no matter to how great extent.

But though, as I think, there cannot be the slightest doubt that a suit is maintainable in a federal court against state officers seeking relief against a threatened wrong such as equity will enjoin, notwithstanding all action in that particular on behalf of the state will thereby be prevented and the state to this extent will be affected by the maintenance of the suit, for many years great uncertainty has existed as to the maintainability of such a suit. To a certain extent this uncertainty has been removed by the Young and subsequent cases, and yet it has not been entirely removed. The positions of the parties hereto is evidence of this. The defendants with much earnestness and sincerity of conviction contend that this suit is not maintainable. The plaintiff has too narrow an idea as to the maintainability of such a suit. Had it the true view, it would not have appended to the names of the defendants in the caption of its bill the title of the offices held by them, respectively, which I treat as mere *descriptio personarum*. According to the true view of the matter, no reference should have been made in the caption to their official capacities, thereby giving room for the impression that they are sued in such capacities. They are not so sued. They are sued in their individual capacities to enjoin them from committing a threatened wrong under cover of their official capacities. Other striking evidence of this may be noted. In the Young Case Mr. Justice Peckham said:

"It cannot be stated that the case before us is entirely free from any possible doubt, nor that intelligent men may not differ as to the correct answer to the question we are called upon to decide."

But it seems to me that a correct observation, classification, and generalization of the previous relevant cases in the Supreme Court rendered the case then before the Supreme Court entirely free from doubt and left no room for intelligent men to differ as to the question it was then called upon to decide. The effort was made in that case to settle the law on the subject for all time to come, and yet the Supreme Court has had the subject before it since in five cases, to wit, the Scully, the Atlantic Coast Line Company, the W. U. Tel. Company, the Chicago, R. I. & P. R. Co., and the Philadelphia Company Cases, and in the last case it deemed it proper to make another survey of the previous relevant cases. It has even found it necessary since then to review all the previous relevant cases in a case where the wrong with which the suit had to do was a past wrong, to wit, in the Hopkins Case, where there would seem to be very little room for difference of opinion. In the Schild Case it was held that officers could be made to respond in damages for a past infringement of a patent, but could not be enjoined from present and future infringement. That they could not be so enjoined was upheld in the Postal Supply Co. Case and the reason which Mr. Justice Holmes gave for the position really undermined the many previous cases in which it had been held that threatened action might be enjoined, notwithstanding the effect thereof was to prevent any action in that particular on behalf of the state. The course of Mr. Justice Harlan in reference to the matter indicates considerable confusion of thought in regard to the matter. Prior to the McGhee Case he had

been a radical in favor of the maintainability of suits against state officers. He had dissented from the decisions in the *Jumel*, *Cunningham*, *Southern*, *Ayers*, and *Schild* Cases, i. e., in all the cases prior to the *McGhee* Case where it had been held that the suit was not maintainable except the *Christian* Case. As I view it his dissent was sound in the *Schild* Case but unsound in the others. In the *McGhee* Case he said in his opinion on behalf of the court that the matter had "so frequently been the subject of consideration by the court" that "nothing of importance" remained "to be suggested on either side of the question," and that it was only necessary in each case as it arose "to ascertain whether it falls on one side or the other of the line marked out" in the former decisions. Yet nothing has done more to unsettle what had been settled before, and to create confusion in regard to the matter, than the way he handled that case and certain expressions in his opinion therein. Thereafter he became a radical against the maintainability of such suits.

In his dissent in the *Young* Case he claimed that his position was in substantial accord with what the court had theretofore decided—that the opinion of the majority "departed from principles previously announced by it upon full consideration"—and that he proposed "to adhere to former decisions of the court, whatever may have been once" his opinion "as to certain aspects of this general question." An indication of the confusion of thought under which he was laboring is to be found in the position that he took as to what followed from the decision therein that the suit was maintainable. He said that it followed therefrom that a suit against a state grand jury, a state judge, and a state petit jury to enjoin them from having to do with the proceedings that *Young*, the Attorney General, had been enjoined from instituting and prosecuting would be maintainable. But that did not follow. The state judge and juries in trying and disposing of the proceedings would commit no wrong against the plaintiff; whereas, *Young*, the Attorney General, in instituting and prosecuting them, would. He would thereby subject the plaintiff to a multiplicity of groundless suits all involving the same question. That Mr. Justice Harlan went to his grave thinking that his dissent in the *Young* Case was sound is evident from his dissent in the *Hopkins* Case, the last case before the court prior to his death involving the question as to the maintainability of suits against state officers or a state agent in any form.

This condition of things has led me to reflect on the probable cause of this uncertainty and confusion of thought. It occurs to me that there are two main sources thereof. One thing that has had much to do with it is a departure from one of the positions Mr. Chief Justice Marshall took as to the maintainability of a suit in the federal court where the sole defendants to the record were state officers, in his masterly opinion in the *Bank of the United States* Case, the pioneer case on the subject. That position was that in no contingency was such a suit against the state and forbidden by the eleventh amendment. This was so because the state, not being a party to the record, was not sued. He said:

"It may, we think, be laid down as a rule which admits of no exception that, in all cases where the jurisdiction depends on the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the Constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a state by citizens of another state, or aliens."

Mr. Justice Swayne took the same position in the case of *Davis v. Gray*, *supra*. He said:

"In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation."

The departure from this position was taken by Mr. Justice Matthews in the *Poindexter Case*. He said:

"The question whether a suit was within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record. The provision is to be substantially applied in furtherance of its intention, and not to be evaded by technical and trivial subtleties."

He put the matter stronger in the *Ayers Case*. He said:

"It must be regarded as the settled doctrine of this court, established by its recent decisions, that the question whether a suit was within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record."

And further:

"This, it is true, is not in harmony with what was said by Chief Justice Marshall in *Osborne v. Bank of United States*."

He was led to this departure by the decision in the case of *New Hampshire v. Louisiana*, 108 U. S. 76, 2 Sup. Ct. 176, 27 L. Ed. 656, where it was held that the Supreme Court had no jurisdiction, by virtue of the third article of the Constitution conferring jurisdiction upon it of controversies between two or more states, of a suit by one state against another to collect an indebtedness of the latter to a citizen of the former assigned to it for the purpose of collection. The decision, however, in that case was not because the suit was not a suit between the two states, but was in fact a suit between the assignor of the indebtedness and the defendant state, but because a party plaintiff to a suit has no right to enforce the cause of action of another against the defendant thereto. He can only enforce his own cause of action. Mr. Chief Justice Waite said:

"One state cannot create a controversy with another state within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other state to its own citizens."

Mr. Justice Matthews, in thus departing from this position of Mr. Chief Justice Marshall, seems to have thought that it was essential to do so in order that a suit in which relief was sought against the state might not be rendered maintainable by the trick of not making the state a party defendant to the record. But such a suit could not thereby be

made maintainable; for, though the eleventh amendment or the common-law rule against suability of a sovereign would not be against its maintenance, the rule that a suit is not maintainable in the absence of indispensable parties would. And in such a case the state would be an indispensable party. So it was that Mr. Chief Justice Marshall supplemented his position that the eleventh amendment did not apply if the state was not a defendant to the record by the further position that, when the state was not such defendant and the suit was against state officers only, the test of the maintainability of the suit was whether the state was an indispensable party to the suit. He said:

"The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

That the indispensableness of the state as a party is the test of the maintainability of a suit against its officers was recognized by Mr. Justice Miller, in the *Cunningham Case*. He said:

"Whenever it can be clearly seen that the state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction."

Judge Marshall took care to point out that it was the fact that the state was an indispensable party to the suit which alone would render it not maintainable. It was not sufficient that the state was a proper party to the suit. The absence of a proper party to the suit, if for any reason he cannot be made such, as, for instance, he is out of the jurisdiction, or if it is a state and cannot be sued, is not in the way of the maintenance of the suit. This principle has found expression in the old 47 equity rule. In the *Bank of the United States Case* he said:

"The direct interest of the state in the suit, as brought, is admitted; and, had it been in the power of the bank to make it a party, perhaps, no decree ought to have been pronounced in the cause, until the state was before the court. But this was not in the power of the bank."

This was a clear recognition, as was the decision in that case, that the fact that a state will be affected by a suit against state officers is not a consideration against the maintainability of the suit. The result of the decision therein prevented the collection on behalf of the state of Ohio of the tax which its officers tried to collect from the bank and from thereby driving the bank out of the state, which was the motive behind the enactment of the unconstitutional statute imposing the tax.

[2] But it seems to me that the better test as to the maintainability of a suit in a federal court against state officers is to be found in a consideration of the relief sought therein. If the relief sought is relief against the state, it is not maintainable. Such relief may be the only relief sought as in the *Cunningham* and *Christian Cases*, or it may be sought through relief against the officers, as in the *Jumel*, *Southern*, and *Smith Cases*. If, however, the sole relief sought is relief against the state officers, it is maintainable. Such it is if it seeks compensation for a past wrong, recovery of possession of property wrongfully withheld, constituting a present wrong, or an injunction against a threat-

ened wrong such as equity will enjoin. This is the better test because it is the test of whether the state is an indispensable party. It is the ultimate test, and it is always best to think in ultimates.

The way in which this departure from Mr. Chief Justice Marshall's position, that a state was not sued within the eleventh amendment unless it was a defendant to the record, has contributed to the uncertainty and confusion of thought to which I have alluded, is that the position that the state can be said to be sued when not a defendant to the record within the eleventh amendment has lent color to the idea that, in order for it to be so said, it is sufficient that the state will be affected by the maintenance of the suit and not essential that the relief therein sought be against it, which we have seen is not true. And the matter has been helped along by the fact that in taking this position the Supreme Court has not made it clear that, in order for a suit to be against the state when not a party defendant to the record, it is essential that the relief therein sought be against it, and that it is not sufficient that the state may be merely affected by its maintenance. As it has now to be accepted that a suit may be a suit against a state though it is not a party defendant to the record, it should be clearly understood that in order to this end the one thing is essential and the other not sufficient.

The other source of uncertainty and confusion of thought to which I have referred is the fact that most of the cases in the Supreme Court, involving suits in a federal court to enjoin state officers from taking action which they threaten to take, have been suits where the threatened action sought to be enjoined was action to enforce an unconstitutional statute, and, in stating the law as to the maintainability of such suits in the opinions therein, it has been given a partial cast. Take, for instance, the quotation from the opinion of Mr. Justice Peckham in the *Young Case* heretofore made, which is taken as the kernel of his opinion therein. In this quotation he undertakes to state the law to be gathered from the various cases in the Supreme Court considered by him. He states that it is to the effect that a suit to enjoin proceedings to enforce an unconstitutional act violating the federal Constitution is maintainable. The parties hereto take it that by "unconstitutional act" he meant an unconstitutional statute. But it is by no means certain that he intended to so limit those words. He may have intended to include an unconstitutional act on the part of any state officer. Which ever he meant, as we have seen, the statement was only a partial statement of the law. The law is that a suit to enjoin the commission of any threatened wrong is maintainable. It is because a multiplicity of proceedings to enforce an unconstitutional act is a threatened wrong, and a suit to enjoin such proceedings is a suit to enjoin the commission of a threatened wrong, that such a suit is maintainable. It follows from this that a suit to enjoin any threatened wrong, no matter what may be its character, provided that it is such as equity will enjoin, is maintainable. For some reason the law was not put in this general and ultimate form. Quotations from other opinions in this partial form might be made. So stating the law was calculated to mislead, especially one whose thinking may be superficial, into supposing that such is the whole law on the subject of the maintainability of suits to enjoin threatened action.

[3] Applying the law on this subject, as I have felt constrained to hold it to be, how then is it as to the maintainability of this suit? Is the relief sought relief against the state of Kentucky, and is the state an indispensable party to the suit? If not, and the relief sought is relief against the state officers sued, will the threatened action sought to be enjoined, if taken, be a wrong to plaintiff, and such a wrong as equity will enjoin? It is clear that no relief is sought against the state of Kentucky. The sole relief sought is against the state officers sued. They are sought to be enjoined from taking certain action which they threaten to take. It is certain, also, that, if the assessment complained of is void on either ground relied on, the threatened action sought to be enjoined, if taken, will be a wrong to the plaintiff such as equity will enjoin. That action is the institution and prosecution of a multiplicity of groundless suits and the taking of steps which, if taken, will result therein. This action, if taken, will be a wrong to plaintiff and such as equity will enjoin. It may sound strange to the defendants that in taking such action they will commit a wrong against plaintiff; but, if the claim that the assessment complained of is void on either ground relied on is correct, such is the legal conception of their action.

I must not leave this feature of the case without taking notice of the cases of *Coulter v. Weir*, 127 Fed. 897, 62 C. C. A. 429, and *Coulter v. L. & N. R. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615. Each of these cases was an appeal from a decree entered by me, one to the Sixth Circuit Court of Appeals, and the other to the Supreme Court. Each was a suit complaining of an assessment made by the same board that made the assessment complained of herein and under the same statute. That complained of in the first case was against the Adams Express Company, and in the second one against the plaintiff herein. In each case the decree entered was in favor of the plaintiff and, in each, on the appeal the decree was reversed, in the first case only in part. In each case it was held that I had erred in upholding a suit against the state in violation of the eleventh amendment. In view of this experience it is quite important that I should not fall into the same error again. And this necessitates a somewhat careful consideration of both those cases.

In the *Weir* or *Adams Express Company Case*, the person then Auditor of the State was the sole defendant. The relief decreed by me was that the defendant be enjoined from apportioning or certifying the assessment complained of in excess of a certain amount for local taxation and from collecting any state taxes thereon, those on the amount thereof not complained of having been paid, and that the assessment in excess thereof be set aside and held for naught. The portion of the decree affirmed was in so far as it enjoined the defendant from apportioning or certifying the excess portion of the assessment for local taxation. It was held that in so far the suit was maintainable and the plaintiff entitled to relief. Judge Lurton said:

"This suit is clearly maintainable so far as it seeks to enjoin the defendant from certifying the assessment complained of to the county court clerks. The suit to that extent is a suit against Coulter as an individual, and the object is to restrain him from certifying the assessments made by the state board, which he claims he is required to do by the law of the state, but which the

complainants say is not a valid authority. Coulter must therefore justify himself by showing, if he can, that the authority under which he claims to act is sufficient."

He cited in support of this decision the prior decision of that court in the case of *Taylor v. L. & N. R. Co.*, 88 Fed. 350, 31 C. C. A. 537, and the decision of the Supreme Court of the United States in the case of *Stone, Auditor, v. Farmers' Bank*, 174 U. S. 409, 19 Sup. Ct. 880, 43 L. Ed. 1027. The portion of the decree reversed was in so far as it related to state taxes, i. e., set aside and held for naught the assessment in excess of a certain sum and enjoined the defendant from collecting state taxes on such excess. It was held that in so far as the decree set aside and annulled the assessment it was relief against the state of Kentucky, and hence erroneous. Judge Lurton said:

"The court in this exceeded its jurisdiction, for jurisdiction over the defendant did not give it jurisdiction over the state of Kentucky, as the decree seems to assume."

Undoubtedly in so far the judgment was erroneous, and for the reason if none other, it was not relief against the defendant. This feature of the decree escaped my attention, and I cannot say now that, had I noticed it, the result would have been different. The ground upon which the decree was held to be erroneous in so far as it enjoined the defendant from collecting any taxes on the excess was that the defendant had nothing to do with collecting state taxes. Judge Lurton said:

"Counsel representing the appellee have not pointed out any provision of law under which the defendant, as Auditor, had any power or authority to coerce the payment of the tax so assessed, and we have searched in vain for any remedy against recalcitrant taxpayers of such a franchise tax, so far as same is due the state, other than those found in sections 4091 and 113, Kentucky Statutes 1903."

He expressly recognized that, if the defendant had anything to do with the collection of state taxes, the suit was maintainable against him to enjoin him from attempting to collect them, the same as it was maintainable against him to enjoin him from apportioning or certifying the assessment for local taxation, which there was no question it was his function to do. He said:

"If the defendant had been about to take some step under color of the law tending to complete the assessment, or if he had been authorized to seize property and was about to do so, then he was, assuming the case to be with the complainant on the merits, about to commit a trespass for which he would be individually liable, and in a proper case equity might enjoin his proposed action upon the ground of his want of legal authority. But this is not the case made in respect to the tax due the state, and the bill, so far as it sought relief against the state tax, must be dismissed without regard to the merits."

There are provisions in the statutes of Kentucky making it the duty of the Auditor to enter in account as a demand payable at the treasury such state taxes, to report to the Attorney General a delinquency arising from a failure to pay them, and to cause proceedings to be instituted because of the failure, to which the court's attention was not called and which it did not find in its research. They are sections

144, 145, and 152, Kentucky Statutes. Had the court known of these provisions, it would have upheld the decree in so far as it enjoined the defendant from taking steps to collect state taxes as well as in so far as it enjoined him from apportioning or certifying the assessment for local taxation.

Here no relief against the assessment is sought. It is not sought to have it set aside and held for naught. And the Auditor is not the sole defendant. The Attorney General and prosecuting officers having to do with the institution and prosecution of proceedings against plaintiff because of its delinquency in payment of state taxes are defendants also, and it is also unquestionable that the institution of a multiplicity of groundless suits involving the same question is such a wrong as equity will enjoin. So the decision in this case is an authority in support of the maintainability of this suit as to both state and local taxes, instead of being against its maintainability to any extent. In the Louisville & Nashville Railroad Company Case the same position was taken as in the Weir or Adams Express Company Case. It was held that the suit was maintainable in so far as it sought to enjoin the apportionment and certification for local taxes, but not in so far as it sought to enjoin the collection of state taxes. The latter holding was based on the Weir or Adams Express Company Case. Mr. Justice Holmes said:

"We need not stop to show that so much of the bill as seeks an injunction against collecting the state tax, and the portion of the decree which orders a receipt to be executed on the part of the state, cannot be maintained. See *Coulter v. Weir*, 127 Fed. 897, 906, 912 [62 C. C. A. 429]. On the other hand, in a proper case, a bill may be brought to restrain apportionment and certification to the counties. *Fargo v. Hart*, 193 U. S. 490, 495, 503 [24 Sup. Ct. 498, 48 L. Ed. 761]."

The suit was against not only the Auditor, but the members of the Board of Valuation and Assessment. Undoubtedly the decree in so far as it ordered a receipt to be executed on the part of the state was erroneous. I do not recall that I saw the decree after handing down my opinion in the case, and I cannot say that it would have made any difference had I seen it. My opinion in the case, reported in 131 Fed. 282, however, shows that as I viewed the matter the sole relief sought was to enjoin the apportionment and certification of the assessment for local taxation. It is certain that there is nothing in this decision against the maintainability of this suit in toto. So far as the decision as to state taxes was concerned, it took for granted what had been held in the Weir or Adams Express Company Case, that the Auditor had nothing to do with collecting state taxes, and the Attorney General and other prosecuting officers were not defendants, and no injunction was sought against institution and prosecution of proceedings for delinquency in payment of state taxes. There is therefore nothing in this decision in support of the contention that this suit is not maintainable because it is a suit against the state.

Finally, it is to be noted that, if this suit had been brought in the state court, instead of this court, it would have been held maintainable. The Court of Appeals has frequently sustained suits in the state court against state officers in which complaint was made of assess-

ment made by the Board of Valuation and Assessment under the statute in question here, and relief was sought against state as well as local taxes. The following are cases of this sort, to wit: Coulter v. Louisville Bridge Company, 114 Ky. 42, 70 S. W. 29; Aetna Life Ins. Co. v. Coulter, 115 Ky. 787, 74 S. W. 1050; Fidelity & Casualty Co. v. Coulter, 115 Ky. 805, 74 S. W. 1053; Hager v. American Surety Co., 121 Ky. 791, 90 S. W. 550; James v. Kentucky Refining Co., 132 Ky. 353, 113 S. W. 468; James v. U. S. Fidelity & Guaranty Co., 133 Ky. 299, 117 S. W. 406; James v. American Surety Co., 133 Ky. 313, 117 S. W. 411. The suits in the Aetna Life Insurance Company, Fidelity & Casualty Company, United States Fidelity & Guaranty Company, and the last of the two American Surety Company cases were suits against the members of the Board of Valuation and Assessment to enjoin them from making an assessment. The suits in the Louisville Bridge Company and Kentucky Refining Company Cases were suits against the Auditor to enjoin him from collecting the state taxes due on assessments made by the Board of Valuation and Assessment. And the first American Surety Company Case was a suit against the members of the Board of Valuation and Assessment and the Auditor, brought, after a final assessment had been made by the board, to enjoin the members of the board from making the assessment and the Auditor from collecting the state taxes due on the assessment. In each one of these seven cases, except the Kentucky Refining Company Case, the plaintiff was held entitled to judgment, and in the Kentucky Refining Company Case it was denied judgment on the merits only. In no one of them was it intimated that the members of the board or the Auditor were not suable. If this suit is not maintainable because it is a suit against the state, then no one of those suits were maintainable on the same ground. For though the eleventh amendment has no application to suits in the state court, the common-law rule that a sovereign is not suable, of which that amendment was an embodiment, has, and is just as effective against the maintenance of a suit against the state as it is, and there was no statute permitting such suits to be brought. And the Louisville Bridge Company, first American Surety Company, and Kentucky Refining Company Cases are authorities against the position taken by Judge Lurton in the Weir or Adams Express Company Case that I had erred in holding that the Auditor had anything to do with collecting state taxes which he could be enjoined from doing. In view then of all that I have said, I think that I am warranted in holding that defendant's preliminary contention is not sound and in being confident that my position will be able to stand against just criticism.

[4] 3. This brings me to the merits of the case, to wit, the claim of plaintiff that the assessment is void. I will consider first the claim that it is void because the board did not follow the statute. As I make it, there are three particulars in which it is claimed that the board did not so do. As stated, plaintiff's property is a physical and organic unit covering 13 states. That which was assessable by the board was not that part of this unit which is in this state but that part of the intangible part thereof located therein, which I designate as its

franchise therein. The method by which it valued and assessed it was this: It apportioned to this state a part of the total value of the whole unit and then deducted therefrom the assessed value of that part of its tangible property in this state, assessed by the Railroad Commission, another body, whose function it is to assess it. The balance it fixed as the value of that part of plaintiff's franchise in this state and is the assessment complained of. The apportionment of a part of the total value to this state was not made on a mileage basis. Roughly speaking, the Kentucky mileage is in round numbers 25 per cent. of the total mileage. It apportioned, according to the presentation before me, 35 per cent. thereof, or 10 per cent. more than the mileage proportion. It obtained this percentage by averaging the gross receipts proportion and the net income proportion, as it determined them to be, respectively, with the mileage proportion. The plaintiff claims that this method was not in accordance with the statute. Its claim is that the board before apportioning to this state any part of the total value should have deducted therefrom the value of plaintiff's tangible property everywhere, i. e., in this state and elsewhere, then apportioned to this state a part of this balance, and that it should have made this apportionment on a mileage basis. There were therefore, according to plaintiff, two particulars in which the board did not follow the statute in the method which it pursued in making the assessment. One was in not first deducting from the total value the value of all the tangible property. And the other was in not apportioning what was apportioned to this state on a mileage basis. The other particular in which it is claimed the board did not follow the statute has to do with the hearing thereby provided.

To fully appreciate these claims of plaintiff and to dispose of them correctly, a general survey of the statutory provisions under which the board acted will be helpful. They are, as heretofore stated, sections 4077 to 4081, inclusive, and 4083, Kentucky Statutes. Such a survey will bring out a number of imperfections therein and show that it is a rather crude piece of legislation. It originated at the first session of the Legislature held after the adoption of the present Constitution. Certain sections of that Constitution had provided, with a note of emphasis, that taxes should be uniform on all property in the state; that all property not thereby specifically exempted should be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; that all property, whether owned by natural persons or corporations, should be taxed in proportion to its value; and that all corporate property should pay the same rate of taxation paid by individual property. In compliance with these provisions, an act entitled "An act in relation to revenue and taxation" was passed at that session of the Legislature and became law November 11, 1892. The first five and the seventh sections of article 3 thereof are, with the exception of certain changes made by subsequent amendments, to some of which reference will be made, the same as the sections of the Kentucky Statutes above referred to. Section 4083 relates to the matter of the hearing and will be passed by for the time being.

Section 4077 provided for the payment annually by 18 enumerated

corporations, companies, or associations, of which "every railroad company or corporation" is the first named, and "every like company, corporation or association, also every other corporation, company or association, having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service," of a tax on its franchise, to the state and to the subordinate jurisdiction in which it may be exercised, in addition to the other taxes imposed on it by law, and for the fixing and apportionment to the subordinate jurisdiction of the value of such franchise by the Auditor, Treasurer, and Secretary of State, who were constituted a Board of Valuation and Assessment for that purpose.

The Court of Appeals of Kentucky has held the following companies, not amongst those enumerated, to be covered by the general language used, to wit, race track, tank car, and refrigerator car companies. *Latonia A. & S. Association v. Donnelly*, 106 Ky. 325, 50 S. W. 251; *Louisville Tank Line Co. v. Commonwealth*, 123 Ky. 81, 93 S. W. 635; *Morrell Refrigerator Car Co. v. Commonwealth*, 128 Ky. 447, 108 S. W. 926.

It has held the following companies not to be covered thereby, to wit, ordinary business corporations, insurance companies, and title companies. *Louisville Tobacco Warehouse Co. v. Commonwealth*, 106 Ky. 165, 49 S. W. 1069, 57 L. R. A. 33; *Ætna Life Insurance Co. v. Coulter*, 115 Ky. 787, 74 S. W. 1050; *Fidelity & Casualty Co. v. Coulter*, 115 Ky. 805, 74 S. W. 1053; *Hager v. Louisville Title Co.* (Ky.) 85 S. W. 182.

As to the companies covered by the section, those enumerated and those held by the Court of Appeals to be within the general language used, it is to be noted that all of them except one conduct and operate their business along fixed and definite lines. The one that does not so operate and conduct its business is a guaranty or security company. The lines of a number of those who so operate and conduct their business are limited to this state, and most of these usually, if not always, to a single subordinate jurisdiction therein. They are gas, water, street railroad, electric power, turnpike, and race track companies. The lines of most of them cover other states as well as this state. They are a railroad, ferry, bridge, express, telegraph, press dispatch, telephone, palace car, dining car, sleeping car, chair car, tank car, and refrigerator car companies. Of these a ferry company and a bridge company are limited to only one other state. The properties of a railroad company, bridge, telegraph, and telephone companies constitute physical and organic units; those of the other companies organic units only. These companies may be placed in three classes, to wit, companies which operate and conduct their business wholly in this state, companies which operate and conduct their business partly in this state and partly elsewhere, and companies which operate and conduct their business wholly elsewhere. So far as the first two classes are concerned, it is immaterial where they were organized. It is sufficient that they wholly or partly operate and conduct their business in this state. So far as the last class is concerned, it is essential that they be organized in this state; for, as they operate and

conduct their business wholly elsewhere, there is no other basis of jurisdiction. Each of these three classes of companies may be subdivided into companies which operate and conduct their business along definite and fixed lines and those which do not. But it is not material to note this except in case of the second class, i. e., companies which operate and conduct their business partly in this state and partly elsewhere.

Section 4078 provides for all the companies covered by section 4077 making and delivering to the Auditor a statement as to certain enumerated facts essential to enable the board to fix the value of the franchise which it is required to assess. The facts as to which they are required to make statement are as follows, to wit: Name and principal place of business; kind of business; amount of capital stock, preferred and common; number of shares of each amount of stock paid up, par and real value thereof; highest price at which such stock was sold at a bona fide sale within 12 months next before the 30th of June of the year in which the statement is made; amount of surplus funds and undivided profits, and all other assets; total amount of indebtedness as principal; amount of gross or net earnings or income, including interest on investments and incomes from all other sources for 12 months next preceding the 30th of June of the year in which the statement is made; amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment in this state; and fair cash value thereof estimated at price it would bring at a fair voluntary sale. It provides further that they shall make a statement as "to such other facts as the Auditor may require."

Section 4079 is twofold in character. It consists of three sentences. The last sentence is divided into two parts by the word "provided," which seems to have been used without significance. The first two sentences and the first part of the last sentence relate to the statement which is the subject-matter of section 4078. Each of the first two sentences provide for its covering additional facts. The first sentence is in these words:

"Where the line or lines of any such corporation, company or association extend beyond the limits of the state or county, the statement shall, in addition to the other facts heretofore required, show the length of entire lines operated, owned, leased or controlled in this state, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere."

This sentence has application to the first two classes of companies of the three into which I have divided the companies covered by section 4077, to wit, those which operate and conduct their business wholly in this state and those which so do partly in this state and partly elsewhere. It does not have application to all the companies in those two classes. It has application to those only of the first class which operate and conduct their business along definite and fixed lines, where the lines extend beyond the limits of one county and to those only of the second class which so do along such lines. It requires the companies to which it has application to make statement as to the additional facts therein referred to.

The second sentence is in these words, to wit:

"If the corporation, company or association be organized under the laws of any other state or government or organized and incorporated in this state, but operating and conducting its business in other states as well as in this state, the statement shall show the following facts in addition to the facts hereinbefore required: the gross and net income or earnings received in this state and out of this state, on business done in this state, * * * and elsewhere during the twelve months next before the thirtieth day of June of the year in which this assessment is required to be made."

This sentence, too, like the first, requires the companies to which it has application to make statement as to certain additional facts. Literally it may be said that it has application to all companies of the second class, i. e., which operate and conduct their business in this state and elsewhere. Literally also the place of organization has something to do with distinguishing the companies to which this statement applies. But, as it covers companies organized both in this state and elsewhere, i. e., all possible places of organization, it is apparent that so much of the sentence is without significance and mere surplusage. And though the letter of the sentence makes it applicable to all companies of the second class, it is clear that it has application to only such of those companies as do not operate and conduct their business along definite and fixed lines. The first sentence of the section provides as to what additional facts such of those companies as so do along such lines shall make statement; and, as we proceed, an additional consideration will be noted which makes it conclusive that it was not intended that it should have application to such of those companies as operate and conduct their business along definite and fixed lines.

The first part of the third sentence of section 4079 permits the board to excuse a statement as to any of the facts required, where it is impossible to make a correct statement as to it, or it will not afford valuable information in determining the value of the franchise to be taxed.

The last part of the third sentence of section 4079, section 4080, and section 4081 are alike, in that each has to do with prescribing a method or methods for fixing the value of the franchise of companies covered by section 4077 to be followed by the board. In so far as the methods thus prescribed apply, the board is limited to them. It cannot do otherwise than follow them. Together they prescribe four methods—section 4079 one, section 4080 one, and section 4081 two. Literally section 4080 prescribes two, but they are alternative methods applicable to the same companies; but the Court of Appeals, in the case of *James v. American Surety Company*, 133 Ky. 313, 117 S. W. 411, has held that they prescribe but one method. Originally section 4081 prescribed but one method. The other or fourth and last method was prescribed March 15, 1906 (Laws 1906, c. 22), when the whole act on the subject of revenue and taxation was re-enacted with certain changes. Theretofore no method had been prescribed for assessing the franchise of companies of the third class, covered by section 4077, to wit, companies which operate and conduct their business wholly elsewhere, but have been organized in this state. The method so prescribed is applicable to those companies, and it is not important to set

forth in detail that method. Our attention will be limited to the first, second, and third methods, prescribed respectively in the last part of the third sentence of section 4079, section 4080, and section 4081. The last part of the third sentence of section 4079 is the same as it was when originally enacted in 1892 (Laws 1891-92-93, c. 103). It is in these words:

"That said board, from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this state, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid."

[11] Literally the application of the method so prescribed is not determined by the classification I have made of the companies covered by section 4077, but by the place of organization, which is not a feature of that classification. So considered, i. e., literally, it applies only to companies organized in this state and to all companies so organized. But it cannot have application to all companies so organized because to so construe it would render it unconstitutional. The first step in the method is to fix the value of the capital stock of the company. The words "capital stock," as used in this and the other sections of the statutory provisions under consideration, have been construed to mean the entire property of the company, tangible and intangible, and when used in the course of this opinion that is the sense in which they are used. In case then of a company organized in this state, but owning property elsewhere, this property would be included in fixing the value of the capital stock, and, as the next and only other step is to deduct the assessed value of the tangible property in this state, the balance to be the value of the franchise, the assessment thereof would include the property elsewhere. Such an assessment would deprive the company of its property without due process of law and hence would be unconstitutional. The Court of Appeals of Kentucky upheld an assessment of such a company, where this method had been applied, in the case of *Louisville & Jeffersonville Ferry Company v. Com.*, 108 Ky. 717, 57 S. W. 624, 626. The company there was a Kentucky corporation operating a ferry between Kentucky and Indiana and owning a ferry franchise in both states. The ferry franchise in Indiana was included in the assessment. On appeal to the Supreme Court of the United States, it held that the assessment was invalid and reversed the judgment of the lower court. *Louisville & Jeffersonville Ferry Co. v. Com.*, 188 U. S. 385, 23 Sup. Ct. 463, 47 L. Ed. 513. The letter of this portion of section 4079 would include all companies of the third class, i. e., which operate and conduct their business wholly elsewhere, but are organized in this state, like the Southern Pacific Railway Company. If, then, this method is limited to companies organized in this state, to render it constitutional, it must be limited further to such of those companies as operate and conduct their business and have their property wholly in this state, i. e., to all companies of the first class organized in this state. Under this construction it has no

application to companies organized elsewhere who also operate and conduct their business and have their property wholly in this state, and, as we shall see, the other two methods have no application to them, no method has been prescribed for assessing their franchise. And either this position will have to be taken, or the words as to organization in this state will have to be disregarded, and so much of section 4079 construed to have application to all companies of the first class, i. e., which operate and conduct their business and have their property wholly in this state.

Section 4080 prescribed the second method. As originally enacted it was as follows, to wit:

"If the corporation, company or association be organized under the laws of any other state or government, except as provided in the next section, the board shall fix the value of the capital stock as hereinbefore provided and will determine from the amount of the gross receipts of such corporation, company or association in this state and elsewhere the proportion which the gross receipts in this state, within twelve months next before the fifteenth of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this state, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this state."

It was amended by the revision act of March 15, 1906, hereinbefore referred to, and, as amended and as it now is, it is as follows, to wit:

"If the corporation, company or association be organized under the laws of any other state or government, except as provided in the next section, the board shall fix the capital stock in this state by capitalizing the net income derived in this state, or it shall fix the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this state and elsewhere, the proportion which the gross receipts of this state, within the twelve months next before the thirtieth day of June of the year in which the assessments were made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock or the capitalizing of the net earnings in this state, less the assessed value of the tangible property assessed, or liable to assessment, in this state, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this state."

This section as originally and as amended is like so much of section 4079 as prescribes the first method in that according to its letter the place of organization has to do with determining the companies to which it is applicable. It, however, is not the sole factor in so determining. The character of the method prescribed shows that it has application only to companies of the second class, i. e., companies which operate and conduct their business partly in this state and partly elsewhere, and, in view of the third method prescribed by section 4081, it must be held to have application to such companies only as do not so do along definite and fixed lines. If then the place of organization is a factor in determining the companies to which it has application, no method has been prescribed for assessing the franchise of companies of the second class which do not operate and conduct their business along definite and fixed lines and which have been organized in this state. That the intention was that this method should have ap-

plication to companies organized in this state as well as those organized elsewhere is to be inferred from the fact that the second sentence of section 4079, which provides for the statement to be filed by the companies to which it applies, containing certain facts in addition to those set forth in section 4078, and which information is essential to enable the second method to be applied and was enacted for that purpose, is not limited to companies organized elsewhere than in this state, but covers those organized in this state as well as those organized elsewhere. This second method then should be construed as applicable to all companies of the second class who do not operate and conduct their business along definite and fixed lines, without reference to whether they were organized elsewhere or in this state or it has to be accepted that no method has been prescribed for assessing the franchise of such of those companies as have been organized in this state.

As originally enacted, the section treated the property of the companies to which it had application as a unit and provided for an apportionment of a part thereof to this state on a gross receipts basis, i. e., of the same proportion of the value of the capital stock which the gross receipts in this state is of the whole gross receipts. In the case of *Hager v. American Surety Co.*, 121 Ky. 791, 90 S. W. 550, it was held that the board in assessing the franchise of a company to which section 4080 applied was restricted to this method and had no right to treat the part of the franchise in this state as an independent whole in itself and fix its value by a capitalization of the net earnings in this state. This was the occasion of the change in section 4080 made by the revision act of March 15, 1906. According to the section as changed, what was done was to prescribe an additional method and to give the board the right to choose between them. This at least was the letter of the change. And the alternative method which it prescribed was to treat the part of the franchise in this state as an independent whole in itself and fix its value by a capitalization of the net earnings therein. The Court of Appeals, however, as heretofore stated, in the *Kentucky Refining Company Case*, held that the Legislature did not so intend, but intended that both methods should be used at the same time and that to make the letter conform to such intent the word "and" should be substituted for the word "or." The two methods are opposites. By the original method the part was to be treated as a part of a larger whole, and by the new method it was to be treated as an independent whole in itself. According to this construction, therefore, we have what may be characterized as an enforced "harmony of opposites." The decision is bottomed on the idea that the Legislature in empowering a tribunal to assess property must prescribe the method by which it is to value it. Of course, if this is so, it has no power to leave to that body the discretion of making a choice between two alternative methods. But I submit that this idea is not sound. The Legislature does not have to prescribe the method by which such a tribunal is to value the property which it is its duty to assess. It can leave to it the matter of adopting a reasonable or suitable method. The authorities relied on as supporting the position do

not, in my opinion, do so. It is against the position that the statute does not, as we shall see, prescribe the method of valuing the capital stock, the first step in each of the three methods, and it has been recognized by the Court of Appeals from the beginning of this legislation that the board has the right to choose between two methods of so valuing, i. e., the stock and bond and the capitalization methods. The later decision in the case of *Southern Pacific Ry. Co. v. Commonwealth*, 134 Ky. 410, 120 S. W. 309, is against it. It was there held as to a company of the third class, i. e., organized in this state, but operating and conducting its business wholly elsewhere prior to March 15, 1906, when no method had been prescribed for assessing the franchise in this state of such a company, that the board had the power to assess it and to adopt a reasonable and suitable method for so doing. There was therefore no reason for holding that the Legislature did not mean what it said and to leave it to the board to adopt whichever method was most advantageous to the state.

Section 4081 prescribes the third method with which we have to do in this case. As originally enacted, it is in these words, to wit:

"If the corporation organized under the laws of this state or some other state or government be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of this state, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in this state bears to the lines owned, leased or controlled in this state and elsewhere, shall be the value of the corporate franchise of such corporation liable for taxation in this state; and such corporate franchise shall be liable for taxation in each county, incorporated city, town or district through, or into which, such lines pass or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in the state, less the value of any tangible property assessed or liable to assessment in any such county, city, town or taxing district."

The section has been amended twice since its original enactment. The first amendment was made at the same session of the Legislature, near its close, it being a long one, i. e., June 9, 1893 (Laws 1891-92-93, c. 217). It consisted simply in inserting the words "considered in fixing" between the words "shall be" and "the value of the corporate franchise," so that it provided, instead of as originally, that the part apportioned to this state should be the value of the franchise in this state, that it should be considered in fixing such value. The other amendment was by the revision act of March 15, 1906. It omitted the concluding clause, to wit, "less the value of any tangible property assessed, or liable to assessment, in any such county, city, town or taxing district," and added two other clauses. One was the words "or a corporation performing any other public service" inserted after the words "chair car company," the last of the eight companies enumerated therein, so that it would not be limited thereto. The other prescribed the fourth method of assessment hereinbefore referred to applicable to companies organized under the laws of this state which operate and conduct their business along definite and fixed lines entirely elsewhere. As thus changed, and as it was at the time when the assessment complained of was made, the section was as follows, to wit:

"If the corporation organized under the laws of this state, or some other state or government be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company or a corporation performing any other public service, the lines of which extend beyond the limits of the state, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this state, bears to the total length of the lines owned, leased or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this state; but if any such railroad or other corporation organized under the laws of this state have all of its lines outside of this state, the said board shall fix the value of its entire capital stock as hereinbefore provided, and apportioned to this state for taxation therein the proper proportion and not less than one per cent. of its said capital stock, and the amount so apportioned shall be the value of its intangible property, including its corporate franchise, stocks, bonds, securities and choses in action, subject to taxation in this state and in the county, city, town and district where its principal place of business in this state may be located."

In determining the companies to which this method has application here, as in the case of the other two methods, apparently the place of their organization is a factor. But as here the language used covers both this state and elsewhere as places of organization, there can be no question that, however it may be as to the other two methods, the place of organization is not a determining factor as to the application of the third method. As originally enacted, it applied to such of the companies of the second class as were enumerated, being eight in number, which companies operate and conduct their business both in this state and elsewhere along definite and fixed lines. By the amendment of March 15, 1906, the section was changed so as to make the third method applicable to all such companies as performed any other public service than that performed by the eight enumerated companies.

It is clear then that down to the revision act of March 15, 1906, no method was prescribed for assessing the franchise in this state of certain of the companies covered by section 4077. This was the case of all companies of the third class, i. e., companies organized in this state and operating and conducting their business wholly elsewhere. It was the case as to all companies of the second class, i. e., companies operating and conducting their business partly in this state and partly elsewhere along definite and fixed lines not included by the eight companies enumerated in section 4081. This was the case as to all bridge and ferry companies so operating and conducting their business. And it is now the case as to all such companies not included by those eight companies or performing any other public service. It is now and always has been the case as to companies of the first class, that is, companies which operate and conduct their business wholly in this state but organized elsewhere, if that portion of section 4079 prescribing the first method limits it to such companies as have been organized in this state, and, as to companies of the second class, i. e., companies which operate and conduct their business partly in this state and part-

ly elsewhere, but not along definite and fixed lines, but organized in this state, if section 4080 prescribing the second method limits it to such companies as have been organized elsewhere. The Court of Appeals has had to deal with the question as to how companies covered by section 4077, as to which no method of assessment was so prescribed, should be assessed. It had to deal with it in the Southern Pacific Railroad Company Case, hereinbefore referred to, and I have indicated how it dealt with the question there. The case was decided after March 15, 1906, when the act prescribing a method for such cases became the law, but it involved years prior thereto. That court had to deal with it in the case of Morrell Refrigerator Car Co. v. Commonwealth, 128 Ky. 447, 108 S. W. 926. The company there involved was a refrigerator car company which operated and conducted its business partly in this state and partly elsewhere along definite and fixed lines, but which was not one of the eight companies enumerated in section 4081 and was not regarded as performing a public service. It was not dealt with as it was in the subsequent Southern Pacific Railroad Co. Case, but section 4081 was construed to apply not only to the companies covered by its language, but all companies like those enumerated, and hence that that method was applicable to it. The earlier case of Louisville Tank Line Co. v. Commonwealth, 123 Ky. 81, 93 S. W. 635, involved the question; but it does not seem to have been raised there.

The true view of the matter seems to me to be this: Section 4077 expressly provides that all the companies covered by it shall pay a franchise tax and empowers the board to make the assessment. The fact that no method has been prescribed for making the assessment of any company does not relieve it from assessment and from the tax. There is simply no method of assessment prescribed. This leaves the matter so that the board can adopt a reasonable method. And it should be taken that the Legislature so intended. And a reasonable method is one similar to that prescribed in analogous cases, if there are such, and, if not, such as is reasonable under the circumstances. A similar line of reasoning was taken by me in the field of federal jurisdiction in the case of Kentucky Coal Lands Co. v. Mineral Development Co. (C. C.) 191 Fed. 899. The first sentence of the first section of the jurisdictional acts of 1887 and 1888 (Acts March 3, 1887, c. 373, 24 Stat. 552 and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]) confers essential jurisdiction on the Circuit Courts of the United States in certain cases. The middle clause of the second section thereof—the venue clause—distributes that jurisdiction amongst those courts. It does not distribute all of it. It leaves a portion thereof undistributed, such as suits against aliens and suits of a local nature. I there pointed out that the fact that a portion of such jurisdiction so conferred was not distributed did not deprive the Circuit Courts of jurisdiction thereof. The sole effect of its not being distributed was that it must be treated as distributed along reasonable lines.

If then this position is sound and the first method of assessment is to be confined to companies organized under the laws of this state

in accordance with the letter of section 4079, so that no method is prescribed for assessing companies organized under the laws of other states which operate and conduct their business and have their property wholly in this state, it should be taken that the board has the right to adopt a reasonable method and a reasonable method is that prescribed in section 4079, as it is an analogous case. And if the second method is to be restricted to companies organized under the laws of other states in accordance with the letter of section 4080, so that no method is prescribed for assessing companies which operate and conduct their business partly in this state and partly out of it, but not on definite and fixed lines, the same course is to be pursued.

So much then as to the methods of assessment prescribed, their applicability, and the course to be pursued where no applicable method has been prescribed. It is now in order to consider the methods themselves.

The first step in the first, second, and third methods is exactly the same. It is to fix the value of the capital stock of the company. It is not important to deal with the method of fixing such value. It is sufficient to note that the statute prescribes none. It is true that section 4079 says that the board shall fix it "as provided in the next succeeding section." But the next succeeding section, to wit, section 4080, provides that the board, if it adopts the third method, shall fix it "as hereinbefore provided." These two clauses cancel each other and leave no method prescribed. So section 4081 says that it shall fix the value of capital stock "as hereinbefore provided." But as there is no prior provision on this subject, this clause is also without meaning. The board therefore, in taking this first step in these three methods, is left to adopt a reasonable method of fixing such value. After the taking of this first step, the three methods part company. According to the first method, the next step is to deduct from the valuation so fixed the assessed value of the entire tangible property which is all in this state. The provision then is that the remainder thus found shall be the value of the company's franchise. This method, therefore, consists of but two steps, fixing the value of the entire property and deducting the assessed value of the entire tangible property. By it the board does not directly fix the value of the franchise. That results automatically from the taking of these two steps.

The several steps of the original second and the third methods are alike, in that neither consists of a deduction of tangible property, like the second step in the first method, but of an apportionment of the value of the entire property. They differ from each other in the manner of apportionment which is prescribed. The apportionment in the original second method is on a gross receipts basis, and that in the third method on a mileage basis. In the nature of things the apportionment in the original second method cannot be on a mileage basis, because the companies to which it is applicable do not operate and conduct their business on definite and fixed lines. According to it the ratio of the gross receipts in this state to the total receipts determines what part of the total value shall be apportioned to this state and that absolutely so.

The third and last step in the original second method is to deduct

from the part of the total value thus apportioned to this state the assessed value of the tangible property in this state. The balance is to be taken as the value of the franchise therein. This method, therefore, consists of three distinct steps—valuation of the entire property in and out of this state, apportionment of a part of such valuation to this state on a gross receipts basis, and a deduction from such part of the assessed value of the tangible property in this state. By it, too, the value of the franchise in this state is not fixed directly by the board. It results automatically from the taking of these three steps. The act of March 15, 1906, treating it as prescribing an alternative method for fixing the value of the franchise of such companies in this state, made a radical departure from the original method applicable to such companies and introduced an entirely new thought into the methods of fixing the value of the franchise in this state of companies which operate and conduct their business partly in and partly out of the state. The old thought was that it could only be done by the apportioning a part of the total value of the franchise of such companies to this state. The new thought so introduced was to disregard the whole and treat the part in Kentucky independently thereof, as if it were the whole. The alternative method provided by the act of March 15, 1906, applicable to companies covered by section 4080, therefore, included no valuation of the whole and apportioning of a part thereof to this state. It called for two steps only. The first was a valuation of the part of the whole in this state, as if it were the whole, and the second was a deduction therefrom of the assessed value of the tangible property in this state. It had a novel feature further, in that a method of assessing the value of such part was prescribed, to wit, the capitalization of the net earnings in this state. Here, too, the value of the franchise in this state is not fixed directly by the board, but results automatically from the taking of these two steps. It is substantially like the first method. Each consists of two steps. In each the first step consists in the valuation of the entire property in Kentucky, and the second in deducting the assessed value of the tangible property in this state. They differ only in one particular. In the first method the board is not limited as to how it shall value the entire property in this state, whereas in this alternative method so prescribed it is limited to a capitalization of the net earnings in this state. I will not undertake to describe in detail the process under the construction of section 4080 as amended in the Kentucky Refining Company Case. I find it difficult to do so and it is not important. This completes our general survey of sections 4077 to 4081, inclusive, and of any detailed reference to sections 4077 to 4080.

We come now to a further detailed consideration of section 4081, in so far as it relates to the third method, which is the one involved here, as plaintiff is a railroad company, whose line extends beyond the limits of this state, and hence is one of the eight companies enumerated therein to which that method is applicable, with a view of determining whether plaintiff's contention in regard to that method and as to the two particulars in which the board failed to follow it is sound. And first as to its contention that the second step in the meth-

od is a deduction of the value of the entire tangible property both in and out of this state: This should be first viewed, as it would have to be under the section as it was originally before the changes introduced by the amendment of June 9, 1893, and the re-enactment of March 15, 1906, and then the effect of those changes should be considered. As already stated, the first step then, as now, consisted of the fixing of the value of the capital stock. As to this there is no dispute. According to plaintiff's contention, this step is followed by two others, the taking of which results automatically in fixing the value of its franchise in this state. The second step consists of a deduction, to wit, of the value of the entire tangible property, both in and out of this state, and the third and last step of an apportionment to this state of a part of the remainder left after making the deduction and that on a strictly mileage basis. But if such are the second and third steps of the third method, they are to be found elsewhere than in the letter of section 4081. The letter thereof provides for no such steps. The second step which its letter calls for is not a deduction but an apportionment. The apportionment which it calls for is of a part of the total value on a mileage basis. And this is the only other step which it calls for. It then provides that the part so apportioned to this state shall be the value of the franchise in this state and that it shall be liable to taxation in the several subordinate jurisdictions in which it is located on a mileage basis less the tangible property therein. It is in this connection only that any reference is made to a deduction of the tangible property, and here it has reference solely to the tangible property in this state. It is evident that the provision as to a deduction was misplaced. According to the letter of the section, the part of the total value apportioned to this state on a mileage basis was the value of the franchise in this state. But as the total value included both tangible and intangible property, the part so apportioned to this state would be not merely the value of the intangible property, but both the tangible and intangible property therein. If such apportionment were to be taken as the value of the intangible property in this state, then the companies to which the method was applied would have to pay a double tax to the state on its tangible property—on it as such and on it as included in this apportionment. But the Legislature could not have so intended. The section was so worded that they would not have to pay a double tax thereon to the subordinate jurisdictions, and it was as little intended that it should pay a double tax thereon to the state. Had the provision as to deduction been inserted, instead of at the close of the section, just after the provision as to the apportionment of a part of the total valuation to this state, and the requirement been that it should be made from the part so apportioned and that the balance should be apportioned amongst the subordinate jurisdictions, then there would have been nothing in the letter of the section favoring payment of double taxes on the tangible property in this state. It should therefore be taken that the intent was that the deduction should be made from the part apportioned to the state and not from the parts apportioned to the subordinate jurisdictions.

By this time one has become used to imperfections in this legisla-

tion. We have found that it uses the word "provided" without significance; that the application of the first method has to be limited to companies which operate and conduct their business and have their property wholly in this state to render it constitutional; that it thinks that the place of organization of the companies is of significance in determining the application of the three methods which it provides, when it is not; and that it thinks that it has provided a method of valuing the capital stock and that it has prescribed a method for assessing the franchise of all companies covered by section 4077, when it has done neither. He is not, therefore, surprised when he comes across such an imperfection here. In the case of *Southern Ry. Co. v. Coulter*, 113 Ky. 657, 68 S. W. 873, the railroad companies of the state were willing to concede that the assessed value of the tangible property in this state should be deducted from the part apportioned thereto, before an apportionment amongst the subordinate jurisdictions, and claimed that by virtue of the provisions as to deducting same after such apportionment from the parts so apportioned that they were entitled to have same deducted again. Thereby they would get a double deduction, and in this way get back the taxes which they were bound to pay on their tangible property as such. But the Court of Appeals could not see it that way.

There is therefore absolutely nothing in section 4081 that allows of a deduction of the valuation of the tangible property both in this state and out of it from the valuation of both tangible and intangible property everywhere and then an apportionment of a part of the balance to this state on a mileage or any other basis. The thought of the section must be taken to be that a part of the valuation of the entire property is first to be apportioned to this state, and that then the assessed value of the tangible property therein is to be deducted therefrom. And to this conforms the thought of the companion sections. In none of the sections relating to the assessment of the franchises of companies covered by section 4077 is there the remotest reference to the deduction in any contingency of the value of the entire tangible property. In so far as any provision is made for a deduction, it is always a deduction of the assessed value of the tangible property in this state. There are two other provisions for a deduction besides that contained in section 4081, which it seems to me was misplaced. One is in section 4079 as a step in the first method thereby prescribed. And the other is in section 4080 as a step in the second method thereby prescribed. And in each case the deduction called for is the assessed value of the tangible property in this state. That may be said to be expected in connection with the first and alternative methods prescribed by the amendment of March 15, 1906, to section 4080 because in each of them the valuation from which the deduction is to be made is the valuation of the entire property in this state. But such is not the case as to the original second method. There, as in the case of the third method involved here, there is a valuation of the entire property in and out of the state and an apportionment to this state on a gross receipt basis, and the requirement is not that the value of the tangible property both in and out of the state shall be first deducted,

and then an apportionment made, but that an apportionment shall be first made and then the assessed value of the property in this state shall be deducted. It is expressly provided that such shall be the method of procedure without any ambiguity. The statement provided for by section 4078 to be considered by the board in making the assessment calls for information as to the value of the tangible property, but it is limited to the assessed value of the tangible property in this state. There is not a word in the provisions in regard to this statement about any information being furnished as to the value of property elsewhere.

Thus far I have dealt with section 4081 as if it were now as it was when originally enacted. Do the changes subsequently made in it to any extent support plaintiff's contention? The change made by the amendment of June 9, 1893, has no bearing on the question now under consideration. It has bearing on the other part of plaintiff's contention, to wit, that the section requires the apportionment to the state to be on a mileage basis absolutely. When I come to take up that part of its contention, the effect of this change will be considered. By the change made by the act of March 15, 1906, the clause at the end of the section, relating to a deduction of the tangible property in each subordinate jurisdiction from the apportionment thereto, was omitted, and the section as it now stands contains no express provision for a deduction of the value of the tangible property at any stage of the process of assessment. As heretofore stated, the clause was improper at that place and had been the basis of a claim of a right to a double deduction of the assessed value of the tangible property. It was no doubt omitted for this reason. That it was not at the same time expressly provided that the assessed value of the tangible property in this state should be deducted from the part of the total value apportioned thereto can be accounted for on no other ground than that it was thought to be clear that it was the thought of the section that such deduction should be made.

It seems to me, therefore, that the idea that the statute, under which the board acted in making the assessment complained of, requires first a deduction of the total value of the entire tangible property from the total value of the entire property and then an apportionment, is utterly without warrant in the provisions thereof, and that there can be no doubt that what it contemplates is first an apportionment and then a deduction; the deduction to be of the assessed value of the tangible property in this state. In other words, the thought of the statute is first apportionment and then deduction, and not first deduction and then apportionment; and that the deduction is of the assessed value of the tangible property in this state, and not of the value assessed or otherwise, of the entire tangible property in and out of the state. There is but one possible ground, then, on which plaintiff's contention in this particular can be upheld, and that is that it is essential to construe the section as providing first for a deduction of total value of entire tangible property from total value of entire property, and then an apportionment of a part of the balance to this state in order to keep it within constitutional limits. I have found it necessary to limit

that portion of section 4079 prescribing the first method to companies which operate and conduct their business and have their entire property in this state in order to so keep it. And it may be necessary to so reshape section 4081 in order to keep it within constitutional limits. How is it as to this?

To answer the question we must equip ourselves with the thought of the Supreme Court of the United States on the matter of assessing for taxation in any given state the part of a unit covering several states in such state, as a part thereof. As heretofore indicated, such unit may be a physical and organic unit, as in case of the property of a railroad, telegraph, or telephone company, or merely an organic unit, as in case of an express company. The rules applicable to the assessment of such a part thereof, as a part, are precisely the same in both cases. That such part thereof can be valued as part of the whole, or, in other words, that it is not essential that it be valued without reference to the whole, as if it were itself the whole, is well settled. Such an assessment does not involve the assessment in the state of property lying outside of it. It is taken for granted that such part of such unit is always of more value regarded as a part than as itself an independent whole, and that therefore the state gains by so doing; and it is thought to be fair for the state to avail itself of such enhancement in value, for, as the parts in other states contribute to its value, so it contributes to their value. It is equally well settled that ordinarily, i. e., in the absence of special circumstances, such part thereof can and should be valued on a mileage basis, i. e., at such a proportion of the value of the whole unit as the mileage in the state bears to the total mileage. It is an exceptional case where the part is not to be so valued. In any given case nothing else appearing than the value of the whole and the proportionate mileage of the part the value of the part is to be taken as the same proportion of the value of the whole. In starting out then to value the part, the presumption is that such is its value, and such presumption is to be maintained until it is rebutted by the special circumstances or exceptional character of the particular case. In the case of *State Railroad Tax Cases*, 92 U. S. 608, 23 L. Ed. 663, where the apportionment involved was between subordinate jurisdictions in the same state, Mr. Justice Miller said:

"It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

In the case of *Pittsburg, C., C. & St. L. R. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, Mr. Justice Brewer said:

"It is ordinarily true that, when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair."

And again in the case of *Cleveland, C., C. & St. L. R. R. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041, he said that one of the questions therein was:

"If an assessing board, seeking to assess for purposes of taxation a part of a road within a state, the other part of which is in an adjoining state, ascertains the value of the whole line as a single property and then determines the value of that within the state, upon the mileage basis, is that a valuation of property outside of the state, and must the assessing board, in order to keep within the limits of state jurisdiction, treat the part of the road within the state as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road?"

In answer to this question, he said:

"It is assumed that no special circumstances exist to distinguish between the conditions in the two states, such as terminal facilities of enormous value in one and not in another. With this assumption the first question must be answered in the negative. The true value of a line of railroad is something more than an aggregate of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. There is something which does not exist, and cannot exist, until the combination is formed."

Then in the case of *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761, Mr. Justice Holmes said:

"And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state. The sleepers and rails of a railroad company, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get the worth of such a line, in the absence of anything more special, by a mileage proportion."

These learned judges, therefore, characterize the method of determining the value of the part on a mileage basis as "reasonable and constitutional" and "eminently fair," and say that it may well be doubted whether any better mode has been devised. But they recognize that this is true "ordinarily" only, or in the absence of "special circumstances," or "anything more special." A special circumstance recognized by Mr. Justice Brewer in one of the quotations heretofore made was the existence of "terminal facilities of enormous value out of the state and not in it." Mr. Justice Holmes also recognized this as a special circumstance affecting the reasonableness of an apportionment on a mileage basis in the *Fargo Case*. He there said:

"So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable. But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense."

In the *Pittsburg, C., C. & St. L. R. R. Co. Case*, Mr. Justice Brewer recognized another special circumstance affecting the rule in connec-

tion with the existence of terminal facilities of enormous value, to wit, the requirement in another state for sole use therein of an "extra amount of rolling stock." He said there:

"It is true, there may be exceptional cases, and the testimony offered in the trial of this case in the Circuit Court tends to show that this plaintiff's road is one of such exceptional cases, as, for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock."

The special circumstances so recognized consist of more tangible property outside of the state than in it. I find no other special circumstance referred to as affecting the application of the rule of valuing on a mileage basis. In the Delaware Railroad Tax Case, 18 Wall. 206, 21 L. Ed. 888, it was held that, if the tax there involved had been on the property of the company, an assessment on the mileage basis would have been invalid because it would be a tax on property outside of the state. Mr. Justice Field there said:

"Assuming that the tax is upon the property of the corporation, if the ratio of the value of the property in Delaware to the value of the whole property of the company be less than that which the length of the road in Delaware bears to its entire length, and such is admitted to be the fact, a tax imposed upon the property in Delaware according to the ratio of the length of its road to the length of the whole road must necessarily fall upon property out of the state. The length of the whole road is in round numbers 100 miles; the length in Delaware is 24 miles. The tax upon the property estimated according to this ratio would be in Delaware $\frac{24}{100}$ or $\frac{6}{25}$ of the amount of the tax upon the whole property. But the value of the property in Delaware is not $\frac{6}{25}$ of the value of the whole property, but much less than this proportion would require."

It did not appear wherein the property outside of Delaware was proportionately worth more than that inside thereof. In the Fargo Case the assessment against the American Express Company on a mileage basis was held invalid as including property outside of the state of Indiana, not because proportionately a greater portion of the unit was outside of that state, but because it included property outside of the state, to wit, stocks and bonds in New York, which were not used in the business, and which therefore were no part of the unit.

In the case of *W. U. Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, apparently a special circumstance outside of the state of Massachusetts making against an assessment therein on the mileage basis, to wit, the ownership of \$3,000,000 of real estate, with the ownership of none therein, was held to be offset by a special circumstance within the state, to wit, the existence proportionately of greater intangible property therein so that an assessment on a mileage basis was held to be valid notwithstanding the special circumstance outside of the state. Mr. Justice Miller said:

"It is very clear to us, when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that state to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax

should be assessed, is not unfavorable to the corporation, and that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation."

It is to be noted in this connection that it would seem that, in assessing the part of such a unit within the state as a part thereof, the determination by the board of how much of the unit is within the state is not such a determination as that it is conclusive unless overthrown by fraud or mistake. In the *Pittsburg, C., C. & St. L. R. R. Co. Case*, Mr. Justice Brewer said:

"Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. Here the question determined by the state board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board."

But in the *Fargo Case*, Mr. Justice Holmes said:

"In *Pittsburg, C., C. & St. L. R. R. Co. v. Backus*, there was reason to suspect an infraction of constitutional rights, but the Secretary of State testified that there was no assessment of property outside of the state, * * * and therefore the court could not say that there was more than a possible overvaluation by the board. Of, course, if the board did not go beyond its jurisdiction, its decision was final. But the court recognized that if the facts charged had appeared the case would have been different. In the express companies' cases previously decided, it was pointed out that there was nothing to show that the line might not fairly be assumed to be of substantially the same value throughout. But it was intimated on the pages just cited that, if the company should prove the fact to be otherwise, a different rule would apply, and the statutes were construed not to prevent such a difference from being taken into account."

And again he said:

"This cannot be treated as a case of mere overvaluation, but is an assessment made on unconstitutional principles."

In view then of this thought of the Supreme Court on the subject of assessing for taxation the part of such property unit located in this state, is it essential to reshape section 4081, in so far as it relates to the third method, or the one applicable here, so as to make it require that there should be first a deduction from the total value of the value of of the total tangible property and then an apportionment in order that it may be constitutional?

I think not. If there is no special circumstance rendering the part elsewhere proportionately of more value than that in this state, there certainly is not. In such a case it is to be taken that the part of the capital stock in this state is proportionately of the same value as the part elsewhere. This is true also of its separate parts, to wit, tangible property and intangible property. The value of the tangible property can first be deducted from that of the capital stock, which would leave the value of the intangible property, and then a part thereof can be apportioned to this state on the mileage basis. But it can just as well,

and even better, be done in this way: A part of the capital stock can be first apportioned to this state on the mileage basis, and then the value of the tangible property in this state can be deducted therefrom. This would give exactly the same result as before. If there is a special circumstance rendering the tangible part of the part elsewhere proportionately of more value than that in this state, in order to keep from taxing such excess value elsewhere it is still not essential that it be first deducted and that then there be an apportionment. It can be handled by deducting from the value of the part of the capital stock apportioned to this state, in addition to the assessed value of the tangible property in this state, the mileage proportion of such excess value included in the apportionment of a part of the capital stock thereto. Of course, the simpler way is first to deduct the whole of such excess value, then to apportion the remainder on a mileage basis, and then to deduct the assessed value of the tangible property in this state. The result is the same either way. I am only concerned to show that, in order to keep from taxing in this state such excess value elsewhere, it is not essential that it be first deducted and that then the remainder be apportioned. It can be handled as successfully the other way. It is clear therefore that, to keep the third method prescribed by section 4081 within constitutional limits, it was not essential that it should have provided that the value of the entire tangible property should first be deducted from the capital stock before an apportionment. It was sufficient that it provided for an apportionment of a part of the capital stock to this state on a mileage basis, with a deduction of the assessed value of the tangible part therein, and permitted a deduction on account of any such excess value in either of the two ways suggested.

But it is urged by plaintiff that both the Court of Appeals of Kentucky and the Sixth Circuit Court of Appeals have held that the proper course is first to deduct the value of the entire tangible property and then to apportion the balance. Of course, if this is so, and the holding by either court is not a mere dictum, I am bound by it. The cases relied on are the following, to wit: *Commonwealth v. Covington & Cincinnati Bridge Co.*, 114 Ky. 343, 70 S. W. 849, and *Coulter v. Weir*, supra.

To understand the *Covington & Cincinnati Bridge Company Case* it is essential to take notice of the case of *Henderson Bridge Co. v. Commonwealth*, 99 Ky. 623, 31 S. W. 486, 29 L. R. A. 73, the first case to arise under the statutory provisions under consideration. The companies, the assessment of whose tangible properties in this state were involved in these two cases, were bridge companies operating and conducting bridges across the Ohio river, one between this state and Indiana and the other between it and Ohio. As we have seen, the statute, as it then stood, provided no method for assessing the franchise of such companies in this state. Those companies did not operate and conduct their business and have their property wholly in this state, and hence the first method prescribed by section 4079 did not apply to them. Though they operated and conducted their business both in and out of this state, they did so along definite and fixed lines. Hence the original second method prescribed by section 4080 did not apply to

them. And though they operated and conducted their business along definite and fixed lines, the third method prescribed by section 4081 did not apply to them, because bridge companies were not one of the eight companies to whom that method was then limited. But the board having power to assess their intangible property in this state under section 4077, and no specific method being prescribed for such a case, the board had a right to adopt a reasonable method, and a reasonable method was that prescribed by section 4081 applying to other companies like it, which operated and conducted their business both in and out of the state and that along definite and fixed lines. The Henderson Bridge Company Case was a suit by the commonwealth against the company to recover the tax due it on an assessment made by the board. The method which it had used was first to value the whole property, then to deduct the assessed value of Indiana tangible, then to apportion to Kentucky a part of the balance on the mileage basis, and then to deduct therefrom the assessed value of the Kentucky tangible; the balance being taken as the value of the intangible in Kentucky. The method erred in favor of the company, in that it first deducted the assessed value of the Indiana tangible. Thereby Kentucky shared with Indiana its tangible without Indiana sharing in turn its tangible with Kentucky. There should have been no deduction of the Indiana tangible. That this was erroneous was noted by Judge Hobson in the Covington & Cincinnati Bridge Company Case. That company was contending for the same method in its case. In response to this contention, he said:

"But that suit, and all those following it, were actions by the commonwealth to recover taxes based on the assessment made by the board. The state was not complaining of the assessment; on the contrary, it was endeavoring to enforce it. It had no right of action except upon the assessment, and no question, therefore, could be presented by the state as to the propriety of the assessment which it sought to enforce."

On the other hand, the commonwealth, appellant therein, contended that the proper method was first to value the whole, then to apportion a part thereof to this state on the mileage basis, and then to deduct from such part the assessed value of the tangible in this state, the method which I have held is the one prescribed by section 4081 and applicable here, and in answer to this contention Judge Hobson said:

"We therefore conclude that the basis urged by appellant is the proper one for the assessment of the property."

So far certainly there is nothing favoring plaintiff's contention. On the contrary, it is directly against it. But this is not all of the case. Judge Hobson had this to say in his opinion as to first deducting the value of the total tangible and then apportioning a part of the balance to Kentucky on a mileage basis, to wit:

"If we subtract from the total value of all the property of appellee the value of its tangible property, the balance represents necessarily its intangible property; and, as the Constitution requires all property within the taxing district to bear its equal part of the public burden, this intangible property, so far as it is within the state, must be taxed as other property. While it does not necessarily follow that all parts of a bridge are of equal value, still the fact remains that its whole value is due to its entirety, and that one part of

the bridge is practically of no value, at least as a bridge, without the other. *Prima facie*, it should be presumed, where part of a bridge lies in Kentucky and part in another state, that the value of the structure in the two states is in proportion to the length of the bridge in each, for the value of the property depends upon its use as a bridge, and the franchise, it seems to us, must necessarily be apportioned the same way. If it should be shown that the property in the other states was of greater value per foot than the property in Kentucky, our officers are not concluded by the action of the officers of the other state, but could for themselves fix the value of the entire tangible property of the bridge, and deduct this from the total value, which was in this case \$1,330,000. But, there being no showing that there was any discrepancy in value between the Kentucky end of the bridge and the Ohio end, it should be assumed, in the absence of proof, that the value of the property in Kentucky was in proportion to the length of the bridge in Kentucky."

In saying what he thus said, Judge Hobson was not indicating the "proper way" of making the assessment under the statute. He said this, *arguendo*, i. e., in support of what he conceived to be the "proper way." For what he thus said is followed immediately by the statement heretofore quoted to this effect:

"We therefore conclude that the basis urged by appellant is the proper one for the assessment."

It followed therefrom that such was the "proper way," because it was based on the presumption that all parts of the bridge were of equal value and so of the franchise, and the result of such way was exactly the same as if the value of the whole tangible had been first deducted and then the balance apportioned.

But when we come to the Weir Case it must be conceded that it contains an express holding in accordance with plaintiff's contention. The holding is based on what Judge Lurton took to be the holding of the Supreme Court in the case of *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960. In the Weir Case Judge Lurton thus expressed himself:

"We therefore read the act, as the Supreme Court seems to have read it in *Adams Express Company v. Kentucky*, as requiring the deduction of tangible property from the gross value of all corporate assets, whether such tangible property be within or without the state."

But did the Supreme Court so read the act in that case? Judge Lurton only says that "it seems to have so read it" as if he were not sure of his ground as to this. In that case Mr. Chief Justice Fuller said:

"But taking the whole act together, and in view of the provisions of sections 4078-4081, we agree with the Circuit Court that it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all * * * corporations, * * * possessing no franchise, should be valued as an entirety, the value of the tangible to be deducted, and the value of the intangible property thus ascertained be taxed under these provisions; and as to railroad, telegraph, telephone, express, sleeping car, etc., companies whose lines extend beyond the limits of the state, that their intangible property should be assessed on the basis of the mileage of their lines within and without the state."

Undoubtedly this has the seeming which Judge Lurton attributed to it. But the case involved no question of method and hence did not

call for accuracy of statement regarding the matter. In the first clause of the quotation, the first, original second, and third methods, which were then the only methods prescribed, are treated as if they were exactly alike, and hence one description is made to fit them all. What is said is true of the first method but not of the other two. As to the then second method, covered by section 4080, it is expressly provided that, after valuing the entire property, tangible and intangible, a part shall be apportioned to this state on the gross receipts basis, and that then for the first time there shall be a deduction, and that of the assessed value of the tangible property in this state. What is thus said, therefore, is an inaccurate obiter dictum. So was Judge Lurton's holding. There was no question of method involved in the Weir Case. It involved the same question that was involved in the Fargo Case, and that is whether stocks and bonds in New York owned by the Adams Express Company and not used in its business could be treated as a part of its property unit, a part of which was in this state and assessable here. There is therefore nothing in either of the cases relied on against the position I feel constrained to take on the matter now under consideration. And on the contrary the decision in the Covington & Cincinnati Bridge Company Case supports it. This position of plaintiff, therefore, is not sound.

4. The other particular in which plaintiff claims that the board did not follow the statute in the method which it adopted was in allotting to this state more than the mileage proportion of its capital stock as the value of the part therein and in fixing the remainder left after deducting from such allotment the assessed value of the tangible property in this state as the value of its franchise therein. As heretofore stated, the proportion of Kentucky mileage to total mileage is 25 per cent. in round numbers. The board allotted to this state 35 per cent. of the value of plaintiff's capital stock, as the value of the part thereof in this state. It obtained this proportion by averaging the gross receipts proportion, which it determined to be 39 per cent., and the net income proportion, which it determined to be 41 per cent., with the mileage proportion. The plaintiff's position is that the statute requires the board absolutely, i. e., in all cases, to allot to this state the mileage proportion of the value of the capital stock as the value of the part thereof therein, and to fix the remainder left after deducting from such allotment the assessed value of the tangible property in this state as the value of its franchise therein. I think it clear that here, also, plaintiff's position as to the requirement of the statute is wrong. The board is not required absolutely, i. e., in all cases, to so do. To construe the statute as so requiring would render it unconstitutional. If it so requires, then, in a case where that part of the capital stock of such a company elsewhere is, by reason of some special circumstance, proportionately of more value than the part in this state, the board is required to include in its assessment the mileage proportion of such excess value elsewhere, no part of which is subject to taxation in this state. Such was the character of the statute as originally enacted, i. e., before the amendment of June 9, 1893. And I think that it is to be accepted that the object of the amendment in providing that the board

should consider the mileage proportion of the value of the capital stock in fixing the value of the franchise instead of that it should take it absolutely as the value of the part of the capital stock in this state and fix it, less the assessed value of the tangible property, as the value of the franchise, was to make it so that, in such a case, the statute would not require the board to include in its assessment any part of the excess value elsewhere.

The plaintiff has it that the object of the amendment was to make it so that the board might deduct the assessed value of the tangible property in this state before apportioning the part apportioned to this state on a mileage basis, amongst the subordinate jurisdictions. But the section as originally enacted permitted it to make such deduction, as I have already held; the deducting clause being simply misplaced, i. e., after the apportionment to subordinate jurisdictions instead of before. Such, then, could not have been the object of the amendment. Its object, in part at least, was as I have stated it to have been. Under the statute as so amended, the board can avoid including in its assessment any part of the excess value elsewhere in either of two ways. It can either first deduct the whole of such excess value, after fixing the value of the capital stock, and then take the mileage proportion of the remainder as the value of the part thereof in this state, or it can apportion to this state the mileage proportion of the value of the capital stock and then deduct the mileage proportion of such excess value therefrom. And as the statute calls for an apportionment to this state of the mileage proportion of the value of the capital stock as the next step after fixing the value thereof—it so calls therefor in providing that it shall consider such mileage proportion—it would seem that it contemplates that the deduction shall be made in this last way. But as the result is exactly the same each way, it is immaterial which way is adopted.

The statute of Indiana involved in the *Pittsburg, C., C. & St. L. R. Co. Case* and the *Cleveland, C., C. & St. L. R. Co. Case* was substantially the same as section 4081 after the amendment. In the first of these causes Mr. Justice Brewer said:

"When a road runs through two states it is, as seen, helpful in determining the value of that part within one state to know the value of the road as a whole. It is not stated in this statute that when the value of a road running in two states is ascertained the value of that within the state of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but only that the total amount of stock and indebtedness shall be presented for consideration by the state board."

And again, after referring to the testimony introduced on the trial of the case as to the special circumstances rendering that case an exceptional one, in the quotation heretofore made from the opinion, he said:

"If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the state, took into account the peculiar and large value of such facilities and such extra rolling stock. But whether in any particular case such matters are taken into consideration by the assessing board does not make against the

validity of the law, because it does not require that the valuation of the property within the state shall be absolutely determined upon a mileage basis."

And again he said:

"The certificate of the state board does not show that it reached its determination of the value of the property in Indiana by first assessing the total value of the company's property, and then dividing it on the mileage basis. It simply shows that it considered the matters which by the statute were required to be presented to it by the railroad company, as well as all other matters which in its judgment bore upon the question of value, and from such consideration reached the result announced, to wit, the value of that part of the company's road in the state of Indiana. Evidence that there were peculiar matters which gave to portions of the road outside of Indiana an enormous value as compared with the general line of the road does not prove that the board did not take those peculiar matters into consideration. On the contrary, the reasonable presumption is that, if its attention was called by the company to those facts, it did take them into consideration in connection with the information derived from the total amount of stock and indebtedness of the company. Indeed, its certificate is affirmatively that it took into consideration 'all other matters appertaining thereto that would assist the board in arriving at a true cash value' of the parts of the road within the state of Indiana. That the aggregate value of the entire property of the company was evidence properly receivable and bearing upon the question of value of that part in Indiana is a proposition which, as we have heretofore said, is clearly established both on reason and authority. * * * Is testimony that the value placed by the board was excessive, together with testimony that portions of the road outside of the state were of largely greater value than any similar length of road within the state, unaccompanied with evidence that the board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside of the state, sufficient to impeach its determination? This question must be answered in the negative."

The later case of *W. U. Telegraph Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49, involved an amendment to the statute involved in those two cases, providing for the taxation of telegraph and other companies. It expressly provided for an apportionment of the gross value on a mileage basis and said nothing whatever as to taking same into consideration. But the state Supreme Court, and the Supreme Court of the United States following it, held that it should be construed in connection with the original act and that, so construing it, such was its meaning. Mr. Justice Gray there said:

"This court, at the last term, in several cases affirming judgments of the Supreme Court of Indiana, held that the statute of 1891 did not, in the case of a railroad partly in that state, and partly in another, require that the value of the part in Indiana should be determined absolutely by dividing the whole value upon a mileage basis; but only that the total amount of stock and indebtedness should be taken into consideration in ascertaining the value."

He quoted with approval from the opinion in the state Supreme Court the following portions thereof, to wit:

"The act, it is true, provides a method of valuation, the mileage method, as a basis for the taxation of certain property within the state of Indiana. But this is simply a means for determining the true cash value of the property within the state; and if in the case of appellant's property, or in any other case, it is shown to the board, or is discovered by them, that still further deductions should be made, on account of larger proportionate values outside of the state, or for any other reason, then the board must make such deductions, so that, finally, only the property within the state of Indiana shall be assessed, and that at its true cash value."

And again:

"Construing the acts of 1891 and 1893 together, it will therefore be presumed, in the absence of evidence to the contrary, that the state board has deducted from the total valuation of all interstate property such values, if any, of extrastate property, as will leave the remaining property, within and without the state, as near as may be of equal proportional value. * * * The act of 1893 provides, generally, for a mode of assessing the true cash value of that part of interstate telegraph and other property which is within the state of Indiana, to wit, the mileage method. But should there be particular cases where that method must be modified in order to reach the necessary result, namely, the true cash value of such part of the property as is within the jurisdiction of the state, the law of 1893 itself supplies the means of doing so."

He then said:

"The statute of Indiana of 1893 regarding telegraph companies, therefore, as construed and applied by the Supreme Court of the state, like the statute of 1891 regarding railroad companies, while it takes, as the basis of valuation of the company's property within the state, the proportion of the value of its whole capital stock which the length of its lines within the state bears to the whole length of all its lines, makes it the duty of the state board of tax commissioners, to make such deductions, on account of a greater proportional value of the company's property outside of the state, or for any other reason, as to assess its property within the state at its true cash value only."

If then such was the object in part of the amendment, it would seem that it was its object also to make it so that, in a case where that part of the capital stock of such a company in this state is proportionately of more value than the part elsewhere, by reason of some special circumstance, the statute would require the board to include in its assessment the whole of the excess value in this state. The inclusion of the whole of the excess value in this state can be brought about in either of two ways also. The mileage proportion in this state of the capital stock would include that proportion of such excess value. The mileage proportion elsewhere of such excess value could then be added thereto. This would make the assessment include the whole of the excess value. Or the whole of the excess value in this state can first be deducted from the value of the capital stock, then a part of the remainder can be apportioned to this state on the mileage basis, and then the whole of such excess value can be added thereto. The result obtained in this way will be exactly the same as that obtained in the other, and it is therefore immaterial which of the two ways is adopted.

Of course, in order to make a deduction or addition on account of such excess value, as the case may be, the amount thereof has to be determined. If the excess is in the tangible property, it has to be determined wherein it lies, i. e., whether in terminal facilities, rolling stock, or in something else, and what the extent of it is, and then the value thereof has to be determined. Cost of construction or acquisition and extent of deterioration are no doubt considerations relevant to such determination. No other way of determining the amount of such excess value, in such a case, occurs to me. Of course, under our complicated system of assessing interstate railroad companies, in such a case, if the excess is in this state, it is in fact first assessed by the Railroad Commission. But, if I mistake not, the Board of Valuation and Assessment, inasmuch as it deducts the assessed value of the tan-

gible property in this state from the value of the part of the capital stock therein, would have to take it into consideration to keep from deducting it from the franchise. So, there occurs to me but one way of determining the amount of the excess value if it is in the intangible property. That is to determine the Kentucky gross receipts and the elsewhere gross receipts, and then to compare them. It is from such a comparison that it is to be determined whether there is any such excess value, where it is, and its amount. It seems to me that it is in such comparison, rather than in a comparison of the respective net incomes, that the truth is to be found, though as to this I may be mistaken. I cannot see anything to be gained by considering both comparative gross receipts and comparative net incomes and averaging them. Such procedure does not seem to me to have relation to the truth of things. The proper division of the gross receipts between this state and elsewhere in order to the comparison of their respective parts calls for much thought, but the necessities of this case do not require that I should give expression to any opinion which I may have in regard thereto.

My conclusion, therefore, is that the statute does not require the board to absolutely, i. e., in all cases, allot the mileage proportion of the value of the capital stock to this state as the value of that part thereof therein and to fix the remainder left, after deducting therefrom the assessed value of the tangible property in this state, as the value of the franchise therein. It is elastic enough to permit of a deduction from or addition to such mileage proportion in case there is excess value elsewhere or in this state, on account of it, so as to keep from taxing any part thereof in this state, if it is elsewhere, and to tax the whole of it, if it is within this state.

If this view of the statute is correct, it follows that the board did not depart therefrom in that it allotted to this state more than the mileage proportion of plaintiff's capital stock and fixed the remainder left, after deducting therefrom the assessed value of its tangible property in this state, as the value of its franchise therein, unless the part of the plaintiff's capital stock in this state was proportionately of the same value as the part elsewhere or proportionately less than the value thereof. It is defendant's claim that the part of plaintiff's capital stock in this state is proportionately of more value than the part elsewhere, and I propose to dispose of this case on the assumption that this claim is correct.

[5] 5. If then the board departed from the statute in the method which it pursued, it so did in some particular not indicated by plaintiff and not thus far considered. But I feel constrained to hold that it did depart therefrom, in that it did not care for the excess value in this state in the way in which I have indicated that it could have cared for it. If I am correct in the view that such is the only way in which to care for it, of course, the statute contemplates that it shall be so cared for and in no other way. The way in which the board attempted to care for it was by changing what defendants term the apportioning unit. It changed it from the mileage proportion to the average of the three proportions, to wit, the mileage proportion, the

gross receipts proportion, and the net income proportion. The only proportions available other than the mileage proportion are the gross receipts proportion, the net income proportion, the average of the two, the average of either and the mileage proportion, and the average of the three proportions. But neither the gross receipts proportion, nor the net income proportion, nor the average of the two will do, for neither has any true relation to the apportionment of the tangible property. So far as either has any relation to the apportionment of the capital stock, it is to the intangible part thereof, and of the three it is only the gross receipts proportion or the net income proportion that can be said to have such relation thereto, of which two it seems to me the gross receipts proportion is to be preferred. Even as to intangible property no instance of an apportionment of such property on a gross receipts basis has come to my notice.

The case of *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. Ed. 595, involved a tax on the gross receipts in Pennsylvania of an interstate railroad company, which was upheld. There the apportionment of the gross receipts was on a mileage basis. The statute itself contained no provision for an apportionment. It merely provided for a tax on the gross receipts in the state of all railroad companies operating therein, and the assessing board determined the amount of the gross receipts in the state of the company there involved by so apportioning them. The case indicates how little an assessing board is dependent on legislation to provide the method by which it shall value the property subject to its assessment. If then the excess value is in the tangible property alone, it is impossible by the use of the gross receipts proportion, or the net income proportion, or the average of the two, to determine its existence or its amount. And if it is in the intangible property, an apportionment of a part of the value of the capital stock on such a basis will apportion both the intangible property and the tangible property, and, whilst the apportionment of the one may be correct, that of the other, presumptively at least, will not be. Possibly there may be a certain degree of sympathy between the intangible and tangible property and such as to weaken the presumption, nothing else appearing, that the two parts of the tangible property are proportionately of the same value, but certainly not sufficient to overcome it. An indication of how little sympathy may exist between the two is to be found in the *Massachusetts Western Union Telegraph Company Case*. There the intangible property in that state was treated as being as much more proportionately than the part elsewhere as the part of the tangible property therein was less than the part elsewhere, so as to justify the court in upholding an apportionment of both on a mileage basis.

If then neither the use of the gross receipts proportion, nor of the net income proportion, nor of the average of the two, will yield a correct result, the use of the average of the gross receipts proportion or the net income proportion and the mileage proportion or the average of the three proportions will not do so. Possibly the use of the average of the gross receipts proportion or of the net income proportion and the mileage proportion may yield a truer result than the use of

the gross receipts proportion or of the net income proportion, by itself, will do; but it will still come short of the truth. The use of the average of the three proportions, thereby as it were doubling up on the mileage proportion, is farther away from the truth than the use of the average of either the gross receipts proportion or the net income proportion and the mileage proportion. The ideas intended to be conveyed here can be made clearer if I apply them to a supposed state of case. That case is that the value of plaintiff's capital stock is \$225,000,000, made up of tangible property of the value of \$175,000,000 and intangible property of the value of \$50,000,000. The mileage proportion thereof is \$56,500,000. But this is not the true value of the part of plaintiff's capital stock in this state if the gross receipts proportion is 39 per cent. and the net income proportion is 41 per cent. as determined by the board. On the one basis the true value thereof is as follows, to wit: 25 per cent. of the tangible property, \$43,750,000; 39 per cent. of the intangible property, \$19,500,000; total value of the part in this state, \$63,250,000—or \$6,750,000 in excess of the mileage proportion. On the other basis it is as follows, to wit: 25 per cent. of the tangible property, \$43,750,000; 41 per cent. of the intangible property, \$20,500,000; total value of the part in this state, \$64,250,000—or \$7,750,000 in excess of the mileage proportion. The gross receipts proportion of the value of the capital stock is \$87,750,000, or \$24,500,00 in excess of the true value of the part of the capital stock in this state according to the one calculation and \$23,500,000 in excess thereof according to the other.

The net income proportion of the value of the capital stock is \$92,500,000, or \$29,000,000 in excess of the true value of the part of the capital stock in this state, according to the one calculation, and \$28,000,000 in excess thereof according to the other.

The average proportion of the gross receipts proportion and the mileage proportion, which is 32 per cent. of the value of the capital stock, is \$72,000,000, or \$8,750,000 in excess of the true value of the part of the capital stock in this state according to the one calculation and \$7,750,000 according to the other.

The average proportion of the net income proportion and the mileage proportion, which is 33 per cent. of the value of the capital stock, is \$74,250,000, or \$11,000,000 in excess of the true value of the part of the capital stock in this state according to the one calculation and \$10,000,000 according to the other.

The average proportion of the three proportions, which is 35 per cent., and which is the proportion used by the board, is \$78,750,000, or \$16,500,000 in excess of the true value of the part of the capital stock in this state according to the one calculation and \$15,500,000 according to the other.

If then the supposed case is the true one, and the line of reasoning here followed is sound, the board has assessed as against plaintiff according to the one calculation \$16,500,000, and according to the other \$15,500,000, of property not in this state. Of course, the extent of the assessment of property elsewhere would be reduced if the value of the part of the tangible property in this state is proportionately more

than the value of the part thereof elsewhere, which it is not unlikely is the case. And in justice to myself it should be noted that in adopting this line of reasoning I have been without the assistance of the reflections of others. This is the first instance, so far as I am advised, in which the position has been taken that the part of such a property unit as is involved here covered by the assessment attacked is proportionately of more value than the part elsewhere, and an attempt has been made to have the assessment include the excess value. I am without any assistance from counsel, because plaintiff's counsel claim that the allotment should have been limited to the mileage proportion, and defendant's that it was right to use the average proportion of the three in making it, both of whom I have been constrained to hold are in error.

The use of the average proportion of the three is excluded by the statute itself. What it says shall be considered is not the mileage proportion, i. e., the proportion of Kentucky mileage to the total mileage, but the mileage proportion of the value of the capital stock. What the board considered was the one, and not the other. It considered the mileage proportion in averaging it with the gross receipts proportion and the net income proportion. But a consideration of the mileage proportion is not a consideration of the mileage proportion of the value of the capital stock. Had it considered the latter, it would have apportioned to this state the mileage proportion of the value of the capital stock, and then made an addition thereto on account of the excess value in this state in order to allot to this state the full value of the part of the capital stock in this state. Had it first made such an apportionment, it could not have made such an allotment otherwise than by making such an addition. Instead of so doing, it considered the mileage proportion in and of itself by averaging it with the other two proportions, and then left it for good and apportioned to this state the average proportion of the value of the capital stock as the value of the part in this state. Such I maintain was not a consideration of the mileage proportion of the value of the capital stock. The distinction here attempted to be made may be a nice one, but it seems to me that it is a true one.

In another view of the matter the statute excludes the use of such an average proportion. It certainly so did before the amendment of June 9, 1893. The allotment then was limited to the mileage proportion of the value of the capital stock. The sole object of the amendment was to make it so that it should not be so limited. This is accomplished by providing that such mileage proportion should be considered in fixing, instead of that it should, less the assessed value of the tangible property, be the value of the franchise. It is a well-known rule of interpretation that the mention of one thing excludes another thing of like character. This is particularly so here where no substitution of an apportioning unit is needed in order to accomplish the object of the statute, which is to have the assessment include no part of the capital stock elsewhere and all of it in this state, and where another portion of the statute, to wit, section 4080, mentions another apportioning unit, to wit, the gross receipts proportion. The original

method provided for in that section is subject to the criticism that it required the apportionment of the tangible as well as the intangible property of the companies covered by it on the gross receipts basis. It seems not to have worked well in practice, and because of this the alternative method was provided, by which an apportionment was abandoned and the part of the capital stock in this state was treated as an independent whole. It was a backward step to so construe the statute as to compel the use of both methods. In the case of such companies, inasmuch as they do not operate and conduct their business along definite and fixed lines, the gross receipts belonging to this state and those belonging elsewhere can be readily determined, which is not the case as to those covered by section 4081. Besides, no express provision was made for companies covered by section 4081 making such a showing as would enable an apportionment as to them being made on such a basis. I have already alluded to a consideration for limiting the second sentence of section 4079 providing for the making of such a showing to the companies covered by section 4080. An additional consideration makes it conclusive that it should be so limited. That sentence was in the original act the same as it is now. At that time section 4081 provided that the apportionment should be absolutely on the mileage basis. It therefore served no purpose as to such companies and could not have been applicable to them. Finally, as already noted, the Indiana statute involved in the Railroad & Telegraph Companies Cases is substantially the same as section 4081 after the amendment of June 9, 1893, in providing that in making the assessment an apportionment of the capital stock on a mileage basis shall be considered. Yet in neither one of those cases is there the slightest intimation that an excess value elsewhere can be cared for by an apportionment on any other basis than the mileage basis. They recognize that the apportionment on the mileage basis is the basis of the assessment and that the excess value elsewhere is to be cared for by a deduction therefrom.

The defendants rely on certain expressions in the opinion of the Southern Pacific Railroad Company Case and in the case of Commonwealth v. U. S. Express Co., 149 Ky. 759, 149 S. W. 1037. In the former case Judge Hobson said:

"The statute does not provide that the proportion between the lines in this state and the lines in and out of this state shall be conclusive. It simply provides that this fact shall be considered by the board. The relative length of the lines in and out of this state would throw much light on the value of the franchise exercised in this state; but there might be other facts throwing light on the question."

In the other case Judge Carroll said:

"We do not think that the mileage basis is exclusive, or that in every case this method should be resorted to in ascertaining the value of the franchise of a common carrier. The statute does not confine either the state board or the courts to the mileage basis, but leaves them at liberty to adopt any other basis within the statutory limits that will aid in reaching a fair valuation. A state of case might be presented in which it would be unjust to the commonwealth to fix the value of a franchise on the mileage basis alone, but, under the facts in this record, we think the court did not err in arriving at the value of the franchise on this basis."

Each of these statements is a dictum, and the latter shows on its face that it is such, for there the apportionment was not only on a mileage basis, but such apportionment less the assessed value of the tangible property was fixed as the value of the franchise. As to the statement of Judge Hobson, I have no criticism to make of it. I said as much in the case of *Louisville & Nashville R. Co. v. Coulter* (C. C.) 131 Fed. 282, 305, when I said:

"This amendment was, no doubt, passed in order that the board should not be found absolutely to accept such proportion of the cash value of the entire property as the value of the part in this state, and might be at liberty, in determining the value of such part, to consider the difference in character and value, if any, between the mileage in and out of the state."

And I have said nothing herein that is in conflict with this statement of Judge Hobson. What I have said is that the apportionment on the mileage basis is not conclusive, i. e., absolutely determinative of the value of the franchise. I have said, also, that it is not wholly exclusive. My position is that it is exclusive of any other method of apportionment, but it is not exclusive of deducting from or adding to the part so apportioned, if there is an excess value elsewhere or in this state, so that by using the mileage basis of apportionment, as the basis of the assessment, property elsewhere will not be taxed in this state, and none of the property therein will escape taxation therein. The statement of Judge Carroll is broader, and possibly goes the length of saying that it is not even necessary that there should be an apportionment on any basis. This, of course, if intended, cannot be sound in the face of the statute providing that an apportionment on the mileage basis shall be considered. What was said was under the misapprehension that, if the mileage basis be held exclusive of any other basis of apportionment, the amount so apportioned would be conclusive of the value of the franchise, so that if it were really of more value such excess value could not be assessed. But, as we have seen, such is not the case.

I am therefore driven to hold that the board did not follow the statute in making an apportionment on any other basis than the mileage basis. If its position that the value of the part of plaintiff's stock in this state was more than the mileage proportion was sound, it should have apportioned a part thereof to this state on the mileage basis, and then cared for the excess value in this state by an addition to such mileage proportion. The board, in taking the position that the part of plaintiff's capital stock in this state was proportionately of more value than the part elsewhere, and in undertaking to care for the excess value in this state, was dealing with a delicate matter. This was so because there was a question of jurisdiction involved. Its valuation was not limited to property in this state. It covered interstate property and its determination was not limited to a mere valuation. It included a finding as to how much of such interstate property was in this state. Had it proceeded along right lines, its conclusion as to how much of plaintiff's capital stock was in this state, however it may have been as to its value, would have been presumptively correct only. It would not have had the binding force as to the valuation of property

admittedly within its jurisdiction. But it did not proceed along right lines, and its assessment must therefore be held void.

[6] 6. Though the fact that I have come to this conclusion might relieve me of the necessity of considering whether the assessment is void on the other two grounds relied on, I have deemed it important that I should reach conclusions regarding them also, and that I should make such conclusions known. I therefore proceed with the case. And it is next in order to dispose of the plaintiff's claim that the board did not follow the statute in the matter of the hearing prescribed thereby. The provision in relation thereto is section 4083, which is in these words:

"It shall be the duty of the Auditor, immediately after fixing such value by said board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation and may introduce evidence, and the chairman of the board is hereby authorized to summons and swear witnesses and, after hearing such evidence, the board may change such valuation as it may deem proper, and the action of the board shall be final."

The claim is not that the board did not give plaintiff notice that it had made a preliminary assessment of its franchise and give it an opportunity to appear before it and be heard. It did give such notice, and plaintiff appeared before it and presented evidence and made arguments in regard to the matter. The claim is that the board failed to inform it as to the method by which it had reached such assessment, and, without its knowledge, used a report by it to the Railroad Commission in reaching the conclusion which it came to; and that by reason thereof it had no opportunity to be heard as to those matters, and hence was denied such hearing as the statute contemplates.

It is well settled that the assessment of property for taxation is a judicial function, and that the taxpayer is entitled to be heard in regard thereto before his property is assessed. But this right to a hearing does not involve a right to know in advance of the assessment the amount at which the assessor thinks the property should be assessed, and hence as to the method by which he has reached such amount. Ordinarily in judicial proceedings against one he is entitled to know specifically what is the charge against him. But this is not so as to the assessment of property for taxation. It is sufficient that the taxpayer has notice that his property is about to be assessed, and that he is given full opportunity to be heard as to the amount at which he thinks it should be assessed. And this notice need not be other than a statutory provision fixing the time and place when the assessment is to be made. This has been held to be true as to the assessment of such property as is involved here as well as to the assessment of the real or personal estate of the taxpayer.

In the *Pittsburg, C., C. & St. L. R. Co. Case*, Mr. Justice Brewer said:

"It is contended specifically that the act fails of due process of law respecting the assessment, in that it does not require notice by the state board at any time before the assessments are made final, and several authorities are cited in support of the proposition that it is essential to the validity of any proceeding by which the property of the individual is taken that notice

must be given at some time and in some form, before the final adjudication. But the difficulty with this argument is that it has no foundation in fact. The statute names the time and place for the meeting of the assessing board, and that is sufficient in tax proceedings; personal notice is unnecessary. In *State Railroad Tax Cases*, 92 U. S. [575, 23 L. Ed. 663], are these words, which are also quoted with approval in the *Kentucky Railroad Tax Cases*: "This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked."

Again he said:

"It is urged that the valuation as fixed was not announced until shortly before the adjournment of the board, and that no notice was given of such valuation in time to take any steps for the correction of errors therein. If by this we are to understand counsel as claiming that there must be notice and a hearing after the determination by the assessing board, as well as before, we are unable to concur with that view. A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital."

But possibly, in view of the fact that such an assessment involves a question of jurisdiction, a different rule should prevail as to it. If then this position is sound, due process of law did not require that plaintiff should in advance of the assessment of its franchise in this state be advised of the amount at which the board had concluded it should be assessed or of the method and the various steps therein by which it had come to such conclusion. But, though due process of law did not so require, the Legislature had power to require that he should have notice thereof. And if it has so provided by section 4083, the giving of such notice was essential to the validity of the assessment. I do not think that there is any dispute as to this. Nor is there any dispute that such notice was not given. The board's records contain this minute in regard to plaintiff's assessment, to wit:

"It is resolved by the Board of Valuation and Assessment of Kentucky, after having given full and due consideration to the returns to the Auditor made by the Louisville & Nashville Railroad Company, a corporation under the laws of Kentucky, and, having taken into consideration the gross and net earnings of said company in Kentucky and elsewhere, and having considered the proportion and length of the lines owned, operated, leased or controlled by said company in Kentucky bears to the total length of the lines owned, operated, leased or controlled in this state or elsewhere; and having considered the value of its shares and the market value thereof and the amount of its bonded debt; and having considered the amount of its surplus fund and undivided profits and the value of all other taxable assets of said company; and after having heard and considered all before the board including the evidence of the witnesses introduced by the company and the exhibits filed therewith; and after having heard and considered the arguments of counsel for the company and after said board had ascertained the value of the capital stock of said company in Kentucky, and, from the amount thus found did deduct the assessed value of all tangible property assessed in the state of Kentucky, it is the judgment of said board, all the members thereof concurring therein, that the taxable value of the franchise of said company exercised in Kentucky as so determined is \$45,428,074.00; and the board does hereby ascertain and fix the value thereof at said sum or amount for the purpose of taxation and assessment in Kentucky for the year 1912.

"August 31st, 1912, the foregoing resolution was offered by H. M. Bosworth, was seconded by Thomas S. Rhea. Upon call of the roll of the members on

the resolution, Bosworth voted 'Yes'; Crecelius voted 'Yes'; Rhea voted 'Yes.' The chairman declared the resolution carried and ordered that same be recorded."

The secretary of the board states in his affidavit that this minute "embodies the acts of the board in making said assessment," and the members of the board in their affidavits state that "it is a true and correct record of the judgment and findings of said board." It is to be taken, therefore, that this minute is the only minute on the records of the board in relation to the assesment. This minutes relates to the board's final assessment. The board's records contain no minute in relation to the preliminary assessment and hence gives no information whatever in regard thereto. All that is known in regard thereto is to be obtained from the notice which the board gave of the preliminary assessment. It is in these words and figures, to wit:

State of Kentucky,

Office of Auditor of Public Accounts,

Frankfort, Ky. April 12th, 1912.

To Louisville & Nashville Railroad Company,

9th & Broadway, Louisville, Ky.:

The State Board of Valuation and Assessment have had the report of the above corporation for June 30th, 1911, for the taxes of 1912, under consideration and have assessed the value of your franchise as follows:

Capital stock.....	\$81,670,377
Less amount of tangible property assessed by assessor for state taxes.....	29,170,377

Value of franchise.....	52,500,000
Tax at 50 cents on each \$100.....	\$ 262,500

Under the law you will have thirty days in which to appear before the board, introduce evidence, and ask for a change in the assessment.

Should the thirty days expire without a protest, this assessment becomes final.

Yours truly,

H. M. Bosworth, Auditor.

Make checks payable to Treasurer but mail to this office.

The words "capital stock" in the notice is vague, in that it is not stated whether what is meant is the entire capital stock or the part apportioned to this state. But there is no question that it was the latter that was meant, and that it was so understood. The only information, then, which the notice contained as to the method by which the assessment had been reached, was as to the part of the entire property allotted to this state and the amount deducted therefrom on account of the tangible property therein. It contained no information whatever as to the amount at which the entire property had been valued, nor as to the basis on which a part thereof had been so allotted. Thereafter the plaintiff appeared before the board and asked a change in the assessment, introduced evidence, and argued the matter. But, after receipt of the notice and before appearing, the plaintiff, in writing, requested the Auditor to furnish it a statement "showing the principle on which the board proceeded or the mode or manner employed by it of estimating the value of this company's franchise." In answer to this request the Auditor wrote to plaintiff as follows, to wit:

"In response to your request that I furnish you by return mail with a statement showing the principle on which the board proceeded or the mode or manner employed by it of estimating the value of the company's franchise, I beg to advise you that as a member of the board making the assessment I was guided by the statutes of Kentucky, under which we were proceeding in making the assessment and the several opinions of the Court of Appeals of Kentucky which have construed those statutes, and the evidence before the board in arriving at my conclusion and forming my judgment as to the value of this property for assessment purposes. The board had before it, when the assessment was made, the several reports made by the officers of the company to the Auditor of Kentucky and the annual report of the company to its stockholders for the year ending June 30th, 1911. If it is made to appear upon a hearing before the board the tentative assessment is erroneous or incorrect, as a member of that board, I will urge that it take such action as will in my judgment do complete justice to the company and the state of Kentucky alike. I do not know of any statutory provision that requires the board to submit its calculations to the company in advance of a hearing or at all."

At the hearing the plaintiff introduced the Auditor, chairman of the board, as a witness, and asked him a series of questions, answers to which would have elicited the valuation which the board had fixed on the whole property and the method by which it had arrived at such valuation and the basis on which the part of such valuation was allotted to this state, and he declined to answer each one of these questions on the advice of the Attorney General. It is clear, therefore, that, in advance of the final assessment, no notice was given to plaintiff of the method by which it had reached the preliminary assessment and the various steps therein, save in so far as the notice thereof contained such information, and it came short of notifying plaintiff whether or not the whole property had been valued and a part allotted to this state, and, if so, at what it had been valued and the basis on which it had been allotted. The minute in relation to the final assessment contains no statement as to these matters. The sole information as to that assessment which it contains is that in making it the value of the entire property in this state was ascertained and the assessed value of the tangible property therein deducted therefrom, and in the notice thereof it was shown that in making it the value of the entire property in Kentucky was changed from \$81,670,377 in the preliminary assessment to \$74,598,451, thereby changing the assessment of the intangible property in this state from \$52,500,000 in the preliminary assessment to \$45,428,074. So I take it that there is not any dispute in this case that plaintiff did not receive the notice heretofore stated, and, in that it did not receive such notice, it claims that it did not have the hearing contemplated by the statute. The sole dispute here is as to whether the board was bound to give such notice. The defendants claim that it was not. According to its position it was not bound to give even as much information as was given by the notices of the preliminary and final assessments. It was sufficient for it to give notice of the amount at which the plaintiff's franchise had been assessed without more. The plaintiff, on the other hand, contends that it was entitled to notice of the method by which that assessment had been reached and the different steps in it. On this point I have not the slightest doubt that the plaintiff is in the right. I am satisfied not only that it was entitled to notice thereof, but that it was the duty

of the board to enter on its records the preliminary assessment showing the different steps in the method pursued by it in making it, and that they resulted in such valuation and such changes therein as were made in the final assessment, and that they resulted in the valuation finally fixed, so that an inspection of its records would give full information in regard to such matters. As it is, the board made no record whatever of its preliminary assessment, and in the record of the final assessment nothing is set forth except the final result of whatever method was adopted.

In the Fargo Case, it was held, as heretofore stated, that certain stocks and bonds owned by the express company were not used by it in its business, and hence constituted no part of the unit a part of which was in Indiana and assessable there. Mr. Justice Holmes, in disposing of the case, considered whether as a matter of fact the taxing board had included those stocks and bonds in the assessment of the entire property, a part of which had been apportioned to that state, on the mileage basis. It was essential that they had been in order to overthrow the assessment. The main evidence which he relied on as showing that they had been was that the minutes of the board did not show that they had been deducted. He said:

"We may add that it appears by a stipulation as to facts that 'the minutes of said State Board of Tax Commissioners' are in evidence. This means the complete minutes. It must be assumed that the minutes show all that took place in the proceedings, and therefore that we have before us all the evidence that was put in as well as a report of what was said."

There could have been but one basis for the assumption that the minutes showed all that had taken place in the proceedings, and that was that they should have shown it. It was the duty of the board to enter of record its proceedings in full. He noted that the company proceeded before the board on the idea that it had or was going to include them in the valuation, and said:

"If the company had been mistaken, common fairness required that it should be informed and allowed to give further evidence of the undoubted truth."

And finally he said that:

"There was no alternative open and no other could be pressed consistently with the candor to be expected from the officers of a state, in face of a constitutional question and dealing with great affairs."

There is nothing in the case of *Chicago, B. & O. R. R. Co. v. Babcock*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636, against this position. The question there raised was whether, after the assessment had been made, the companies in a suit impeaching the assessment had a right to put the members of the board on the witness stand and examine them "with regard to the operation of their minds in valuing and taxing the roads." It was held that they had not the right to do so. And one of the reasons which led Mr. Justice Holmes to this conclusion is thus set forth by him:

"Again this board necessarily kept and evidently was expected by the statutes to keep a record. That was the best evidence at least of its decisions and acts. If the roads had wished an express ruling of the board upon the deduc-

tions which they demanded, they could have asked for it, and could have asked to have the action of the board or its refusal to act noted in the record."

This reasoning against the right to put the members of the board on the stand after it had completed its work and inquire into the operation of their minds is that the companies, instead of so doing, should go to the records of the board, where they ought to be able to find all that they ought reasonably to know, and, if they did not contain all they wanted to know, they had themselves only to blame for the fact that they did not. It was in their power in the course of the work of the board to make the records full and complete. A decision that the members of the board cannot be quizzed after they have completed their work as to the operation of their minds in doing it is not against the position that their records should exhibit in full the various steps in their work. And the reason given why they should not be so quizzed is, in effect, that their records should contain such steps, which was all that the company was entitled to know.

The position of the board and of the defendants herein is that all that was essential to the validity of their work was that the company before it was finally assessed should have notice of the automatic result of the taking of the various steps in the method applicable to it, and that its record should show that result as affected by the changes made in it after hearing the plaintiff constituting the final assessment. The board had nothing whatever to do directly with such result. It was the creature of the statute. In the case of each method, as we have seen, the statute prescribes certain specific steps to be taken by the board, the taking of which will result automatically in the assessment of the franchise in this state. This is less apparent as to the method involved here than the others. Section 4081 only mentions expressly the first two steps, to wit, the valuation of the capital stock and the apportionment of a part of the value to this state on a mileage basis; but the other two, to wit, the deduction from or the addition to this part, as the case may be, on account of any excess value by reason of a special circumstance, if any there be, and the deduction of the assessed value of the tangible property in this state, are implied and as really prescribed as the two which are expressed. The statute provides that the board shall take these various steps, i. e., shall reach conclusions first as to the value of the capital stock and then as to how much thereof is in this state, which involves a determination whether as much as and no more than the mileage proportion thereof is therein, and, if it is determined either that not as much as or more than such mileage proportion, how much less or more, and that it shall, after so determining how much of the capital stock is in this state, deduct therefrom the assessed value of the tangible property therein, and that the result thereof shall be the value of the franchise in this state.

Yet it is contended that the board has the right to keep to itself these weighty conclusions which the statute requires it to reach, on the correct determination of which depends the question whether the board has exceeded its jurisdiction or exhausted its full power, which it could keep only as long as its members remembered them, and, in view of the extent of its work, not very long, if for any length of time, and

make no entry thereof on its record or give any notice in regard thereto, and that all that was required was that it should enter of record and give notice of the automatic result of its work. The mere statement of this position is sufficient to condemn it. It is inconceivable that the Legislature had any such idea. Had it had any such idea, it would never have provided for a preliminary assessment and notice thereof, to the company, so that it might appear before it and point out any errors that the board might have fallen into in the operation of a complicated piece of machinery. It would have contented itself with a provision fixing the time and place for making the assessment at which the companies might appear and introduce such evidence and present such arguments as they saw fit without more.

The Court of Appeals of Kentucky, in the two American Surety Company Cases, held that, if the board in making an assessment does not follow the method prescribed by the statute, the assessment is void. If such is the case, then the company to be affected thereby is entitled to know that method, so that, if the method or any step in it is wrong, it can have the preliminary assessment corrected by the board in the final assessment, and, if it cannot succeed in so doing, may appeal to the courts to overthrow it.

The necessities of this case do not require that I should determine whether, if the board had supplied plaintiff with full information as to the steps taken by it, the assessment would be invalid because the record of the board does not show the conclusions which it reached concerning those matters as to which the statute required it to reach conclusions. It is sufficient to say that plaintiff was entitled to notice thereof, and that the failure to give such notice is an additional reason for holding the assessment void.

[7] 7. I am clear, also, that the board did not have the right to use plaintiff's report to the Railroad Commission without its being notified thereof and given an opportunity to be heard in regard to the matters therein relied on as affecting the assessment. It was from items in that report, in connection with items in plaintiff's report to its stockholders, that the board was enabled to determine the gross receipts proportion and the net income proportion which it averaged with the mileage proportion, thereby obtaining the percentage which it used in apportioning a part of plaintiff's capital stock to this state. Without those items it would have been unable to make such apportionment and would have been limited to the mileage proportion. By means thereof it was enabled to raise the apportionment 10 per cent. and thereby add possibly as much as \$25,000,000 to plaintiff's assessment. This it did without an opportunity on plaintiff's part to say one word in regard to it.

An authority in support of plaintiff's position that it was entitled to know of the contemplated use of this report and to an opportunity to be heard in regard thereto is the case of *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431. Mr. Justice Lamar there said:

"The government further insists that the Commerce Act * * * requires the commission to obtain information necessary to enable it to perform the

duties and carry out the objects for which it was created, and, having been given legislative power to make rates, it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing for manifestly there is no hearing where the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute."

And again he said:

"The commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. * * * But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are awarded or defended. In such cases the commissioners cannot act on their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given an opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

The fact that it was plaintiff's own report which was used does not make a difference. Whilst plaintiff can hardly be heard to say that its own statement is not true, it can be heard to say in what sense it intended the statement to be taken as true. It was not made for assessment purposes or to enable any one to form a judgment as to the gross receipts or net income proportions of the plaintiff. According to the affidavit of plaintiff's comptroller, the items therein relied on were made for comparative purposes only, i. e., to compare one year with another, and otherwise they were arbitrary in character. A consideration of all he says in regard thereto suggests the possibility at least that plaintiff has been done an injustice in the use which the board made of those items. The plaintiff had the right to make the explanation to the board, and it is not to be presumed that it would not have given it whatever weight it is entitled to.

[8] 8. Finally, I come to plaintiff's claim that the assessment is void because in violation of the fourteenth amendment.

The defendants make a preliminary contention here, as they have done, against the consideration of the merits of this suit. This preliminary contention is that the assessment made by the board is not the action of the state and hence cannot be in violation of the fourteenth amendment, the applicable clause whereof is in these words:

"Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

They argue that if a suit against state officers to enjoin them from taking action which they threaten to take in the name and for the state, under color of their office, as this is, is not a suit against the state, as I have held, then the action of the board in making the assessment complained of in the name and for the state under color of its office is not action on the part of the state, and hence not prohibited by the fourteenth amendment, even though it may deny plaintiff the equal protection of the laws. And they cite and rely on the decision of the Supreme Court in the case of *Barney v. New York*, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737. That was a suit begun in the

federal court. As there was no diversity of citizenship between the parties thereto, jurisdiction depended solely on the question whether the action complained of therein was a violation of the fourteenth amendment and hence arose under the federal Constitution. The plaintiff in the suit was an abutting lot owner, and the action of which he complained was the construction of a rapid transit tunnel under a city street, so as to obstruct the easement of access to his lot, without compensation therefor, under the authority of the Board of Rapid Transit Railroad Commissioners for the City of New York. The theory on which the plaintiff proceeded was that such action was not only unauthorized but was forbidden by state legislation. It was held that the federal court in which it was brought was without jurisdiction because the action of the board under whose authority the tunnel was being constructed was not the action of the state, and hence not in violation of the fourteenth amendment, and the suit, therefore, did not arise under the federal Constitution, and it was dismissed on this ground. The case was disposed of on the assumption that the Board of Rapid Transit Railroad Commissioners for the City of New York were state officers, or a state agency. Mr. Chief Justice Fuller said:

"The bill on its face proceeded on the theory that the construction of the easterly tunnel section was not authorized, but was forbidden by the legislation, and hence was not action by the state of New York within the intent and meaning of the fourteenth amendment, and the Circuit Court was right in dismissing it for want of jurisdiction."

The Chief Justice seems to have been of the opinion that, in order for the action of state officers to be in violation of the fourteenth amendment, it is essential that such action be authorized by the Legislature. But a little reflection will convince one that this position is not sound, and there is no inconsistency between my holding that this is not a suit against the state and the further holding that the assessment complained of is in violation of the fourteenth amendment. In the *Poindexter Case*, heretofore referred to, Mr. Justice Matthews said:

"The distinction between the government of a state and the state itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself, and often the former is meant when the latter is mentioned. The state itself is an ideal person, intangible, invisible, immutable. The government is an agent and, within the sphere of the agency, a perfect representative; but, outside of that, it is a lawless usurpation. The Constitution of the state is the limit of the authority of its government, and both government and state are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. So that, while it is true in respect to the government of a state, as was said in *Langford v. U. S.*, 101 U. S. 341, 25 L. Ed. 1010, that the maxim, that the king can do no wrong, has no place in our system of government, yet, it is also true, in respect to the state itself, that whatever wrong is attempted in its name is imputable to its government, and not to the state, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by supreme law, the Constitution of the United States, is not the word or deed of the state, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name."

This, I take it, amounts to saying that the state is a political entity separate and distinct from its officers who act in its name and for it. By the government of the state nothing more is meant than its officers so acting. According to it, the acts of the officers of a state are never the acts of the state unless rightful. If wrongful, though done in the name of and for the state and under the color of their offices, they are not the acts of the state in any sense, but are their own individual acts, just as much so as they would have been had they not been done in the name of and for the state and under color of their offices. It is because such is the case that a suit against state officers complaining of a past, present, or threatened wrong on their part and seeking relief against them on the basis of it is never suit against the state, but a suit against the officers individually. And, in view of the fourteenth amendment, wrongful acts on the part of state officers are not otherwise than the individual acts of such officers. In no sense are they the acts of the state. It is never because they are such that they come within its reach. They come within its reach because the fourteenth amendment is leveled against them, and not against rightful acts which may be said to be acts of the state. Though the letter of the fourteenth amendment says that "no state shall" or "nor shall any state" do so and so, that is not what is really meant. What is really meant is that the government of the state, the state officers, or state agencies, shall not do so and so. It cannot mean anything else. The state itself cannot act except in a metaphorical sense. It is only its officers or an agency of it that can act. The fourteenth amendment is not a brutum fulmen or leveled against rightful action. It does not prohibit from acting that which does not act except metaphorically and then rightfully only. It prohibits from acting that which alone can act literally, to wit, its officers, and they only when their acts will be wrongful. Hence it is directed against state officers and state agencies and is to be interpreted as if it had provided in express terms, instead of "nor shall any state" deprive or deny, nor shall any state officers or state agency deprive or deny. So interpreted, it takes in any state officer or agency. There is no room to limit its sweep to any of the state government departments. It takes in every department thereof and every branch of every department. Every state officer and state agency is prohibited from depriving any person of his life, liberty, or property without due process of law or denying him the equal protection of the laws, and the act of such officer or agency so doing is absolutely void.

The idea intended to be here conveyed was expressed early by the Supreme Court in the case of *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676. Mr. Justice Strong said therein as follows, to wit:

"They (i. e., the war amendments) have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its Legislature, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the

laws, violates constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with powers to annul or evade it."

This statement is subject to but one criticism, and that in so far as it says that the act of the officer who violates the fourteenth amendment "is that of the state." I submit that in no sense is it the act of the state. It is the individual act of the officer himself and none other. It is not necessary that it be the act of the state in order for it to be prohibited by the amendment. What it prohibits is not acts of the state, but acts of state officers or agencies of the character therein described, i. e., wrongful acts on their part. Had Mr. Chief Justice Fuller had this idea clearly in mind, he could not have permitted the decision in the *Barney Case* to have the appearance of holding that the action of state officers prohibited or even not authorized by the Legislature did not come within the fourteenth amendment. He confused two entirely distinct ideas, to wit, action in violation of the fourteenth amendment, and action in violation of state laws. Seemingly he thought that action in violation of state laws could not at the same time be action in violation of the fourteenth amendment. He was undoubtedly correct when he said:

"Controversies over the violation of the laws of New York are controversies to be dealt with by the courts of the state."

And also:

"It is for state courts to remedy acts of state officers done without the authority of or contrary to state laws."

But the fact that action on the part of state officers may be in violation of state laws is no reason why it may not at the same time be action in violation of the fourteenth amendment. If it deprives a person of his life, liberty, or property without due process of law, or denies him the equal protection of the laws, it is a violation of the real intent and meaning of the fourteenth amendment, even though at the same time it is a violation of the state law.

And he was affected by two irrelevant considerations. One was that, under section 641 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 520), providing for a removal from the state to the federal court by one who is denied or unable to enforce in the judicial tribunals of the state rights secured to him by any law providing for the equal civil rights of all persons, citizens of the United States, a defendant, in a state court, is not entitled to removal on the ground of a denial of such rights unless the denial is a legislative denial. This was finally settled in the case of *Commonwealth v. Powers*, 201 U. S. 1, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692. But this removal statute is narrower than the fourteenth amendment. Though, as thus construed, it is so limited, the fourteenth amendment is not. It is not limited to any state officers or officer, and therefore takes in every state officer or agency. The other irrelevant consideration was that a suit against a state officer for a wrongful act is not a suit against the state within the fourteenth amendment, which consideration I have heretofore dealt with.

But he recognized that if power to act in relation to a certain matter is conferred by legislation on a state tribunal, and it acts in excess of its power, such action is in violation of the fourteenth amendment as was held in the *Farmers' Loan & Trust Company Case*, to which he alluded, where confiscatory rates of transportation fixed by the Texas Railroad Commission were invalidated because in violation of the amendment. And that is just the case we have here. The Board of Valuation and Assessment has power conferred on it to assess plaintiff's intangible property, and the claim is that it exceeded its power in thereby denying plaintiff the equal protection of the laws and in not following the statute. So that, even if the decision in the *Barney Case* is sound, it is not against the claim of plaintiff herein that the assessment complained of is in violation of the fourteenth amendment. Such a consideration, however, is not essential to bring action of state officers within the amendment. It is essential only in the case of those who are not state officers, such as municipal officers, and it is essential as to them to make them a state agency. It is not entirely certain that the point actually decided in the *Barney Case* is not sound. It all depends on the question whether the Board of Rapid Transit Railroad Commissioners for the City of New York, whose action was complained of, were state officers or officers of the city of New York. If they were the latter and their action was not only not authorized but prohibited by state legislation, then the board was not a state agency, and hence its action did not come within the fourteenth amendment.

But whatever difficulty is presented by the *Barney Case* has been removed by two later cases, to wit, *Raymond v. Chicago Union T. Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757, and *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510. Perhaps the difficulty was not fully removed by the *Chicago Union T. Co. Case*, but it has been by the *Home Telegraph & Telephone Company Case*. The action complained of in the first of the two cases was exactly the same as that complained of here, to wit, an assessment by the Board of Equalization of the intangible property of the plaintiff, and it was complained of on the same ground. The Supreme Court upheld the attack on the assessment on that ground and overthrew it. In that case, however, the assessment had been made pursuant to the command of the Supreme Court of Illinois in mandamus proceedings, and this circumstance has given rise to a claim that it has no application here. But in reality, as the later case shows, it in no wise affected the matter. The *Barney Case* was distinguished simply on the ground that the action there complained of was forbidden by the state Legislature. This was not, however, a true ground of distinction. The only possible ground of distinction is the one which I have referred to, to wit, that the board of whose action complaint was made therein was not a state agency, but an agency of the city of New York, and the fact that it had been prohibited by the Legislature from acting as it had had bearing on the question whether it was in fact a state agency. And in Mr. Justice Peckham's opinion therein may be found expressions which are calculated to confuse. They are expressions to the effect that action by state officers or a state agency in violation of the fourteenth amend-

ment are acts of the state. As, for instance, referring to the assessment complained of which was held to violate the fourteenth amendment, he said:

"It is not the mere action of individuals, but, under the facts herein detailed, it was the action of the state through the board."

I have heretofore criticised language to the same effect of Mr. Justice Strong in the *Ex parte Virginia* Case. I would respectfully submit that the action was the mere action of individuals and not action of the state through the board. It came within the fourteenth amendment, not because it was action of the state, but because what the fourteenth amendment in reality prohibits is not action of the state but of state officers, which, because of its character, is wrongful, and hence not the action of the state, but the individual action of the state officers, though in the name and for the state and under color of their offices.

The question, however, came to a head in the *Home Telephone & Telegraph Company* Case. The action complained of in that case was an ordinance of the city of Los Angeles establishing telephone rates which were claimed to be confiscatory. It was claimed that by reason thereof the ordinance was in violation of the fourteenth amendment. This was the sole ground of jurisdiction, as there was no diversity of citizenship, and the lower court dismissed the suit because it held that the ordinance was not in violation of the fourteenth amendment. The ground upon which it so held was that the enactment of the ordinance by the city council was not state action. The city council was a state agency because it had been empowered by the state Legislature to fix telephone rates. And the ground upon which it was held that the ordinance was not state action, though by a state agency, was because the Constitution of California contained a provision to the effect that no person should be deprived of his life, liberty, or property without due process of law. The ordinance, therefore, on plaintiff's claim, was in violation of the state Constitution, and hence could not be the act of the state, and, as it was not state action, it was not in violation of the fourteenth amendment. The position was taken that because of this constitutional provision not even state legislation could be in violation of the fourteenth amendment unless upheld by the state courts. It is difficult to see how, on this view, the fact that it or such an ordinance was so upheld would make it a violation of the fourteenth amendment, and why the position was not taken that all a state had to do to nullify the fourteenth amendment, so far as its limits were concerned, was to adopt in its Constitution a provision in the exact terms of the fourteenth amendment. Thereafter no action by any state officer or officers, no matter who they might be, could be in violation of that amendment, because their action was prohibited by the state Constitution, and hence was not action on the part of the state, and the fourteenth amendment is limited to state action.

But the position taken was denied, and the judgment of the lower court was reversed. It was held that on plaintiff's claim the action complained of was in violation of the fourteenth amendment. It was

sufficient that it was the action of a state agency, though in violation of the state Constitution. The Barney Case was dealt with by Mr. Chief Justice White, though he did not suggest the ground upon which possibly it may be upheld to which I have referred. He said:

"As to the other—the Barney Case—it might suffice to say, as we have already pointed out, it was considered in the Raymond Case, and if it conflicted with the doctrine in that case and the doctrine of the subsequent and leading case of *Ex parte Young*, it is now so distinguished or qualified as not to be here authoritative or even persuasive. But on the face of the Barney Case it is to be observed that, however much room there may be for the contention that the facts in that case justified a different conclusion, as the doctrine which we have stated in this case was plainly recognized in the Barney Case, and the decision there rendered proceeded upon the hypothesis that the facts presented took the case out of the established rule, there is no ground for saying that that case is authority for overruling the settled doctrine which, abstractly, at least, it recognized. If there were room for such conclusion, in view of what we have said, it would be our plain duty to qualify and restrict the Barney Case in so far as it might be found to conflict with the rule here applied."

That there is not the slightest inconsistency between the position heretofore taken, that this is not a suit against the state, and that now taken, that the assessment complained of is a violation of the fourteenth amendment, if it denies plaintiff the equal protection of the laws, is made plain by the Hopkins Case. That, as heretofore noted, was a suit to recover damages against a state agency for action claimed to have been taken in violation of the fourteenth amendment. It was brought in the state court and carried from thence through the Supreme Court of the state to the Supreme Court of the United States. The latter court had no jurisdiction of the case unless it contained a federal question, i. e., unless the action complained of was in violation of the fourteenth amendment, or plaintiff's claim that it was, was not colorable. No question as to jurisdiction was raised. It was conceded. And the court made no point of the matter, which it would had there been any question about it. Yet it held that the suit was not a suit against the state, and hence forbidden by the common-law rule that a sovereign is not suable. It was within the amendment, and yet not within such rule.

[9] 9. I therefore conclude that the assessment complained of is a violation of the fourteenth amendment, if thereby plaintiff is denied the equal protection of the laws. It is claimed that it is denied, in that the assessing officers, to wit, the county assessors and boards of supervisors and the State Board of Equalization, who have to do with the assessment of the property of individuals and of corporations not subject to the jurisdiction of the Board of Assessment and Valuation, constituting the bulk of the assessable property in this state, uniformly and purposely assessed such property for the same year at less than 60 per cent. of its fair cash value, and the board itself, which has jurisdiction of the assessment of the property of the banks and trust companies in the state, assessed the whole of same for the same year at 80 per cent. of the par value, whereas the assessment of plaintiff's franchise made by the board was at more than its fair cash value. That such a discrimination against plaintiff is a denial of the equal protection of the laws and a violation of the fourteenth amendment

is settled beyond question. A direct authority to this effect is the case of *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 31 C. C. A. 537, containing a decision of the Sixth Circuit Court of Appeals. It went there from the Circuit Court of Tennessee. By the Constitution of that state it is provided that all property shall be taxed "according to its value," to be ascertained as the Legislature shall direct, "so that taxes shall be equal and uniform throughout the state." These provisions are substantially the same as those in the Constitution of this state, to which allusion has heretofore been made. It was held in that case that an assessment upon a railroad property at its full value when it was the uniform practice in the various counties of the state to assess real property at not exceeding 75 per cent. of its true value, which was both in violation of the Constitution and of a statute passed pursuant thereto requiring all property to be assessed at its full value, was invalid under the fourteenth amendment.

To the same effect is the decision of the same court in the case of *Louisville Trust Co. v. Stone*, 107 Fed. 305, 46 C. C. A. 299, which went there from the Circuit Court of this state. It involved the validity of an assessment by the Board of Valuation and Assessment, the same board whose assessment is involved here, under the provisions empowering it to assess the property of banks and trust companies. A similar discrimination to that relied on in the earlier case was relied on therein. And it was held that if there had been in fact such discrimination, the assessment would have been invalid. The relief sought was denied solely on the merits.

And both these decisions find support in the *Chicago Union T. Company Case*, heretofore referred to; the decision in the *Louisville Trust Company Case* being cited therein by Mr. Justice Peckham with approval. The facts in the case differed somewhat from the facts as they really were in the *Louisville & Nashville Railroad Company Case*, and as they were claimed to be in the *Louisville Trust Co. Case*; but the principle involved and applied therein was exactly the same as that involved and upheld in those two cases. There the discrimination was between corporations of the same class and made by the same board. Seemingly under the Illinois Constitution the franchises of a corporation may be assessed at a different rate from that of other property in that state, so that there was no claim of a discrimination between the assessment of the franchise of the plaintiff in that case and the assessment of other property in the state. The sole discrimination was between the assessment of plaintiff's franchise and that of the franchise of other corporations, and this discrimination was made by the board whose assessment was complained of. It is in these particulars that the facts of that case differ from this. But there is nothing in the circumstance that the discrimination was between corporations of the same class to render the decision inapplicable here. The thing that made the discrimination fatal to the assessment complained of was that the law required uniformity as to all members of the class. So here the fundamental law of the state requires uniformity between all persons, and the plaintiff is discriminated against in that all property in the state, except possibly that of other railroad companies like it, is assessed at much less than its fair cash value, whereas its prop-

erty is assessed at not less than its fair cash value. In that it has been so discriminated against it has been denied the equal protection of the laws. I am now assuming the fact of a discrimination. Whether in fact there has been a discrimination as claimed will be considered later.

Nor is there anything in the circumstance that the discrimination there was made by one board to render this decision inapplicable here, in so far as discrimination was brought about by the action of the county assessors and boards of supervisors and State Board of Equalization, in assessing the property subject to their jurisdiction at less than 60 per cent. of its fair cash value and the action of the Board of Valuation and Assessment in assessing plaintiff's franchise in this state at its fair cash value or more. It is urged by defendants that the members of the board in so doing complied with the Constitution and laws of the state and respected their oaths and consciences, and their action should not be condemned because the other assessing officers of the state did not do likewise. Instead of seeking to have their work overthrown, steps should be taken calculated to make those officers do their duty likewise. This line of argument was advanced in the case of Louisville Railway Company v. Com., 105 Ky. 710, 49 S. W. 486, where it was held in accordance with the defendant's contention here. In order that the full force of this position may be grasped, I quote from Judge Paynter's opinion therein quite fully. He said:

"The contention of counsel for appellant is to the effect that, if other officers of the state disregard the constitutional provision and the statutes requiring them to assess property at its fair cash value, the courts should adjudge that the action of the Board of Valuation and Assessment in assessing franchises at their fair cash value, estimated at the price they would bring at a fair voluntary sale, should be set aside. It is certainly an unusual demand that the action of officers should be disregarded although they may have acted in strict conformity to the law imposing the duty. The officers take an oath that they will faithfully discharge their duties, and, if they have due respect for their oaths, they are bound to follow the requirements of the organic and statutory law of the state. There never can be exact equality and uniformity in taxation. The purpose of the constitutional provision in question was to require all property to be assessed at its fair cash value. There is no way to execute that provision of the Constitution, except officers be selected by the people for the purpose of assessing the property, that revenue may be raised to carry on the government. It does not seem to be logical, or sound in principle, to say that because one officer, or a class of officers, disregard the law, the action of those who strictly follow it, for that reason, should be annulled. If that be a proper view, then the constitutional provision and statutes become a dead letter, and the courts will be continually called upon to disregard the legal actions of legally constituted officers because other officers in the state have acted illegally. The court is called upon to constitute itself an instrument, not to uphold the Constitution, but to make complete the utter disregard of its provisions, by not sustaining a proper and legal action of the officers of the state in the performance of their duties. If the officers of the state are not properly assessing the real and personal property of the several counties of the state, and if the Railroad Commissioners of the state are not faithful in the discharge of their duties in assessing the railroad property of the state, then there must be a change of the personnel in the various officers of the state so as to bring about a condition, in so far as possible, that equality of assessment and taxation can be had. A speedier way would be to enforce the penal and criminal statutes of the state, if they are being violated.

If they are, the prosecution of an officer would suffice to correct the evil complained of. It may be said that this will take time, and leave some of the taxpayers of the state to bear an unequal proportion of the burdens of taxation. It is far better that this should be done for a short time, rather than for the courts to adjudge illegal that which the organic law of the state declares is legal. We cannot give our consent to declare void a proceeding because such proceeding conforms to the law."

But the invalidation of plaintiff's assessment because of such discrimination would not be because it conformed to the law. Neither it nor the board for making it would be condemned. The condemnation would be of the other assessing officers for not doing their duty likewise. It is they, and not the board, who have denied plaintiff the equal protection of the laws. By not assessing the property subject to their jurisdiction at its fair cash value, they have made it so that if the assessment stands plaintiff will have to pay more taxes than it otherwise would. The plaintiff has no other remedy than to have the assessment against it cut down. It can neither prosecute the delinquent officers nor choose their successors. Confessedly, if the board had had jurisdiction of the assessment of such other property and made the discrimination between it and plaintiff's property, the discrimination of the latter could not stand. But the mere fact that the state sees fit not to intrust the matter of assessing all property to one body, but imposes the duty of assessing different properties on different officers, should make no difference. They should be treated as one body; for together they exercise the one function of the state of assessing property for taxation. In the Louisville & Nashville Railroad Company Case Judge Taft said:

"The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment."

Thus far I have proceeded on the idea that this is the only discrimination which the case presents. But it is not. It involves a discrimination made by the Board of Valuation and Assessment itself. The discrimination, it is true, is not between plaintiff and other companies covered by section 4077, i. e., between the companies of the same class, but between plaintiff and possibly other such companies on the one hand, and other companies the assessment of whose property is imposed upon it, to wit, banks and trust companies. There are 623 such companies in this state whose capital stock, surplus, and undivided profits in this state amount to \$54,425,369.64, and in the assessment thereof no account is taken of the real value thereof, but same is uniformly assessed by the board at 80 per cent. of the par value, or the sum of \$43,140,164.50.

There is nothing in the fact that the discrimination is not between companies of the same class to distinguish this case from the Chicago Union T. Company Case.

The decision in the case of *Coulter v. Louisville & Nashville R. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615, is not against the position here taken. The basis thereof was that it was thought that the fact of the discrimination was not sufficiently established to justify the

court in interfering. In the course of the opinion Mr. Justice Holmes said:

"If it be a fact that the franchise of a Kentucky corporation is taxed at a different rate from the tangible property in the state, there can be no question that the state had power to tax it at a different rate, so far as the Constitution of the United States is concerned."

He cited a number of Supreme Court decisions in support of this position.

But it will be noted that what he said was that such a discrimination was not in violation of the United States Constitution, and that he was not careful to indicate that what he meant was that such was not the case if it was permitted by the Constitution and laws of the state. The cases cited show that he could have meant nothing else. In other words, what he meant was that such discrimination was not in and of itself, i. e., nothing else appearing, a violation of the federal Constitution. He did not and could not have meant that, if it was prohibited by the Constitution and the laws of the state, it was not then a violation of the federal Constitution. Such a discrimination is a denial of the equal protection of the laws, and that is prohibited by the express terms of the fourteenth amendment. Inasmuch as in this state the Constitution and laws expressly provide that all property, whether owned by corporations or individuals, shall pay the same rate of tax, the statement was irrelevant to the case in hand. It had no application whatever to it. And the making of it was calculated to mislead in two directions. It was calculated to cause it to be thought that such a discrimination in this state, or in any other state whose Constitution and laws are the same as here in this particular, is not a violation of the federal Constitution. It has naturally misled the defendants in this direction. The other particular in which it was calculated to mislead was in causing it to be thought that the Constitution and laws of this state permit of such discrimination. It actually misled Mr. Justice Peckham in the Chicago Union T. Co. Case in this direction. In his opinion therein he said:

"There is here no contention of illegality simply because of assessing the franchises of these corporations at a different rate from tangible property in the state which the state might do."

And in support of the statement that the state might make such discrimination, he cited the Louisville & Nashville Railroad Company Case under consideration.

There can be no question, therefore, that if there has been such discrimination as claimed by plaintiff, i. e., if its property has been assessed at not less than its fair cash value and the other property in this state, except possibly that of other railroad companies of similar character, has been uniformly and purposely assessed at substantially less than its fair cash value, the assessment is void at least to the extent which it exceeds the percentage of such other property.

That the board has assessed the entire capital surplus and undivided profits of the banks and trust companies throughout the state at at least 20 per cent. less than its real value cannot be disputed. The assessment itself shows that same is assessed at 80 per cent. of its par

value as heretofore stated. And I take it that no one will claim that such property is not worth at least par. The likelihood is that it is worth considerably more than par.

As to the property owned by individuals and corporations subject to assessment by the county assessors and boards of supervisors and the State Board of Equalization, there can be no question that it, too, has been uniformly and purposely assessed at less than its fair cash value, possibly as much as 40 per cent. less. In the case of Louisville & Nashville Railroad Company v. Coulter, *supra*, which involved plaintiff's franchise assessment for the year 1902, just ten years before the one involved here, I held that such property was underassessed at least 20 per cent. One of the circumstances on which I largely relied as showing that it was not assessed at a greater value than 80 per cent. was the comparison of the transfer sheets required to be laid before the State Board of Equalization with the assessed value; but as property covered by those sheets was generally assessed at a higher rate than other property in order to prevent the showing made by them affecting the assessment of the county by the State Board of Equalization, as the evidence in that case indicated, the conclusion there reached does not shut out absolutely a contention that such property is assessed at lower than 80 per cent. The Supreme Court on the appeal differed with me as to the fact of the discrimination. It did not hold that there had been no discrimination, but that it was not so palpable that the reluctance of federal courts to intervene in such matters should give way and the assessment be overthrown. And the weakness in plaintiff's case was thought to be as much in the claim that its property had been assessed at its fair cash value, essential to constitute the discrimination relied on, as in the claim that the other property had not. Concerning my reasoning therein as to the underassessment relied on, Mr. Justice Holmes said:

"The reasoning is careful and elaborate and cannot be read without an impression that probably it is correct to the extent of establishing a general undervaluation of land."

I confined myself in that case entirely to reasoning from the facts in evidence. I might have been justified in saying then, as now, that it is a matter of common knowledge to any one living in this state with a reasonable acquaintance with its affairs that such is the case.

Here no one claims that such is not the case. On the contrary, it is expressly admitted to be so. In the course of the oral argument, the Attorney General expressed himself in this way:

"I recognize the fact that the people throughout the state of Kentucky, except those who have only small tracts of land, list their property at far less than the value of the property. There are two classes of people who list their property so that you can determine whether it is listed at its fair cash value, and that is the class who own property worth less than \$2,000, and the corporations who make a sworn statement from which you can see all the property owned by them. I agree with your honor and the statement the gentlemen have made here that there is throughout the country a disposition, not only on the part of the officers, but on the part of individuals, to violate the Constitution and the law of the state by listing property at less than its fair cash value, estimated at what it would bring at a fair voluntary sale.

It is alleged in this bill that the officers do that. But they will never be able to prove that any officer or set of officers intends to list property differently or to discriminate. As your honor knows from experience, when a man comes to list his farm worth \$2,500 or \$3,000, he will list it at \$1,200 or \$1,500. He puts it down himself at that figure, and then, if the assessor or the Board of Equalization attempts to raise him, he brings to bear all the political and personal influence he can command to prevent the board from raising his property to its true value. He does as an individual exactly what the corporations do when they appear before the state board. When the state board finds from their statements filed with the Auditor that they have not fixed the true value on their property, they receive notice to that effect and have a hearing before the board, and what do they do? They use all their influence, and bring to bear the importunities and persuasions of their friends, to keep the board from placing a higher valuation on their property. For these reasons it is almost impossible for any officer, either county or state, to assess the property of individuals or corporations, as his oath requires, at its true value."

And in Mr. Rich's brief he says:

"Defendants do not mean to defend or attempt to defend the acts of the assessors in this state who disregard their oaths of office by assessing property at less than its fair cash value in plain defiance of the statutory and constitutional mandates on this subject, but, on the contrary, regard such conduct on the part of such officers as highly reprehensible. The question is: What is the remedy for this state of affairs?"

In the fact that the board assessed the assets of the banks and trust companies, whose numerous stockholders are scattered all over the state, at 80 per cent. of par value, is a strong circumstance in favor of the position that in its opinion the ordinary property of the state is assessed at no greater percentage of real value than this 80 per cent. of par value is of the real value of such property. There is no accounting for the board's so assessing such property, except on the hypothesis that it thought that the property of banks and trust companies should pay no greater percentage of real value than the ordinary property of the state paid, and such percentage of par value of the one reasonably represents the percentage of real value at which the other is assessed.

The main ground upon which Mr. Justice Holmes hesitated to accept the conclusion which I reached in the Louisville & Nashville Railroad Company Case, and which he said was probably correct, and to act upon it, was the testimony therein of the members of the Board of Equalization. But such a ground for hesitation no longer exists. The board for the years 1910 and 1911 in its reports to the Governor frankly admit the underassessment. In the report for the year 1910 it said:

"The revenue laws provide that all property shall be assessed at its fair cash value. It was not contended that this was done in a single county; therefore, the Board of Equalization was not privileged to reduce any assessment. We selected those counties that most nearly conformed to the requirements of the law and endeavored to equalize the others with them."

And again:

"The increase made by the State Board of Equalization averages 8 per cent., and with this addition, is no measure of the fair cash value of the property in the state."

In the report for the year 1911 it said:

"In this, as in former years, there was no occasion for reducing any county's returned assessment. Not one of them was assessed at a measure of its fair cash value."

And again it said:

"All witnesses who appear before the board are appointed by the county judge after he has received notice of a tentative raise by the board. It is seldom that the judge will select a witness who has not formed an opinion and expressed a desire to appear in defense of his county. All the evidence before the board is *ex parte*. The record is made up by the county officials and all witnesses selected for the purpose of testifying for the defense.

"There are a few good assessors in the state—we say a 'few' for the lack of a general term that expresses a lesser number.

"The impression seems to be gaining ground throughout the state that we have a 'single tax' system, and that personal property is exempt from taxation, and, inasmuch as real estate is compelled to bear the burden, it is the privilege of the owner and the duty of the officials to connive to list all property at a very low figure. In the matter of personal property no witness testified that the assessor claimed to have assessed it fully, or that the owners had intended to give it in at its worth. In substance, they contend that it is not given in anywhere, and excuse themselves on the ground that it is a matter of perjury or poverty, and exercise their right of choice.

"The result is that, after the number of lists that the assessor arbitrarily increases is added to the number that the county board of supervisors raise, there remains about 95 per cent. of the people in the state who fix the sum themselves upon which they are willing to pay taxes, and it is a safe assertion that 99 per cent. of that 95 per cent. are not inclined to pay a great amount.

"From the testimony of the average witness who appears before the board, there is very little good land in his section of the state, and what is there is mainly in adjoining counties; in his particular county there is a poor streak extending the length and width of the county from which all the timber has been cut and marketed; the process of erosion has carried all the fertile soil into the Gulf of Mexico; that a peculiar and unprecedented condition exists in regard to the bottom lands in his county, unlike the conditions along most streams that enrich the land, but the current of the stream changes and washes it away, and, if by accident there is a deposit, it is always of sand, that destroys its future productiveness; that there is here and there an occasional oasis of small area upon which the tireless farmer can eke out an existence, and, by the addition of a small mortgage, pay his taxes.

"The cities do not labor under the same difficulties, but their difficulties are just as difficult. It seems that in all the cities the railroads have secured quantities of land for terminal facilities that are withheld from assessment; in addition to which, the smoke, noise, and dust has destroyed the value of property for blocks on either side. Schools and churches have also acquired valuable property which is exempt from taxation; this also lessens their total. The money in banks is owned by nonresidents, country banks, and the federal government. The remaining few dollars left among their citizens is mainly for the purpose of street car fare. Business has been removed from the principal streets and is yet unlocated. In fact, the city would go into the hands of a receiver if there were anything to receive or anybody who would receive it.

"Many counties insist that any increase in their present assessment would impoverish them; possibly, this complaint has been loudest from the pauper counties that are a liability of the state, that not only expend every dollar collected from taxes in their own county, but are beneficiaries from the state of many thousand dollars each year."

There is a note of exaggeration as well as humor here. But it is a case where exaggeration was permissible in order to bring out sharply the real truth of things.

These reports are followed by that of 1912, the same year as that of the assessment involved herein. And in it we have this statement:

"Our figures for this year show a decrease in the total assessments on real and personal property. We made raises only where a great falling off was shown in assessment as compared with the preceding year; it being the policy of the board not to increase arbitrarily the assessment of any county."

The existence of this substantial underassessment of such property is confirmed by the showing made by the United States census. According to the census of 1900 the assessed value of farm property in this state, consisting of land, building, machinery, implements, and live stock, was 63 per cent. of the cash value; whereas, according to that of 1910, the percentage was 51.6. This fall was no doubt due to the fact that the property had increased substantially in cash value during the ten years there had been no substantial change in the assessed value.

Progress, therefore, has been made along the line of truthfulness since 1902. No longer do the courts have to contend with the sham and pretense that ordinary property in this state is assessed at its fair cash value or substantially so.

As to whether the board assessed plaintiff's franchise at its fair cash value, it seems certain that the board intended to so fix it and, when it left its hands, thought that it had done so. The board's record sheds no light on the matter. The notices of the preliminary and final assessments state that the value placed on the part of plaintiff's capital stock apportioned to this state is the "cash value." It is apparent how the value of plaintiff's franchise was arrived at on the preliminary assessment. It was predetermined that the franchise should be assessed at \$52,500,000. This predetermination was either arbitrary or what Mr. Justice Holmes terms in the Chicago, B. & Q. R. Co. Case an "intuition of experience." It was not the result of a valuation of plaintiff's capital stock and an allotment of a part thereof on some basis to this state. I make this out by the consideration that in the notice of the preliminary assessment the cash value of the part of the capital stock in this state was placed at \$81,670,377, and that the assessed value of the tangible property therein, to wit, \$29,170,377, was deducted therefrom, leaving \$52,500,000 as the value of the franchise. This shows that the cash value of the part of the capital stock was obtained by adding to the amount at which it had been predetermined to assess the franchise, to wit, \$52,500,000, the assessed value of the tangible property, to wit, \$29,170,377 and in no other way. The conclusion is confirmed by the fact that this same course was pursued in the case of the assessments at the same time of the franchises of the Illinois Central Railroad Company, the Chesapeake & Ohio Railway Company, and the Cincinnati, New Orleans & Texas Pacific Railroad Company, each of which is involved before me in a separate suit. There is therefore not the slightest indication in what is known in regard to the preliminary assessment that the board intended to assess it at less than fair cash value.

That it was the intent of the board to make the final assessment at the fair cash value, and that it thought it had done so, appears from

the statements made in the affidavit of the three members of the board prepared before the oral argument and then filed. They are exactly alike, and in each one a statement is made eight times as to the value at which the franchise had been assessed, and always the phraseology used is the same. It is that in the opinion of the members of the board the amount at which the assessment had been made was "not more than the fair cash value." It is also stated several times that the board did not know or believe it to be true that:

"The assessing and taxing authorities of the state of Kentucky systematically, habitually, intentionally, and designedly assess and have assessed the property of individuals and other corporations for taxation in the state of Kentucky at less than its fair cash value estimated at the price it would bring at a fair voluntary sale."

In view of this ignorance, the board would hardly assess plaintiff's franchise at less than its fair cash value. Then it is stated positively that the board sought "to ascertain the correct value of plaintiff's franchise" and "strictly followed the statutes of Kentucky defining the duty of the board, considering with said statutes the decisions of the Kentucky Court of Appeals." As those statutes require the assessment to be at the fair cash value, and the Kentucky Court of Appeals held in the Louisville & Nashville Railroad Company Case that an assessment at such value would not be invalid, notwithstanding that other property was substantially underassessed, it must be taken that the meaning intended to be conveyed by this language was that the assessment in question was made at the fair cash value.

If then there were nothing else in the case than the considerations to which I have referred, it would have to be accepted as beyond question that the board made no effort to equalize the assessment of plaintiff's franchise with the assessment of ordinary property, but that it intended to assess, and thought it had assessed, plaintiff's franchise at its fair cash value. But this is not all there is bearing on the matter. The supplemental affidavit of the Auditor, heretofore referred to, has to be considered in this connection. It was prepared and filed after the oral hearing of the demurrer and motion for preliminary injunction, which lasted several days, and that because, at that hearing, I made the request that an explanation be given as to the method pursued by the board in making the assessment and the various steps in it. In making the request, I was not prying into the mental process by which the members of the board had come to any conclusion. I called merely for the conclusions, which the statute required it to reach, and which, as I have held, should have been entered upon its record and of which plaintiff should have been informed. And I called for them in the interest, if possible, of upholding the assessment. On its face this affidavit is inconsistent with the original affidavit. As shown, according to the latter, the board made no effort to equalize the assessment of plaintiff's franchise with the assessment of ordinary property and intended and thought that it had assessed same at its fair cash value. According to the supplemental affidavit, it did make an effort to equalize and did not assess the franchise at its fair cash value.

The value of this affidavit as tending to show that it did so is affected by other considerations than that it conflicts with the former affidavit. It presents two different equalizations, both of which could not have been used, and one of these is certainly not real. According to this one, the equalization was at 80 per cent. of fair cash value; but it is evident that it was brought about by finding out what amount the amount at which the value of the part of the capital stock in this state was finally fixed as shown by the notice of the final assessment, to wit, \$74,598,451, was 80 per cent. of, and then taking that amount as the amount at which the value of such part was fixed before the equalization. The affidavit indicates just what one would expect, under the circumstances, to wit, an inability on the part of the board to give the exact figures by which it arrived at the amount of \$74,598,451 at which it fixed the amount of such part. Unless it preserved a memorandum of its calculations, the members of the board could not retain it in their memory, and there is no indication that it preserved any such memorandum. Besides, apparently no reliance is placed on the statement of the affidavit by the defendants. They do not claim that the board did in fact make any attempt at equalization. Their position is that it was not bound to equalize, and that the validity of its assessment is not affected by the fact that it did not equalize, and the assessment is at fair cash value. I think, therefore, that the true construction to be placed on the affidavit is that it does not undertake to set forth just how the assessment was made, but how it might have been made so as to equalize. Its statements are so involved and confused that possibly I have done it an injustice; but I think that, in the absence of any cross-examination of the members of the board, I should dispose of the motion for a preliminary injunction on the basis that the board in making the assessment intended to fix, and thought it had fixed, the value of the franchise at its fair cash value.

It follows from what I have said that the demurrer should be overruled, and that conditionally, at least, the plaintiff is entitled to the preliminary injunction sought.

[10] The injunction which it seeks is not against the enforcement of the entire assessment, but only so much thereof as exceeds the sum of \$11,899,200, the amount of the assessment for the preceding year, to wit, 1911, taxes upon which, state and local, have been paid as required by a previous order herein. In the case of *People's Nat. Bank v. Marye*, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. Ed. 180, it was held that a court of equity should not grant an injunction against an assessment because of its invalidity except on condition of payment of the taxes fairly and equitably due on plaintiff's own theory as presented in its bill. In the *Chicago Union Traction Company Case* the lower court, pending the application for the preliminary injunction, determined the amount of taxes fairly and equitably due, and granted it on condition that this amount be paid. The Supreme Court affirmed its action. Judge Grosscup in his opinion, reported in *People's Gaslight & Coke Co. v. Raymond* (C. C.) 114 Fed. 557, said:

"Injunctions issue as a matter of discretion and conscience, not right. The court may always attach equitable conditions."

And in the Cincinnati & Covington Bridge Company Case Judge Hobson said that, if it affirmatively appeared that a valid assessment would amount to as much as the invalid assessment complained of, an injunction against its enforcement should be denied absolutely, notwithstanding its invalidity. His words are these:

"It is also insisted for the appellee that the basis adopted by the board in this case, on the mode by which it reached its result, was erroneous. If this be conceded, still, if the result reached by the board was correct, or not more onerous on appellee than it should have been, the assessment cannot be disturbed."

Here it cannot be said that it so appears, or that, on plaintiff's own theory as presented in its bill, any larger assessment should fairly and equitably be made for the year 1912 than was made by the board for the preceding year. Nor are there sufficient data before me to enable me now to determine what is a fair and equitable assessment for that year. I may say here that I do not think that it will ever be incumbent on me to determine this question. That is a matter, as I view it, for the determination of the board. My action with reference thereto, so far as I may have anything to do with it, will be limited to determining whether the board has followed the statute or whether its assessment is in violation of the fourteenth amendment. But I feel constrained to hold that the injunction sought should not be granted except on condition that a larger sum be paid on account of that year's taxes than has already been paid. What has led me to this conclusion is this: The case of *Siler v. L. & N. R. R. Co.*, heretofore referred to, was an appeal to the Supreme Court from a decree of this court. It was a suit against the Railroad Commission of this state to enjoin the enforcement of an order made by it fixing maximum rates for transportation of intrastate freight. The plaintiff in its bill, filed therein July 25, 1906, claimed as a basis for the relief sought, amongst other things, that those rates were confiscatory, and, as the value of its railroad in this state was relevant to this contention, the bill contained allegations in regard thereto. It set forth the value thereof as of June 30, 1905, on several different bases. One of these was the cost of reproduction. It was alleged that it would cost \$70,599,484.81 to reproduce it. The claim was not simply that it would cost that much to reproduce it, but that it was worth that sum, and was worth it because it would take that much money to reproduce it. The plaintiff referred to this valuation as a "virtually conceded value." The mileage which it thus claimed to be of this valuation was 1,265.23, all of it mileage operated by plaintiff.

Here then was a distinct claim that on June 30, 1905, this amount of mileage was worth \$70,599,484.81, and relief was asked of this court on the basis that it was worth that much. It was asked to condemn the rates complained of as confiscatory because on such a valuation they were too low. The operated mileage as of June 30, 1911, the date as of which the assessment speaks, was 1,494.36, or 229.13 miles over that as of June 30, 1905. In addition, the assessment included 190.34 miles of controlled mileage and 70.11 miles of owned mileage. But a deduction has to be made on account of a small amount of mileage included in the estimate which was not included in the assess-

ment. On the basis, then, of the correctness of the plaintiff's claim to which I have alluded, there can be no question that the value of the part of plaintiff's capital stock in this state was at least the sum which the board found it to be, to wit, \$74,598,451. As to whether such a value can be worked out by pursuing the method prescribed by the statute is another question, and it is essential that it can be in order to the validity of an assessment calling for a valuation as much as that. I am quite confident that it can be if the necessary pains are taken. As to this matter I do not deem it best for me to say more than this. As I have just said, the determination of what is a fair and equitable assessment is a matter for the board, and, having indicated my views of the method prescribed by the statute, I think I should leave it to do the work unhampered by any ideas I may have. The suppository case which I have put is not to be taken as presenting my views of the matter to any extent. I put it simply to indicate the possible wrong that may have been done plaintiff if the board in making the assessment complained of apportioned to this state a part of plaintiff's capital stock in the manner set forth in the Auditor's supplemental affidavit, and I so did with hesitation.

It is not necessary that I should deal with this matter in any detail to justify my refusing to grant the injunction sought, except on condition that plaintiff make payment of taxes, state and local, on the assumption that the value of the part of its capital stock in this state is at least the sum which the board found it to be, even though it may have reached it by an erroneous method. At least, until the board has had an opportunity to make an assessment in accordance with the statute, I do not think that I should admit of the possibility that an assessment so made will not yield a valuation as much as, according to the representations to this court, it must be taken to be. The board intended this amount as full value, as I have heretofore held. Deduction, therefore, should be made therefrom on account of the under-assessment of ordinary property, and that of banks and trust companies. The plaintiff claims that this property is not assessed at more than 60 per cent. of its fair cash value. It is possible, if not probable, that this is so, and I have a decided impression that it is capable of demonstration that such is the case. On this basis the amount on which payment would have to be made is as follows, to wit:

60% of \$74,598,451.....	\$44,759,070 60
Deduct assessed value of tangible property in this state.....	29,170,377 00

Leaves a balance.....	\$15,588,693 60
Deduct amount on which payment has been made.....	11,899,200 00

Leave a balance of.....	\$ 3,889,493 60
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—on which payment should yet be made. In plaintiff's brief the assessed value of the tangible property in this state is put at over a \$1,000,000 less than as above, which is the amount taken from the board's notice. If this should be the correct amount on which payment should yet be made, it would have to be increased to this extent. But plaintiff's attitude as to the percentage of full value at which such other property is assessed has been equivocal. In the former litiga-

tion as to the assessment for the year 1902, it took the position that the percentage was 80. In the hearing before the board in regard to the assessment here involved, it conceded the possibility that it might be as much as 80 by presenting what it claimed the assessment should be on that basis as well as on the basis of 60, and it has so done in its brief filed before me. But this is not all. It has filed affidavits to the effect that property in Jefferson county, which includes the city of Louisville, and in the important county of Woodford, is assessed on the basis of 80 per cent., and in some other counties as much as 70 per cent. On the basis of 70 per cent., the amount on which payment would have to be made is as follows, to wit:

70% of \$74,598,451.....	\$52,418,875 70
Deduct assessed value of tangible property in this state.....	29,170,377 00
Leaves a balance of.....	23,248,498 70
Deduct amount on which payment has been made.....	11,899,200 00
Leaves a balance of.....	11,349,298 70

—on which payment should yet be made.

This is open to the criticism that tangible property is covered by intangible. But this is the necessary result of the complex method of assessed companies within section 4077, Ky. St. Their tangible property is assessed by other officers, and the board of valuation and assessment is required to fix the difference between the value of the whole property and the assessed value of the tangible as the value of the intangible. If, then, the tangible has been underassessed, the assessment of the intangible necessarily includes tangible property.

In view of everything, I conclude that the injunction should be, and it is, granted on condition that plaintiff pay within 30 days from this date the taxes due the state and subordinate jurisdictions on \$11,000,000 in addition to what it has already paid.

ILLINOIS CENT. R. CO. v. BOSWORTH et al.

(District Court, E. D. Kentucky. December 20, 1913.)

In Equity. Suit by the Illinois Central Railroad Company against Henry M. Bosworth and others, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky, and others. On motion for preliminary injunction and demurrer to the bill. Demurrer overruled, and injunction granted on condition.

Blewett Lee, of Chicago, Ill., and Trabue, Doolan & Cox, of Louisville, Ky., for plaintiff.

James Garnett, Atty. Gen., and M. M. Logan, Chas. H. Morris, O. S. Hogan, and D. O. Myatt, Asst. Attys. Gen., of Kentucky, and John L. Rich, of Covington, Ky., for defendants.

COCHRAN, District Judge. This cause is before me on motion for a preliminary injunction and demurrer to the bill. It is similar in char-

acter to that of the Louisville & Nashville Railroad Co. Case against the same defendants (209 Fed. 380), in which I have heretofore handed down an opinion, though it does not present all of the questions involved therein.

There is a radical difference between the two cases in this: That in that case the board took the position that the part of the company's capital stock in this state is proportionately of more value than the part elsewhere, whereas in this case it took the reverse position. The assessment made by the board of plaintiff's franchise in this state for the year 1911 amounted to \$4,510,320. The assessment complained of herein amounts to \$14,746,857. It was reached in this way:

The value of the part of plaintiff's capital stock in this state was	
fixed at.....	\$27,124,240
Deducting the assessed value of the tangible property in this state	12,377,383

Leaves the balance of.....	\$14,746,857
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The board's record does not state the conclusions which it reached in making the assessment as to the matters regarding which the statute required it to reach conclusions, but only the automatic result of those conclusions, to wit, that the value of plaintiff's franchise in this state was the sum of \$14,746,857. It is known that it fixed the value of the part of its capital stock in this state at \$27,124,240, and obtained the value at which it fixed the franchise by deducting therefrom the assessed value of the tangible property in this state only, from the notice which it gave to plaintiff of the final assessment and the affidavits of the members of the board filed herein.

No complaint seems to have been made by plaintiff of its want of notice of how the assessment was arrived at, nor is the absence of such notice made a ground of attack on the assessment complained of. The sole grounds of attack which are made thereon are that the board, after fixing the value of the capital stock, did not first deduct the value of the entire tangible property before apportioning a part thereof to this state, that it arrived at its valuation of the part of the capital stock in this state by capitalizing the net earnings in this state at 6 per cent. and taking 80 per cent. thereof, and that it is in violation of the fourteenth amendment, in that it denies plaintiff the equal protection of the laws. The first ground of attack is not well taken, as I have held in the Louisville & Nashville Railroad Company Case. The second ground of attack is denied by the board.

The last ground of attack is well taken, but it invalidates the assessment only to the extent that the valuation placed on the part of plaintiff's capital stock in this state exceeds the percentage at which other property is assessed. If, as in the Louisville & Nashville Railroad Company Case, 70 is taken as the proper percentage, the amount of the assessment on which the plaintiff should pay taxes is as follows, to wit:

70 per cent. of \$27,124,240.....	\$18,996,968
Deduct assessed value of tangible property.....	12,377,383

Leaves a balance of.....	\$ 6,618,585
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—as the value of the franchise. This is \$2,108,265 in excess of the assessment for the previous year. As the plaintiff claimed in its bill

that it was liable to no franchise assessment at all, because the value of its entire property did not exceed the value of its tangible property, under the erroneous view that the statute required a deduction of same from the value of the entire property, no payment has heretofore been made by plaintiff on account of its franchise for the year 1912.

The motion for a preliminary injunction, therefore, is sustained, on condition that the plaintiff within 30 days from this date pay the taxes, state and local, on the sum of \$6,618,585.

The demurrer to the bill is overruled.

CINCINNATI, N. O. & T. P. RY. CO. v. BOSWORTH et al.

(District Court, E. D. Kentucky. December 20, 1913.)

In Equity. Suit by the Cincinnati, New Orleans & Texas Pacific Railway Company against H. M. Bosworth and others, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky, and others. On motion for preliminary injunction and demurrer to the bill. Demurrer overruled, and injunction granted on condition.

John Galvin and Murray Hubbard, both of Cincinnati, Ohio, for plaintiff.

James Garnett, Atty. Gen., and M. M. Logan, Chas. H. Morris, O. S. Hogan, and D. O. Myatt, Asst. Attys. Gen., of Kentucky, and John L. Rich, of Covington, Ky., for defendants.

COCHRAN, District Judge. This cause is before me on motion for a preliminary injunction and demurrer to the bill. It is similar in character to that of the Louisville & Nashville Railroad Company against the same defendants (209 Fed. 380), in which I have heretofore handed down an opinion, though it does not present all the questions involved therein.

There is a radical difference between the two cases in this: That in that case the board took the position that the part of complainant's capital stock in this state is proportionately of more value than the part elsewhere, whereas in this case it took the reverse position. The assessment of plaintiff's franchise in this state for the year 1911 made by the board amounted to \$3,559,320. The assessment complained of herein amounts to \$10,574,200. It was reached in this way:

The value of the part of plaintiff's capital stock in this state was fixed at.....	\$16,625,000
Deducting the assessed value of the tangible property in this state	6,050,800

Leaves a balance of.....	\$10,574,200
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The board's record does not state the conclusions reached in making the assessment as to the matters regarding which the statute required it to reach conclusions, but only the automatic result of those conclu-

sions, to wit, that the value of plaintiff's franchise in this state was the sum of \$10,574,200. It is known that it fixed the value of the part of its capital stock in this state at \$16,625,000, and obtained the value at which it fixed the franchise by deducting therefrom the assessed value of the tangible property in this state only, from the notice which it gave the plaintiff of the final assessment and the affidavits of the members of the board filed herein.

The grounds of attack on the assessment are that the board, after fixing the value of the capital stock, did not first deduct the value of the entire tangible property before apportioning a part thereof to this state, that it refused on demand to disclose to it the method by which it had fixed the value of its franchise at the sum of \$10,574,200, and because thereof it was denied the hearing contemplated by the statute, and that the assessment is in violation of the fourteenth amendment, in that it denies plaintiff the equal protection of the laws. The first ground of attack is not, and the other two are, well taken, for the reasons set forth in my opinion in the Louisville & Nashville Railroad Company Case. But the last one invalidates it only to the extent that the value placed on the part of plaintiff's capital stock in this state exceeds the percentage at which other property in this state is assessed.

Though the second ground invalidates it entirely, there is nothing presented to me which leads me to think that the valuation of \$16,625,000 placed on the part of the capital stock in this state is excessive. It is less than the mileage proportion of a possible valuation of the whole capital stock, and hence may be said to make allowance for the fact that the part elsewhere is proportionately of more value than the part in this state. If, as in the Louisville & Nashville Railroad Company Case, 70 is taken as the proper percentage at which other property in this state is assessed, the amount of the assessment on which the plaintiff should pay taxes is as follows, to wit:

70 per cent. of \$16,626,000.....	\$11,637,500
Deduct assessed value of the tangible property.....	6,050,800
Leaves a balance of.....	\$ 5,586,700
as the value of the franchise in this state.	
Deduct amount of 1911 assessment on which taxes have been paid	3,559,320
Leaves a balance of.....	\$ 2,027,380
on which payment has not been made.	

The motion for a preliminary injunction is sustained, on condition that plaintiff within 30 days from this date pay the taxes, state and local, on the additional sum of \$2,000,000.

The demurrer to the bill is overruled.

CHESAPEAKE & O. RY. CO. v. BOSWORTH et al.

(District Court, E. D. Kentucky. December 20, 1913.)

In Equity. Suit by the Chesapeake & Ohio Railway Company against H. M. Bosworth and others, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky, and others. On motion for preliminary injunction and demurrer to the bill. Demurrer overruled, and injunction granted on condition.

John T. Shelby and Robert L. Northcutt, both of Lexington, Ky., and Worthington, Cochran & Browning, of Maysville, Ky., for plaintiff.

James Garnett, Atty. Gen., and M. M. Logan, Chas. H. Morris, O. S. Hogan, and D. O. Myatt, Asst. Attys. Gen., of Kentucky, and John L. Rich, of Covington, Ky., for defendants.

COCHRAN, District Judge. This cause is before me on motion for a preliminary injunction and demurrer to the bill. It is similar in character to that of the Louisville & Nashville Railroad Company against the same defendants (209 Fed. 380), in which I have heretofore handed down an opinion, though it does not present all the questions involved therein.

There is a radical difference between the two cases in this: That in that case the board took the position that the part of complainant's capital stock in this state is proportionately of more value than the part elsewhere, whereas in the case in hand it took the reverse position. The assessment of plaintiff's franchise in this state for the year 1911 made by the board amounted to \$2,743,350. The assessment complained of herein amounts to \$18,798,630. It was reached in this way:

The value of the part of plaintiff's capital stock in this state was fixed at.....	\$25,368,900
Deducting the assessed value of the tangible property.....	6,570,270

Leaves the balance of.....	\$18,798,630
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The board's record does not state the conclusions which it reached in making the assessment as to the matter regarding which the statute required it to reach, but only the automatic result of those conclusions, to wit, that the value of plaintiff's franchise in this state was the sum of \$18,798,630. It is known that it fixed the value of the part of its capital stock in this state at \$25,368,900, and obtained the value at which it fixed the franchise by deducting therefrom the assessed value of the tangible property in this state only, from the notice which it gave to plaintiff of the final assessment.

The grounds of attack on the assessment are that the board, after fixing the value of the capital stock, did not first deduct the value of the entire tangible property before apportioning a part thereof to this state and that it is in violation of the fourteenth amendment, in that it denied plaintiff the equal protection of the laws. The first ground is not well taken, for the reasons set forth in my opinion in the Louisville & Nashville Railroad Company Case. The second ground of attack is well taken, but it invalidates the assessment only to the extent

that the value placed on the part of the plaintiff's capital stock in this state exceeds the percentage at which other property is assessed. If, as in the Louisville & Nashville Railroad Company Case, 70 is taken as the proper percentage, the amount of the assessment on which the plaintiff should pay taxes is as follows, to wit:

70 per cent. of \$25,368,900.....	\$17,758,230
Deduct assessed value of tangible property.....	6,570,270
Leaves balance of.....	\$11,187,960
as the value of the franchise in this state.	
Deduct amount of 1911 assessment, on which taxes have been paid	2,743,350
Leaves a balance of.....	\$ 9,444,610
on which payment has not been made.	

But the assessment is also subject to attack on the ground that the board did not enter of record or give to plaintiff notice of its conclusions in regard to the matters as to which the statute required it to reach conclusions, and, if the facts justified it, that it was in violation of the fourteenth amendment, in that it deprived plaintiff of its property without due process of law by taxing property elsewhere. Inconsistent and conflicting statements have been made in regard to these conclusions, and this case has features rendering it possible that by the assessment property elsewhere is taxed in this state. The part of plaintiff's capital stock elsewhere, both in the tangible and intangible parts, is proportionately of much more value than in this state according to the presentation made by plaintiff. The mileage in this state, though amounting to 543.1 miles, or 27.52 per cent. of the whole, contains a large portion of inferior mileage. This is shown by a comparison of the assessment thereof with the assessment of the mileage of the Illinois Central and Cincinnati, New Orleans & Texas Pacific Railroad Companies as made by the Railroad Commission. It is claimed that plaintiff has among its assets \$25,000,000 of stocks and bonds, constituting no part of the unit, a part of which is apportionable to this state and not taxable here.

The plaintiff's bill is open to the construction that by the assessment complained of property elsewhere is taxed in this state; but, if such is plaintiff's position, it should be put more definitely than it is, and it would be proper to permit it to amend its bill in order that it may do so. In view of these considerations, I do not think that I should require payment of taxes on the whole of the above balance of \$9,444,610 as a condition to granting the injunction sought. Yet I think that it should pay more than it has already paid. Unless, therefore, cause is shown against it, the preliminary injunction sought is granted on condition that plaintiff within 30 days from this date shall pay the taxes, state and local, for the year 1912 on the sum of \$5,000,000 in addition to what it has already paid, which is slightly less than it offered to submit to before the board.

The demurrer to the bill is overruled.

IRVING et al. v. NEAL et al.

(District Court, S. D. New York. November 6, 1913.)

1. CORPORATIONS (§ 370*)—PRACTICING LAW—NEW YORK STATUTE.

Penal Law (Laws N. Y. 1909, c. 88 [Consol. Laws N. Y. 1909, c. 40]) § 280, which prohibits any corporation from practicing law, does not make it unlawful for a corporation to prosecute an action for the benefit of another at its own expense, employing members of the bar to conduct the case.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511-1518; Dec. Dig. § 370.*]

2. TRADE UNIONS (§ 4*)—LIABILITY OF MEMBERS—COMBINATION IN RESTRAINT OF TRADE.

A member and officer of a labor organization, who joins with others in the adoption of a rule or regulation which is made a part of the organic law of the organization and binding on all its members under penalty of a fine, if such rule or regulation is unlawful as in restraint of trade, is liable for anything done to carry it out, although he does not personally participate therein.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 3; Dec. Dig. § 4.*]

3. MONOPOLIES (§ 12*)—COMBINATIONS IN RESTRAINT OF TRADE—REGULATIONS OF LABOR ORGANIZATIONS.

A combination between local unions of organizations of carpenters and joiners, by which their members are pledged to refuse to work on any job where trim or finish made in a nonunion shop is used, is in restraint of trade and commerce, and, if it affects interstate commerce, is in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and it is immaterial that the combination is not directed against any particular concern or dictated by any malicious motive.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

4. MONOPOLIES (§ 24*) — COMBINATIONS IN RESTRAINT OF TRADE — STATUTORY REMEDIES.

Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prescribes the remedies for its violation, civil and criminal, at law and in equity, and under its provisions injunctive relief can be given only at suit of the government. Nor can such relief be granted under section 340 of the General Business Law of New York (Consol. Laws N. Y. 1909, c. 20) against a combination in restraint of competition in trade in violation of its provisions except at suit of the state.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

5. MONOPOLIES (§ 24*)—COMBINATION IN RESTRAINT OF TRADE—INJUNCTION.

Under Penal Law N. Y. (Consol. Laws N. Y. 1909, c. 40) § 580, subd. 6, which makes it a misdemeanor for two or more persons to combine to commit any act injurious to trade or commerce, but makes no provision for civil remedies, any appropriate remedy is available to one specially and directly injured by its violation who may, where the combination affects his business, obtain relief by injunction.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

In Equity. Suit by Charles R. Irving and Robert Casson, copartners doing business as Irving & Casson, against Edward H. Neal, individually and as secretary of the Joint District Council of New York and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Vicinity of the United Brotherhood of Carpenters and Joiners of America and Amalgamated Society of Carpenters and Joiners of America, and others. On final hearing. Decree for complainants.

See, also, 180 Fed. 896.

Walter Gordon Merritt, of New York City, for complainants.

Charles Maitland Beattie, of New York City (William P. Maloney, of New York City, of counsel), for defendants.

WARD, Circuit Judge. On April 30, 1910, this suit was brought by the complainants, citizens of Massachusetts, against the Joint District Council of New York and Vicinity of the United Brotherhood of Carpenters and Joiners of America and Amalgamated Society of Carpenters and Joiners of America, which Joint Council is a voluntary unincorporated association, and also against certain individuals who were members of the United Brotherhood and all of whom were either officers of the Joint District Council or of the United Brotherhood. Jurisdiction depends upon citizenship. The bill has been dismissed against the Joint District Council, because it is a voluntary association, and not a citizen of any state, but sustained against the other defendants connected with the Joint District Council, because they are citizens of New York, and against the two remaining individual defendants, officers of the United Brotherhood of Carpenters and Joiners of America, who, although citizens of Indiana, have voluntarily appeared. 180 Fed. 896.

The bill alleges that the United Brotherhood is an unincorporated association, having affiliated with it over 1,900 local unions, composed of carpenters and joiners, aggregating some 170,000 members in the United States; that there are 70 of these local unions within the limits of the city of Greater New York, which, with certain branches of the Amalgamated Society of Carpenters and Joiners of America, have formed the Joint District Council of New York City and Vicinity, composed of delegates from the local unions and branches aforesaid; that this Joint District Council has power, under the rules of the United Brotherhood, to adopt regulations concerning strikes and the use of any material which it declares "unfair"; that it has made rules giving the business agents authority to call strikes, and has provided a penalty of \$10 against any member who works on "unfair" trim—that is, woodwork made in a nonunion shop.

The bill then alleges that the complainants carry on an open shop for manufacturing fine interior woodwork or trim, in Massachusetts, and that the United Brotherhood, the Joint District Council, and the other defendants have entered into a combination to destroy their business and to prevent them from selling or installing their trim outside of Massachusetts until they operate their mill in Massachusetts as a closed or union shop; that, in pursuance of such conspiracy, the defendants have, among other things, put the complainants on "unfair" lists distributed to builders, architects, and owners, and have omitted their names from lists of "fair" shops circulated in the same manner, together with a letter saying that the employment of these shops will avoid labor troubles; have written letters to builders, architects, and

owners asking them not to contract with the complainants, because they are an "unfair" concern; have threatened and called strikes of various trades working upon buildings where the complainants' trim was being installed.

The prayer for relief is as follows:

"That the defendants * * * be restrained and enjoined from conspiring, agreeing, or combining in any manner to restrain, obstruct, interfere with, or destroy the business of the complainants, and from interfering in any manner with the complainants obtaining orders or contracts for work or materials or interfering in any manner with the sale or disposition of the product of the complainants' factory, or the installation or setting of any of the product of the complainants' factory upon any building or buildings and from publishing, circulating, or otherwise communicating either directly or indirectly in writing or orally to each other or to any other person, firm, or corporation any statement or notice of any kind or character whatsoever calling attention to the fact that your complainants or their business or their products are or were or have been declared unfair or are on any unfair list, or that your complainants should not be patronized or dealt with or their products purchased, used, handled, worked upon, or dealt in because made in an open or nonunion shop, and from publishing, circulating, or communicating either orally or in writing any representation or statement of like effect or import for the purpose of injuring or interfering with or tending to injure or interfere with the complainant's business or with the free and unrestricted right of the complainants to dispose of their product and to obtain contracts for work to be performed or orders or contracts for merchandise to be made, installed, or set by them, and from giving notice verbally or in writing to any person, firm, or corporation to refrain from soliciting, making, or carrying out contracts with complainants for services to be performed or merchandise to be made, or to refrain from purchasing or attempting to purchase materials of any sort from complainants under threats that if such contracts or purchases are made or carried out they will cause the persons so notified loss or trouble, or that they will cause persons in the employ of said persons so notified to withdraw from their employment, or that they will cause persons employed by others upon buildings where said persons so notified are doing work to withdraw from all work upon said building, and from inducing or attempting to induce any person or persons whomsoever to decline employment or cease employment or not to seek employment under any person, firm, or corporation because such persons, firm, or corporation may have made contracts or purposed to make contracts with complainants or may have purchased or purposed to purchase materials from the complainants, or because materials furnished by the plaintiff were being used on or in connection with some building where said persons were doing work, and from in any way inducing or attempting to induce any person or persons to refuse to install or work upon materials manufactured by your complainants, and from enforcing or attempting to enforce or threatening to inflict any injury, loss penalty or liability, whether in the nature of a fine, or suspension, or expulsion from any labor organization or otherwise against any person who works for your complainants or upon materials furnished by your complainants, or against any person who works for any employer who purchases materials from your complainants, or against any person who works upon any building where the materials of complainants are being installed or are about to be installed, and from making, communicating, or circulating any statement orally or in writing that the defendant or members of any union, or working men will refuse to work upon any materials unless said materials are constructed under strict union conditions, and from requesting customers, or those who might become customers, of the complainants, to purchase their wood materials from or have their woodwork done by persons or corporations who use the union label of the United Brotherhood of Carpenters and Joiners of America or who operate their factories according to the rules and regulations of said Brotherhood, so that no controversy or difficulty can arise on account of nonunion woodwork and from using said label to obstruct and interfere

with the complainants' business and from combining, conspiring, and confederating together to refuse to work upon materials unless they are made under strict union conditions and from publishing, circulating, enforcing, and attempting to enforce the provisions of section 52-C of the by-laws of the District Council of New York and Vicinity, which is as follows:

"Any member proven guilty of using the product of any person, firm or mill who have been declared unfair by their District Council, or working for any person, firm or mill who have thus been declared unfair shall be fined ten dollars (\$10) for each offence.'

"And from publishing, circulating, enforcing, and attempting to enforce section 78 of the by-laws of the District Council of New York and Vicinity, which is as follows:

"Any person of this United Brotherhood who is required to put up material not bearing this union label (meaning the carpenters' label) shall forthwith report the facts to the business agent in writing. Failing to do so he shall be fined.'

"And from using any and all ways, means, and methods of doing any of the aforesaid forbidden acts and from doing any of the forbidden acts either directly or indirectly or through by-laws, orders, directions or suggestions to committees, associations, officers, agents, or others."

The defendants in their amended answer admit that the members of the United Brotherhood have bound themselves to work only on union trim, and that those represented by the Joint District Council are subject to a fine of \$10 if they knowingly do so. Articles tenth and eleventh are as follows:

"Tenth. That it is true that under the rules of the United Brotherhood its members have bound themselves, without thought of and probably without knowing of the existence of the plaintiffs, to work only under union conditions which established certain wages and hours, and to work only on the products of mills running under union conditions. That there are several thousand mills in this country, several hundreds of which are larger than the plaintiffs, and of all said thousands of mills probably not more than half are union. That there is no more reason for the defendants to refuse to work on the products of plaintiffs' mill than on many hundreds of other nonunion mills, the sole reason being that plaintiffs' mill is nonunion, and there never has been a conspiracy to act against their mill on the part of the defendants, there could be no such conspiracy against them under the circumstances among the approximate 200,000 members of the Brotherhood of Carpenters, and the allegations to the effect that their mill, among the many hundreds of other nonunion mills, has been selected to conspire against are untrue and without reason. Whenever the members of the Brotherhood of Carpenters find that they are required to work on nonunion products of any mill, they cease under their contract or rules of membership to work upon such products, and, if they knowingly work on any nonunion products, they are subject, as stated in said complaint, to be fined \$10, but these defendants know of no case where a member has been fined for working on the products of these plaintiffs, which they believe to be due to the plaintiffs employing nonunion men, or that members worked thereon without it being disclosed to them that said millwork was nonunion.

"Eleventh. That prior to all the times complained of in the complaint many of the large contracting employers of labor at the city of New York in the building line had united with different organizations of labor in what is known as the Arbitration Agreement, for the adjustment of all differences among them, and said contracting employers and the Brotherhood of Carpenters of this city had their separate trade agreement for their mutual interests of arbitration and to prevent strikes and lockouts, to fix wages and hours of the journeymen, and provide for union conditions. That in and by said trade agreement said journeymen carpenters are not to work on non-union products of mills, but there is no discrimination against any one mill. They further allege, on information and belief, that the plaintiffs from time

to time, well knowing of these arbitration and trade agreements, have sought to have these particular employers under these said agreements and members of the Brotherhood and Amalgamated Carpenters put up and install the products of their nonunion mill without disclosing to either parties to said arbitration and trade agreements that the said products were nonunion. That the effect of the injunction asked for herein would be to destroy said arbitration and trade agreements, and reduce said city to the chaos of lock-outs and strikes which has at times existed in the building trades, and compel these union men to handle the cheap products of hundreds of nonunion mills all over the country, and would further destroy the business of many union mills in this state which pay higher and union wages commensurate to the higher cost of living here. That under the decisions of the highest courts of this state and district as they are advised, they are not required to handle the products of nonunion mills, so that an injunction which can only be given in the federal courts to nonresidents—the diversity of citizenship only giving jurisdiction—would have the effect of compelling them to handle the products of the nonunion mills of residents of other states, and would so discriminate against mills of this state.”

The particular case of a sympathetic strike threatened by the defendant Blumenberg, a business agent of the Joint District Council at the Cathedral of St. John the Divine in this city, resulted in the issuance of a restraining order and preliminary injunction prohibiting the individual defendants, both individually and officially, from interfering with the complainant's business. The case now comes up on final hearing.

[1] The defendants make a preliminary objection that the bill must be dismissed because the cause has been conducted at the expense of the American Anti-Boycott Association, and by lawyers paid by it in violation of section 280 of the Penal Law (Consol. Laws N. Y. 1909, c. 40). Assuming that this section applies, I do not think that the complainants' cause of action is affected in any way. If the Anti-Boycott Association were the owner of the claim, relief might be denied it. *Matter of Bensel*, 68 Misc. Rep. 70, 124 N. Y. Supp. 726. But the only connection the association has with the claim is to prosecute it for the benefit of the complainants at its own expense. Exactly the same thing is being done for the defendants by the United Brotherhood and Joint District Council. The attorneys who conduct the case on behalf of the complainants are qualified to practice at the bar of the court, so that such cases as *Kaplan v. Berman*, 37 Misc. Rep. 502, 75 N. Y. Supp. 1002, do not apply.

[2] I find that the allegations of the bill as to particular instances in which the purpose of the combination was carried out or sought to be carried out against the complainants are true as matter of fact. The defendants contend that, even if this be so, the bill should be dismissed as without equity against them because they have not individually published “unfair” lists or called or threatened sympathetic strikes, and further because no “unfair” lists have been published or sympathetic strikes called for the past two years. They are, however, members of the United Brotherhood and of the local unions represented by the Joint District Council and are officers either of the Brotherhood or Council. Several of them did actually take part in some of the particular instances stated in the bill. At all events, if the thing principally complained of, viz., an agreement not to work on nonunion trim

enforceable by fine is unlawful, they are liable for anything done to carry it out, even though they did not individually participate. The agreement is a part of the organic law of the associations of which they are members and officers, and, of course, they cannot say they are ignorant of it or do not participate. The admissions of their answer are to the contrary. I think this proposition consistent with the opinion of the Circuit Court of Appeals for this circuit in *Lawlor v. Loewe*, 187 Fed. 522, 109 C. C. A. 288. So also, assuming that the acts complained of in the bill or some of them have been discontinued, further commission of them may be properly enjoined if they are unlawful.

[3] There can be no question: First, that a combination does exist between the various local unions which constitute the United Brotherhood; second, that one of the purposes of the combination is to compel the unionization of all manufacturing carpenter shops; third, that the object is to restrain competition between open shops and union shops; and, fourth, that this object is to be accomplished principally by an agreement to refuse to work on any job where nonunion trim is used. It further appears that an agreement exists between the Master Carpenters Association, composed of the principal employers of carpenters in Greater New York, and the Joint District Council, whereby the builders agree to use only union trim, which I think the builders were coerced into making by the unions. The effect of it is that nonunion trim, except of negligible sizes, cannot be sold throughout almost the whole of that territory.

It is said that workmen have a right to refuse to work for any reason they choose, good or bad, which is satisfactory to themselves. This is true, but it does not follow that they have a right to combine to do so some 200,000 strong over the whole country. Doubtless the purpose of the combination is to advance their own interests without actual malice against manufacturers who do not wish to operate their mills in accordance with the requirements of the unions. This, however, is true of almost every combination in restraint of trade. The combination in this case results all the same in directly restraining competition between manufacturers.

The precise question of law to be determined is whether this feature of the combination, there being no right of action at common law, is made unlawful by, and may be enjoined under, any statute.

[4] I think it is shown to be unlawful under the Sherman law by the decision of the Supreme Court in *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815. In that case the United Hatters of North America, composed of some 9,000 members, associated with other labor unions as the American Federation of Labor, aggregating more than 1,000,000 members, combined to unionize all factories in which the United Hatters worked. The particular party proceeded against was *Lawlor & Co.*, not for the purpose of restraining interstate commerce, nor out of any hostility to that particular concern, but entirely for the purpose of benefiting the United Hatters. Yet the method of enforcing the combination was held unlawful under the Sherman Law because it resulted directly in restraining interstate commerce. I think the mere agreement of the local unions

throughout the United States in this case not to work on nonunion trim necessarily and directly restrains interstate commerce in the same way and is therefore unlawful. But because the Sherman Law prescribes the remedies, both criminal and civil, at law and in equity, it is held in this circuit that only the prescribed remedies can be pursued. From this it follows that the injunctive relief can only be had at the instance of the government, and therefore that the complainants cannot recover. *National Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

Section 340 of the General Business Law of this state (Consol. Laws 1909, c. 20) makes any combination, whereby competition in the supply or the price of any article in common use in the state is restrained, a misdemeanor. Interior trim such as the complainants manufacture is such an article; but, as the law confers the remedy by injunction on the state and elaborately prescribes the procedure, I am bound to follow the suggestion made in the *National Fireproofing Case*, *supra*, that under this act also injunctive relief can be had only at the suit of the state.

[5] Section 580 of the Penal Law of this state, subd. 6, makes it a misdemeanor for two or more persons to conspire to commit any act "injurious to trade or commerce." Without discussing the multitude of decisions cited by counsel, the reasoning in the case of *Loewe v. Lawlor*, *supra*, seems to me enough to show that the combination in this case is such an act. See, also, *People v. McFarlin*, 43 Misc. Rep. 591, 89 N. Y. Supp. 527. As the act says nothing whatever about civil remedies, I think any appropriate remedy is available to one especially injured by violation of it.

This was the view of the Court of Appeals in *Cranford v. Tyrrell*, 128 N. Y. 341, 344, 28 N. E. 514, 515, an action to restrain defendant from keeping a house of ill fame, made a misdemeanor by section 322 of the Penal Code. So far as this was a common nuisance, it was for the public authorities to suppress it, and the defendant contended that the plaintiff could not maintain a civil action. Judge Gray said:

"If the business complained of is a lawful one, the legal question presented in a civil action for private damage is whether the business is reasonably conducted, and whether, as conducted, it is one which is obnoxious, and hurtful to adjoining property. If the business is unlawful, the complainant in a private action must show special damage, by which the legitimate use of his adjoining property has been interfered with, or its occupation rendered unfit, or uncomfortable. That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner. The principle has been long settled that the objection that the nuisance was a common one is not available, if it be shown that special damage was suffered. *Rose v. Miles*, 4 M. & S. 101; *Rose v. Groves*, 5 Man. & G. 613; *Francis v. Schoellkopf*, *supra* [53 N. Y. 152]; *Lansing v. Smith*, 4 Wend. [N. Y.] 9 [21 Am. Dec. 89]. * * *

"In the present case the indecent conduct of the occupants of the defendant's house and the noise therefrom, inasmuch as they rendered the plaintiffs' house unfit for comfortable or respectable occupation, and unfit for the purposes it was intended for, were facts which constituted a nuisance, and were sufficient grounds for the maintenance of the action. If it was a nuisance which affected the general neighborhood and was the subject of an

indictment for its unlawful and immoral features, the plaintiffs were none the less entitled to their action for any injury sustained and to their equitable right to have its continuance restrained."

This case was cited with approval in *Re Debs*, 158 U. S. 564, at page 593, 15 Sup. Ct. 900, 909 (39 L. Ed. 1092); Mr. Justice Brewer saying:

"Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive power of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law. Thus, in *Cranford v. Tyrrell*, 128 N. Y. 341, on page 344 [28 N. E. 514, 515], an injunction to restrain the defendant from keeping a house of ill fame was sustained; the court saying: 'That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner.' And in *Mobile v. Louisville & Nashville Railroad*, 84 Ala. 115, 126 [4 South. 106, 112 (5 Am. St. Rep. 342)], is a similar declaration in these words: 'The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights.'

"The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. An assault with intent to kill may be punished criminally, under an indictment therefor, or will support a civil action for damages, and the same is true of all other offenses which cause injury to person or property. In such cases the jurisdiction of the civil court is invoked, not to enforce the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered, and it is no defense to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction."

Finally, there remains to inquire whether the decision in the National Fireproofing Case will prevent the complainants from recovering. In that case the Circuit Court of Appeals held that the combination complained of was not a violation either of the Sherman Law or of the General Business Law of this state, and then went on to consider whether it was a conspiracy at common law maliciously to injure the complainant which would give it a right of action. The particular provision attacked was the agreement between the Master Builders and the Bricklayers' Union, forbidding the subletting of fireproofing. The court held that, this provision being for the benefit of the bricklayers, and not being maliciously aimed at the complainant, it had no right to recover. Indeed, the complainant was not directly, but only incidentally, injured. If its charter had authorized it to contract for the erection of buildings, it would have been under no disadvantage whatever. The New York market was closed to it because it could contract only for the erection of fireproofing, a separate contract for which was forbidden by the agreement. Therefore it was held that the object of the

agreement being lawful, and the means taken to enforce it lawful, the complainant, although injured, had no cause of action. For the same reasons the court held that the combination did not violate the Penal Code, § 168, subd. 6, which is the same as the section of the Penal Law now under consideration. I think the difference between that case and this clear. In this there is a combination to do an act made unlawful by statute and punishable as a misdemeanor which has, at least in certain instances, been enforced against the complainants by unlawful means.

The decision of the Court of Appeals in *Kellogg v. Sowerby*, 190 N. Y. 370, 83 N. E. 47, does cause doubt. It was a civil action for damages, the plaintiffs charging the defendants with combining to prevent them from using their elevator or competing in the business of elevating grain. The Court of Appeals held that, although the agreement was a conspiracy in violation of the statute, the defendants should have been allowed to show at the trial that when they entered into the combination they supposed the plaintiffs were also going to enter into it, because this would prove that they did not by the combination intend to injure the plaintiffs, in which case the plaintiffs could not recover.

This seems to be treating a conspiracy in violation of statute as if it were a combination at common law to restrain trade or prevent competition without malice to the plaintiffs. Of such a combination, although not valid nor enforceable between the parties, no third party could complain at common law, unless it was made maliciously to injure him. *Mogul S. S. Co. v. McGregor* (1892) App. Cas. 25. But under the statute in question the offense is a misdemeanor, and it makes no difference what the intention of the parties to the agreement was, and so the court said, in the *Kellogg Case*:

"The error committed in the exclusion of this evidence requires a reversal of the judgment. In order to guard against any possible misapprehension, however, on another trial, it is proper to say that we do not think that good motives on the part of those who enter into a combination in restraint of trade save it from the condemnation of the law of this state. *People v. Sheldon*, supra [139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690]. The fact that the parties to an agreement of such a character may have honestly believed that it would be beneficial instead of injurious to commerce does not render it legal. The law denounces it if it is designed to prevent competition and will have that effect whatever the intent of the parties. Where, on the other hand, the parties act in the honest belief that a third party is to join in the agreement, that fact tends to disprove any intent to injure him, whatever may be said of the agreement as to others."

Furthermore, I cannot see why the conspirators should have been excused because they did not learn until after they had entered into the unlawful agreement that the plaintiffs would not join it. The conspiracy was a continuing one reaffirmed *de die in diem*, and it would seem that the defendants should be held liable if the plaintiffs were directly injured because they continued an unlawful conspiracy after they did know the plaintiffs would not become parties to it.

While there is no evidence of a special hostility to the complainants in particular, as maintaining an open shop, the proofs show a persistent campaign has been made by the combination to compel them to unionize their shop. They suffer in a way different from the commu-

nity at large. This entitles them to all available civil remedies, among others to injunctive relief. A decree will be entered granting a permanent injunction in accordance with this opinion.

SLATER v. ILLINOIS CENT. R. CO.

(Circuit Court, M. D. Tennessee, Nashville Division. September 30, 1911.)

No. 3,671.

1. RAILROADS (§ 282*)—TRESPASSERS—INJURIES—DEFECTIVE APPLIANCES.

Where decedent was a trespasser on defendant's freight train at the time he received injuries from which he died, an averment that he was injured through defective appliances and the inefficiency and unskillfulness of the operation of the train was insufficient to show liability, in the absence of an averment of wanton and intentional wrong or injury to him after defendant's operatives became aware of his danger.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910-923; Dec. Dig. § 282.*]

2. RAILROADS (§ 281*)—INJURIES TO PERSONS ON TRAIN—TRESPASSERS—CARE AFTER INJURY—TREATMENT—WANTON NEGLIGENCE.

Decedent, while riding on one of defendant's freight trains as it was rounding a curve, was thrown from the train by reason of a defective coupling of the engine and cars and the negligence of the operatives in running the train. One of his legs was cut off, and the other badly cut; but his injuries were not necessarily fatal. While utterly helpless and bleeding profusely, he was placed by defendant's agents and servants over his protest in an unheated box car, where he was allowed to remain, also against his protest, without medical attention or other care, for about four hours, and in consequence of such exposure and negligence he bled to death before reaching a hospital to which he was subsequently taken. *Held* that, though defendant was not liable for the original injury, its servants having assumed control over decedent over his protest and with knowledge of his imminent peril, their conduct amounted to wanton negligence in decedent's treatment, for which defendant was liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 902-909; Dec. Dig. § 281.*]

At Law. Action by Frederick E. Slater, administrator, etc., against the Illinois Central Railroad Company. On demurrer to declaration. Overruled.

This suit was brought by the plaintiff, as administrator, to recover damages for the death of his intestate. The declaration alleged that the plaintiff's intestate, while riding, with a friend, on one of the defendant's freight trains, and rounding a curve, was, by reason of the defective coupling of the engine and cars and the inefficiency, unskillfulness and negligence of the railway employees in the manner of running the train, thrown from the train, falling between the cars, and run over; that one of his legs was entirely cut off, and the other badly cut, his injuries being serious but not fatal; that, after the plaintiff's intestate had been thus injured and rendered utterly helpless and was bleeding profusely from both legs, the defendant's agents and servants, over his protest, placed him in an unheated work or box car, on a siding, where he was allowed to remain, over his protest, without medical attention or other care, for about four hours, and without any effort to procure a physician or other medical aid, in consequence of which exposure and neglect he bled to death before reaching the hospital to which he was subsequently taken;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and that his death was due to the wanton negligence of the defendant's agents in placing him in a position where he could not receive proper medical attention, until it was too late, and leaving him unattended and permitting him to die from hemorrhage, where if he had been permitted to call medical aid, he could, and would, have recovered from the injuries.

The defendant demurred to the declaration on the grounds, among others; that it appeared that the plaintiff's intestate received the injuries from which he died while riding as a trespasser on the defendant's train, and without fault or neglect on its part; and that it owed him no duty to secure him proper medical attention after being so injured, and could not be held liable for the failure of its employes to aid him in this respect.

Perkins Baxter and J. H. Zarecor, both of Nashville, Tenn., for plaintiff.

Robin J. Cooper, of Nashville, Tenn., for defendant.

SANFORD, District Judge. Plaintiff, in the declaration, does not seek a recovery for the injuries to his intestate resulting in the cutting off of his leg, but to recover damages for his death due to the alleged wanton neglect of the defendant's agents and employes to procure medical attention for the plaintiff's intestate after they had taken him in charge after the accident and removed him, over his protest, about a mile from the scene of the accident and placed him in a work or box car on the siding.

[1] The declaration does not show that plaintiff's intestate was riding on the defendant's freight train either as a passenger or as a licensee; and since it is entirely consistent with the averments of the declaration that the plaintiff's intestate was riding on the freight train as a trespasser (this appearing to be the theory upon which plaintiff's brief is based), the averment that he was injured through defective appliances and the inefficiency and unskillfulness of the employes operating the train, is clearly insufficient to show liability for the original injury to such trespasser, in the absence of any averment of wanton and intentional wrong or injury to the plaintiff's intestate after becoming aware of the danger in which he stood. *Kansas City, F. S. & M. R. Co. v. Cook* (C. C. A., 6) 66 Fed. 115, 122, 13 C. C. A. 364, 28 L. R. A. 181; *Felton v. Aubrey* (C. C. A., 6) 74 Fed. 350, 356, 20 C. C. A. 436; *Louisville & N. R. Co. v. Womack* (C. C. A., 6) 173 Fed. 752, 754, 97 C. C. A. 559; *Railroad v. Meacham*, 91 Tenn. 428, 431, 19 S. W. 232; *Hoskins v. Railroad* (Ky.) 30 S. W. 643; *Brown's Adm'r v. Railroad*, 97 Ky. 228, 30 S. W. 639; *Gherkins v. Railway Co.* (Ky.) 30 S. W. 651.

[2] The plaintiff's case, if maintainable, must then rest solely on the averment in the declaration of the wanton negligence of the defendant's agents and employes in failing to care for the plaintiff's intestate after he had been injured and taken charge of by them. Upon the question whether a defendant who has injured another, without fault, under such circumstances that there is no legal liability for the original injury, owes such legal duty to the injured person when in a helpless condition, based upon the obligations of humanity, to prevent an aggravation of the injury from lack of proper care, as to render the defendant legally liable for the failure to exercise such care, there is a direct conflict of authority. This question is fully considered and

the authorities upon both sides of the question cited in a valuable note to the case of *Union Pac. R. Co. v. Cappier*, in 69 L. R. A. 513, especially in the section "V. a." at p. 533, dealing with the "obligation to prevent aggravation of injury." The view that a legal duty arises in such cases, upon which an action may be based for failure to exercise due care of the injured person, is supported by the cases of *Northern C. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545, *Baltimore & O. R. Co. v. State*, 41 Md. 268, and *Whitesides v. Southern R. Co.*, 128 N. C. 229, 38 S. E. 878; also, by *Beach on Contrib. Neg.*, sec. 215, and 2 *Thompson on Negligence*, sec. 1744. The opposite view, that no legal duty arises on the part of the defendant in such case to care for the injured person and no right of action hence accrues, is supported by the cases of *Griswold v. Railroad Co.*, 183 Mass. 434, 67 N. E. 354, *Kendall v. Louisville & N. R. Co.*, 25 Ky. Law Rep. 793, 76 S. W. 376, and *Union Pac. R. Co. v. Cappier*, 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 513.

Without determining the abstract question on which the authorities have thus differed, it is sufficient to say that the instant case presents an entirely different situation. According to the averments of the declaration, after the leg of the plaintiff's intestate had been cut off and the plaintiff's intestate rendered utterly helpless, defendant's agents and servants took the plaintiff's intestate and placed him in a car or caboose of the defendant, against his protest, backed the car about a mile to Krebs, Ky., and there placed him in a work or box car on the siding, where he was allowed to remain, over his protest, without medical attention or other care for the space of four hours, although the agents and servants saw and knew that he was bleeding profusely from both of his legs on account of the injuries, and that with prompt medical aid his life could have been saved, and although the plaintiff's intestate was begging and asking that he be carried to Paducah, Ky., which could be reached in a twenty minutes run and where medical aid could be secured, and that after he was finally placed upon a freight train to be carried to Paducah he had, in consequence of his exposure, lost so much blood that after reaching Paducah he died before reaching the hospital.

A direct authority sustaining the liability of the defendant in such case is found in the case of *Dyche v. Railroad Co.*, 79 Miss. 361, 30 South. 711, in which it was held that where a railroad company had injured a trespasser under such circumstances that it could not be held liable for the original injury, if it assumed charge of the injured person when in a helpless condition and shipped him to another place from that at which he had been injured, it was charged with the duty of ordinary humanity in taking care of him while he was thus in its charge. There seems to be no case holding to the contrary under an analogous situation, although in the case of *Griswold v. Railroad Co.*, supra, the *Dyche* Case is criticised as proceeding upon a "singular ground." After careful consideration, however, I am of opinion that the doctrine of the *Dyche* Case is applicable to the present situation, and that, whatever may be the abstract duty of a railroad company or one who has injured another to give him proper care and attention, regardless of liability for the injury, if the defendant assumes to

take charge of an injured person in a helpless condition, over his protest, and to remove him from the scene of the accident, where other persons acting under the dictates of common humanity might be expected to see that he received proper care and medical attention, and to keep him in the defendant's exclusive custody and charge, over his protest, there arises, while the injured person is being held in charge over his protest, a legal as well as moral obligation to exercise due care concerning him, including the obligation to exercise reasonable care to see that he has medical aid and attention, especially where it is clear that if such medical attention is not employed the injuries are of such character that death will probably ensue.

The present case, under the averments of the declaration, is much stronger on the facts than that presented in the Dyche Case. The averments of the declaration show wanton neglect of the injured person, while being detained in the custody and charge of the defendant and over his protest. And just as it has been repeatedly held, as shown in *Kansas City, F. S. & M. R. Co. v. Cook*, supra, and the other cases first cited in this opinion, that while a railroad company is not liable to a trespasser on the track for the want of ordinary care, it is liable for wanton and intentional injury to him after it becomes aware of his danger, so I think it clear, by a parity of reasoning, that even in a case where it is not in fault concerning the original injury, if it assumes control of the injured person over his protest and with knowledge of the imminent peril due to his condition, it is liable for wanton negligence in its treatment of him while thus retained in its custody and charge and under its control.

The demurrer to the declaration will accordingly be overruled.

In re GRAND RAPIDS FURNITURE AGENCY.

In re SMITH et al.

(District Court, W. D. Washington, N. D. November, 1913.)

No. 4,719.

1. CORPORATIONS (§ 243*)—STOCKHOLDERS—ISSUANCE OF STOCK.

Where three persons organized a corporation and were its sole stockholders and officers, having the custody of its books, certificates of stock properly filled out in their names, respectively, and signed, although not detached from the stubs in the stock certificate book, were sufficiently issued to constitute them stockholders and liable to creditors of the corporation for any unpaid balance due on such stock.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 943, 944, 946-950, 952-959, 974, 975, 979; Dec. Dig. § 243.*]

2. CORPORATIONS (§ 243*)—LIABILITY OF STOCKHOLDERS—UNPAID SUBSCRIPTIONS.

Under Rem. & Bal. Code Wash. § 3677, which requires all of the stock of a corporation to be subscribed before it is authorized to do business, a subscriber cannot avoid liability to creditors for an unpaid part of his subscription by causing the stock to be issued to a trustee and to be held and sold as treasury stock, although he is entitled to credit on his sub-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

scription for any amounts received by the corporation for such stock sold by it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 943, 944, 946-950, 952-959, 974, 975, 979; Dec. Dig. § 243.*]

In the matter of the Grand Rapids Furniture Agency, bankrupt. On report of special master in the matter of the alleged stock liability of John C. Smith, W. M. Lucas, and F. E. Dickinson. Modified.

McClure & McClure, of Seattle, Wash., for trustee.

Trefethen & Grinstead, of Seattle, Wash., for respondents.

NETERER, District Judge. On January 29, 1912, the trustee filed a petition seeking to levy an assessment against John C. Smith, W. M. Lucas, and F. E. Dickinson to pay the debts of the bankrupt in an amount not exceeding an alleged liability for the unpaid portion of the capital stock of the bankrupt corporation subscribed by the respective parties, and on March 15, 1912, filed a separate petition to enforce the alleged stock liability of said parties. It is alleged that Smith, Lucas, and Dickinson on the 25th of April, 1911, made and subscribed articles of incorporation of the bankrupt, which recited that the capital stock should be \$100,000, divided into 1,000 shares of \$100 each; the respondents being named therein as the first trustees. It is further alleged that on May 9, 1911, the respondents signed a written subscription by which John C. Smith agreed to take 333 shares, W. M. Lucas 334 shares, and F. E. Dickinson 333 shares, but that this subscription had been changed so as to make it appear that Dickinson had subscribed for 900 shares, and Smith and Lucas each for 50 shares; that on the same day said stock was issued and accepted by the respondents in the proportions first above set out; that Smith had paid on his subscription an amount not exceeding \$7,333.33, Lucas an amount not exceeding \$3,333.34, and Dickinson \$2,733.33, and, after an allegation of insufficiency of the assets to pay the claims against the bankrupt, prays for judgment against the respondents in the respective amounts of their unpaid stock liability. The petitions were referred to the referee in bankruptcy, John P. Hoyt, as special master, who heard evidence and arguments thereon and on October 3, 1913, reported to the court his findings of fact and conclusions of law. The special master stated: That he found it unnecessary to determine whether the subscription had in fact been altered. That Smith, Lucas, and Dickinson were the sole stockholders, having exclusive control of the stock, and that the stock had not been issued according to the stock subscription now appearing on the books of the company but had been issued as follows: John C. Smith, 333 shares; W. M. Lucas, 334 shares; F. E. Dickinson, 333 shares. That, after the issuance of such capital stock as aforesaid, Smith, Lucas, and Dickinson so conducted themselves as to creditors and parties in interest as to make it appear that they owned the stock in equal proportions, and that said Smith and Lucas were the chief financial backers of said bankrupt. That said Smith is entitled to a credit of \$6,100 on his stock liability, and Lucas to a credit of \$3,000. The special master concludes that Smith is liable for \$33,-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

300, less a credit of \$6,100, and Lucas is liable for \$33,400, less \$3,000. No jurisdiction was acquired over Dickinson.

The testimony of various witnesses was to the effect that statements had been made by Dickinson, in the presence of Lucas and Smith, that about two-thirds of the stock was owned by Lucas and Smith in equal proportions; some of the witnesses stating that Lucas and Smith had nodded their assent to these statements. The witness McKnight, a representative of one of the largest creditors, who came to Seattle to investigate the financial standing of the company, stated in his deposition that he was told by Smith and Lucas that while the original subscription had been Smith and Lucas each for 50 shares, and Dickinson 900 shares, yet this had been altered by agreement, and that they were each entitled to one-third of the capital stock which had been issued to them accordingly. Three witnesses, employes of banks, testified as experts that in their opinion the figures in the original subscription showed signs of alteration.

No stock was issued according to the subscription as it now appears. But on May 9, 1911, the date of the subscription, the blanks in certificates Nos. 1, 2, and 3, for 333, 334, and 333 shares, were properly filled to indicate that Smith, Lucas, and Dickinson were the owners of that number of shares respectively. These certificates were not detached from the stubs, and across the face of each is written the word "canceled." The stubs in the stock book show that on the same day certificate No. 4, for 166 shares, was issued to Lucas "as trustee for Grand Rapids Furniture Agency," being transferred by F. E. Dickinson, who held same under certificate No. 3, for 333 shares; that certificate No. 5, for 167 shares, was issued to W. M. Lucas, "as trustee," etc., being transferred by W. M. Lucas, who held same under certificate No. 2, for 334 shares; and that certificate No. 6, for 167 shares, was issued to W. M. Lucas, "as trustee," etc., being transferred by John C. Smith, who held same under certificate No. 1, for 333 shares. Various certificates were thereafter issued to different parties, being transferred from W. M. Lucas, "as Trustee G. R. F. A."

On August 24, 1911, certificate No. 12, for 167 shares, was issued to W. M. Lucas "in pool," being transferred by W. M. Lucas, who held same under certificate No. 2, for 334 shares; certificate No. 13, for 166 shares, was issued to John C. Smith "in pool," being transferred by John C. Smith, who held same under certificate No. 1, for 333 shares; and certificate No. 14, for 167 shares, was issued to F. E. Dickinson "in pool," being transferred by F. E. Dickinson, who held same under certificate No. 3, for 333 shares. Thereafter various certificates were issued to the respective parties, being transferred from himself "in pool"; a notation being made upon the stub of the character of payment made therefor.

Lucas testified that the original subscription of the parties was as indicated in the original subscription; that certificates Nos. 1, 2, and 3 were written up by the witness in an effort to get the stock "into a pool," or into the hands of a trustee; that the subsequent issue of certificates Nos. 12, 13, and 14 "in pool" was with a view of getting that portion of the stock into a pool from which each of the said parties

would have the privilege of purchasing one-third, the stock to be issued to him only when paid for; and that the remainder of the stock held under certificates Nos. 4, 5, and 6 by Lucas, "as trustee," should be regarded as "treasury stock" to be sold to various parties for the benefit of the company. The witness testified that certificates Nos. 1, 2, and 3 were never delivered but remained undetached from the stub in the stock certificate book, which all the while remained in the possession of the company until delivered to the trustee.

[1] The respondents contend that the trustee cannot recover upon the alleged agreement or subscription, and that "if he depends upon the issuance and acceptance of capital stock, as he has alleged, he certainly must fail because there is no evidence of the issuance of any share of stock without the payment of the full consideration therefor." The respondents assert that no rights are acquired by reason of a certificate of stock not taken from the stock book or delivered to the purchaser.

Where one having no control over the books of the company is sought to be held, the rule stated is undoubtedly true. But—

"where a certificate is filled up and signed by the proper officer, though not detached from the stock certificate book, and though the corporate seal be not affixed, it is sufficient issuance of the certificate to constitute the person to whom it is issued a stockholder, when such person has the custody of the certificate book and the power and right to detach it at any time." 26 Am. & Eng. Enc. of Law, 875; *Halstead v. Dodge*, 51 N. Y. Super. Ct. 169; *Brown v. Finn* (C. C.) 34 Fed. 124.

Here the parties sought to be charged were the officers and trustees, constituted the sole governing body of the corporation, had custody of its books, and could have detached the certificates at any time. A subscriber is liable for the amount of his unpaid subscription, which may be recovered for the benefit of the creditors by the trustee of a bankrupt corporation. *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523.

"To constitute one a subscriber no formal agreement in writing or otherwise is necessary. The acceptance of the shares themselves is equivalent to a subscription or an agreement to take them." 26 Am. & Eng. Enc. of Law, 1009; *Upton v. Tribilcock*, 91 U. S. 48, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 60, 23 L. Ed. 220.

No stock was issued in accordance with the written subscription in the record but rather pursuant to an arrangement whereby the parties were to have an equal interest. The actual issuance of the stock and the subsequent course of dealing therewith are inconsistent with such subscription. The corporation, as such, and the respondents, as original subscribers, participating in such issuance and course of dealing, are estopped from denying the liability of the respondents for unpaid stock held by each respectively.

[2] The contention of respondents that the issuance of the stock to them was merely designed to get it into the hands of a trustee for the company for the purpose of so manipulating the stock that they would be liable for no amount except in so far as they had paid for stock is fully answered by the statement that, before the corporation could do business as such, all the stock must be subscribed (section 3677, Rem. & Bal. Code), so that there is a liability as an asset for stock not

paid for. The adoption by the courts of the contention of counsel would nullify the law requiring all capital stock to be subscribed.

Upon the books of the company the respondents and Dickinson appeared as its first stockholders in the proportions as therein stated, and the creditors had the right to believe that the stock was paid for or that the stockholders were liable for the stock unpaid for. A subsequent transfer of that stock to escape liability to an irresponsible person could not impair that liability. 26 Am. & Eng. Enc. of Law, 1036; *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386. Nor would a transfer to the company direct release it, as to creditors. *Glenn v. Scott* (C. C.) 28 Fed. 804. And a transfer to one of the respondents as a trustee for the company could have no greater effect.

Certificates Nos. 1, 2, and 3, for 333, 334, and 333 shares, to Smith, Lucas, and Dickinson, respectively, were issued on May 9th. On the same day certificates Nos. 4, 5, and 6 to Lucas, "as trustee," were issued by transfer from the respective parties. But it was not until August 24, 1911, that certificates Nos. 12, 13, and 14 were issued to each of the parties "in pool." Therefore, for a period of over two months, Smith, Lucas, and Dickinson held under certificates Nos. 1, 2, and 3, for 166, 167, and 167 shares of stock, respectively, as the absolute owners thereof; no attempt being made during that period to transfer them to any one. The fact that they undertook to transfer the number of shares held under certificates Nos. 1, 2, and 3 indicates an acceptance of the shares of stock covered by those certificates, even if the custody of the books were not sufficient for that purpose. The respondents are liable for the amount of the stock issued to them which has not been paid.

The trustee is not entitled to recover from the respondents the amount of any stock, the consideration of which has already been received by the corporation. The respondents are therefore entitled to credit not only for the amount of stock paid for by each of them respectively but also for the amount of stock paid for by other parties, where such stock was issued out of the "treasury stock"; each respondent being entitled to a credit for this amount in the proportion that each respondent's original number of shares bears to the total amount of shares issued.

The court acquired no jurisdiction over F. E. Dickinson. The fourteenth finding of fact of the special master, to which no exception is taken, is as follows:

"That it has been agreed between the trustee and the said John C. Smith and W. M. Lucas that this court in this cause shall have and exercise as full jurisdiction of all and singular the matters and things set forth in said petition for assessment and said separate petition for enforcement of said stock liability as if independent plenary suit or action had been brought as provided by law; all objections to the jurisdiction of this court to hear and determine said matters in this cause having been waived by said agreement."

The report of the special master is therefore modified, and this cause remanded to him, with instructions to make a computation of stock sold and paid for and deduct such amounts from the unpaid stock in the proportions above stated, and report to this court the amount due from each respondent.

THE RICHMOND.

(District Court, E. D. New York, December 8, 1913.)

SALVAGE (§ 17*)—SALVAGE SERVICES—RIGHT TO RECOVER.

A steamer lying in New York harbor, on finding fire in a cargo space filled with lumber, blew alarm signals to call the fire boat, which caused libellant to swing his own tug alongside. The captain of the steamer did not wish libellant's services, but permitted libellant to pump water into a cargo port in the side of the vessel from which dense smoke appeared. This water, because of the peculiar construction of the ship, did little or no good. The tug, however, was not compelled to leave and supplied water at what appeared to be a point of danger for nearly an hour before the fire boat appeared. *Held*, that the tug rendered a salvage service for which libellant was entitled to recover \$250.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 30; Dec. Dig. § 17.*]

In Admiralty. Libel by Charles McNeill and others against the steamship Richmond, etc., to recover for salvage services. Libellant held entitled to an award of \$250.

Foley & Martin, of New York City, for libellants.

Haight, Sanford & Smith, of New York City, for claimant.

CHATFIELD, District Judge. The Florence was one of several tugs called to the help of the steamer Richmond, which discovered a fire in a cargo space filled with lumber while preparing to be taken to a berth at about 6:30 a. m. on the morning of February 26, 1913. Various settlements have been made with other libellants and salvors, but certain peculiar facts have led to the trial of this claim.

Some of the tugs were alongside ready to assist in towing the boat. One of these was sent by the captain of the Richmond to get the fire boat, but it was an hour before a telephone was reached and the fire boat arrived. This tug and the Richmond blew alarm signals also to call the fire boat and in so doing aroused every tug in the neighborhood.

The steamer is a converted passenger boat, and her captain did not wish salvage services, but hoped to get along with his own equipment and with the fire boat. He did, however, take a line of hose from one tug and put it down a hatch over the cargo of lumber in which the fire was located. He also knew of the presence of the other tugs and compelled some of them to cease what were apparently useless efforts at points where no danger could be reached.

The fire boat was busy several hours, finding the fire stubborn and deep seated. Much smoke was pouring out at the arrival of the fire boat, and subsequently the Richmond was moved over on the flat where she could be filled without danger of sinking in deep water. In so doing flames broke out, and a different tug (which had been kept by the captain of the Richmond from throwing water previously) was used to put out this fire in the deckhouse.

The Florence had arrived soon after the first alarm of fire and placed her stem against the side of the steamer alongside the tug from which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the line of hose had been taken aboard. The Florence used an ordinary fire hose and nozzle which was directed by a deck hand on her bow. This stream of water was trained into a square cargo port or steel door in the side of the vessel and through which the hose from the other tug led into what appeared to be dense smoke. As a matter of fact, the space into which the Florence threw her stream of water was what had been formerly a deck space or passageway along the port side of the cabin and engine trunkway. No changes had been made to this passageway in rebuilding the boat, and the water from the Florence struck the steel sides or walls with sufficient force to prevent the crew from going fore and aft on that side of the boat. The only help given by this stream of water was to keep down the temperature, if the fire had any effect on the plates of the vessel's decks and walls at that point. None of this water seems to have gotten into the hold or directly on the fire. The captain of the Richmond and the engineer both testify that they tried to stop the stream of water from the Florence, as the crew could not get through this passageway without getting wet or knocked over, and that the Florence would not stop. There was so much smoke, and the situation until the fire boat arrived seemed likely to prove so serious, that these statements cannot be taken as showing the situation for the whole hour.

It would seem that the captain could have compelled the Florence to leave or have caused her hose to be taken to some point where it could be used advantageously, if he had been trying merely to stop the useless playing of water into the passageway referred to, or had been so sure that no assistance was needed and that the vessel could either subdue the fire or let it burn until the fire boat arrived, as he now says was his deliberate intention.

The presence and efforts of the Florence would have proved useful in case things did not turn out as the captain of the steamer expected. She answered alarm signals which justified her in offering her assistance. She supplied a stream of water at what looked like a point of danger and where water appeared to be useful, for something like an hour before the controlling factor in the situation, viz., the fire boat, appeared.

The element of uncertainty in the amount of benefit offered and rendered must always be anticipated by a boat attempting to perform salvage services, just as much as the element of risk may prove to have been negligible, even if there were an appearance of danger when aid is first offered.

From these standpoints, the Florence rendered what should be called a salvage service, which proved to be of little use and to have been made almost ridiculous through the unusual construction of the steamer. Her reward therefore should be based upon her readiness and willingness and the amount of her effort, considered in the light of the danger which she would have prevented if other aid had not appeared.

The Richmond was not bound to accept the offer of salvage service so far as the vessel was concerned, but a captain should not be allowed, when manifestly in a position of great danger, to loudly protest that there is no danger, to imperil both his boat and his cargo by

the assumption that he is able to prevent or take care of the threatened danger without help, and to avoid payment of the services which, while protesting, he accepts, unless the circumstances are such that appearances justify the captain at the time and are of themselves sufficient notice to those offering aid, to warn them that they will not be sustained by the courts in forcing a useless offer of help upon some one who does not desire or need to be helped.

But in the present case the Richmond was calling for assistance, and yet the captain's conclusion as to his wishes and wants at the time of the fire must be viewed in the light of results, which indicate that additional help was not necessary and that the fire boat did finally arrive to render the services for which she was called. Added to this is the fact that the damage to the cargo from the fire was slight and that the most of the expenditure was for repairs to the vessel made necessary by efforts to reach the fire and for resurfacing or redressing the lumber cargo. These expenses would not have been decreased, whether the help came from one source or another.

Upon the above statement of fact, it must be concluded that the Florence is not entitled to a great award for actual accomplishment, nor for persistence in rendering service, even assuming that her captain did not hear or receive the intimation from the Richmond that they wished the stream from the Florence to stop before the arrival of the fire boat. The Florence is entitled to an award for the salvage service offered and for attempted help furnished and received in a situation justifying such offer with the possibility of efficient service so long as danger existed.

An award of \$250 to the Florence will be given, one-third to the crew and two-thirds to the owner.

In re PHILLIPS et al.

(District Court, W. D. Washington, N. D. November, 1913.)

No. 5,147.

BANKRUPTCY (§ 398*)—EXEMPTIONS—WASHINGTON STATUTE.

Rem. & Bal. Code Wash. § 563, provides for the exemption to a debtor who is a householder, in addition to wearing apparel and household goods, of live stock, etc., or other property to be selected in lieu thereof to the value of \$250, and, if a mechanic, of his tools, and material used in his trade not exceeding in value \$500, but further provides that no property shall be exempt from execution issued on a judgment for the price thereof nor from execution for clerks', laborers', or mechanics' wages earned in the state. Bankrupt, a householder, conducted a tailor shop, but the material on hand therein at the time of the bankruptcy was not paid for, and he also owed wages to his workmen. *Held*, that under Bankr. Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which vests the trustee as to property in the custody of the court with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, the bankrupt was not entitled to any exemption from the stock of material on hand, nor to an ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

emption of his tools, except on condition of his paying the claims for wages.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 676, 677; Dec. Dig. § 398.*]

In the matter of Gordon Phillips, bankrupt. On claim of the bankrupt and the community composed of the bankrupt and Lulu Phillips, his wife, for exemptions. Order of referee modified and affirmed.

Ben L. Moore, of Seattle, Wash., for bankrupts.

Leopold M. Stern, of Seattle, Wash., for trustee.

NETERER, District Judge. It appears from the records and files that prior to the 1st day of July, 1912, one Joseph Diener had been engaged in the tailoring business, and on said day associated with him, as a copartner, Gordon Phillips, the bankrupt, and transferred to the copartnership of Diener & Phillips all of the materials, etc., in his possession and delivered the same to said firm. The firm assumed and agreed to pay the indebtedness of the said Diener. On the 27th day of June, 1913, Diener and Phillips dissolved partnership; Phillips assumed all of the indebtedness of the copartnership and took all of the interest of the said Diener in the firm assets and business, including the tools. It also appears that the indebtedness of the copartnership was approximately \$5,000; that the stock and materials in the possession of the bankrupt owned by the copartnership, some of which were materials delivered to the copartnership by Diener, had never been paid for. The bankruptcy petition was filed on the 27th day of September, 1913. The bankrupt claimed as exempt certain life insurance policies, all of the household goods and wearing apparel, also, certain other properties in lieu of the specific articles and property named in subdivision 4 of section 563, Rem. & Bal. Code, amounting to the sum of \$250, also, tools and instruments used to carry on a tailor's trade for the support of himself and family, and materials used in his trade, claimed as exempt under subdivision 6 of section 563, Rem. & Bal. Code, amounting to the sum of \$430.71. It further appears that labor claims and wages due workmen, clerks, and servants to the amount of \$85.56 are unpaid.

The trustee in bankruptcy has filed exceptions to the claim of the bankrupt denying his right to the exemptions of any of the property other than the life insurance policy, household goods, and wearing apparel. The claim was submitted to the referee in bankruptcy, who rendered a decision in which exemptions claimed by the bankrupt were disallowed, except as to the insurance policy, household furniture, and wearing apparel. A petition for a review has been filed and presented to the court.

Section 569, Rem. & Bal. Code, provides:

"The proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt."

Section 563, Rem. & Bal. Code, is as follows:

"The following property shall be exempt from execution and attachment, except as hereinafter provided: (1) All wearing apparel of every person and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

family. * * * (3) To each householder, one bed and bedding, and one additional bed and bedding for each additional member of the family, and other household goods and utensils and furniture not exceeding five hundred dollars, coin, in value. The other household goods and utensils and furniture specified above shall on the demand of the officer having the execution or attachment in hand, be selected by the husband, if present, if not present they shall be selected by his wife, and in case neither husband or wife, nor other person entitled to the exemption by having the description of a householder, shall be present to make the collection, then the sheriff shall make a selection of the household goods, utensils and furniture equal in value to said five hundred dollars, and shall return the same as exempt by inventory, and such selection by the sheriff or other person described above shall be prima facie evidence,—1, that such household goods, utensils, and furniture are exempt from execution and attachment; 2, that the value of the property so selected is not over five hundred dollars. (4) To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months: Provided, that in case such householder shall not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three, and said selection shall have the same effect as selections made under subdivision three of this section. * * * (6) To a mechanic, the tools and instruments used to carry on his trade for the support of himself and family, also material used in his trade, not exceeding in value five hundred dollars in coin."

It is contended that the interest of the bankrupt in the firm had been severed, and that the property thereby became his individual property, and the right of exemption would attach. 12 Am. & Eng. Enc. (2d Ed.) 157, and cases cited in notes; *Goudy v. Werbe*, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114; *Bates v. Callender*, 3 Dak. 256, 16 N. W. 506; *In re Bjornstad*, 3 Fed. Cas. 1,453; *Fairfield Shoe Co. v. Olds*, 176 Ind. 526, 96 N. E. 592.

The findings of the referee show that none of the materials claimed as exempt have been paid for. Under the record in this case, such finding must be treated as a fact. Subdivision 14, § 563, Rem. & Bal. Code of Washington, provides:

"* * * But no property shall be exempt from execution issued upon a judgment for the price thereof, or any part of the price thereof. * * *"

Section 564 provides:

"No property shall be exempt from execution for clerk's, laborer's or mechanic's wages earned within this state."

The trustee under section 47 and kindred provisions of the Bankruptcy Act is vested with all the rights, powers, and remedies of a creditor holding a lien by legal or equitable process on property in his custody. I think this holding on behalf of creditors by the trustee operated with the same effect under the Washington statute, supra, as a levy made under execution. From this conclusion it must follow that the bankrupt is not entitled to any of the property claimed which has not been set aside and apart to him as exempt as against unpaid wages or for materials which have not been paid for. *In re Campbell* (D. C.) 124 Fed. 417; *Mullinix v. Simon*, 196 Fed. 775, 116 C. C. A. 399; *In re Tobias* (D. C.) 103 Fed. 68; *In re Bailes* (D. C.) 176 Fed.

460; *McGahan v. Anderson*, 113 Fed. 115, 51 C. C. A. 92; *Cannon v. Dexter*, 120 Fed. 657, 57 C. C. A. 119; *In re Boyd* (D. C.) 120 Fed. 999.

I think upon the record in this case that the tools and instruments used to carry on the debtor's trade for the support of himself and family have been sufficiently severed from the partnership to vest in him an individual ownership and give him the right of exemption, save only as to the unpaid wages. The bankrupt may pay the wages due to employes within five days and have delivered to him the tools and instruments used by him in his trade. On failure, the decision of the referee will stand affirmed.

THE LIGHTER P. R. R. NO. 250.

(District Court, E. D. New York. November 10, 1913.)

1. SALVAGE (§ 28*)—SALVAGE SERVICE—RESCUE OF DRIFTING BARGE.

A salvage award of \$100 made to a tug and crew for the rescue of a loaded barge, which had gone adrift and was picked up in Buttermilk Channel, where drifting was dangerous to herself and other shipping.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. §§ 67, 69; Dec. Dig. § 28.*]

2. SALVAGE (§ 16*)—RIGHT TO COMPENSATION—SALVAGE OR TOWING SERVICE.

The action of the mate in charge of a drifting barge in first offering a tug \$3 for a towing contract and then attempting to prevent it from making fast by threatening to cut the hawser with an ax did not deprive the tug of the right to a fair salvage award for the rescue of the barge, without making it so large as to encourage litigation, where no contract was in fact made, and the service was meritorious.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. § 29; Dec. Dig. § 16.*]

In Admiralty. Suit by James Brooks and others against the Lighter P. R. R. No. 250 and cargo. Decree for libelants.

Foley & Martin, of New York City, for libelants.

Burlingham, Montgomery & Beecher, of New York City, for claimants.

CHATFIELD, District Judge (orally). [1] The testimony shows that the boat was being moved around the end of the pier with the intention of letting it drift down the side of the pier with the help of the ebb tide. The boat got away through interference with the calculations of its captain because of the presence of some trucks which prevented his securing the boat by the only line which he had leading to the dock, which ran out before he could do anything to prevent it. The man Olsen upon the dock did not go for help, but under the instructions from the captain waited to see if the captain got out of calling distance. Two tugs are said to have gone by while the boat was close to the dock, and one of them inquired if help was needed and was given to understand that a tugboat was present and in control of the situation. By that time the tide had turned and the progress down the dock was apparently not rapid. The southeast wind did not have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

much effect upon the boat until after this second tug had gone by and the boat got below the shed upon the wharf. Then the wind, not blowing against the tide, but across the tide, carried her over towards Governor's Island, and the testimony of the libelant is that about half past 3 she was picked up well over towards the lower point of Governor's Island and in a position where drifting was dangerous to other shipping and to the boat and also where assistance was needed.

It must be assumed that if the Gertrude left City Island anywhere after noon and around high tide she could not have reached Butter-milk Channel much before half past 3, and it must be that the mate of the barge is mistaken in the time that he was drifting, or else that the performance did not start as soon as he thinks, unless Capt. Bull is mistaken in the exact time of his arrival. It does not seem to me that that error has much to do with the situation, except that Capt. Bull's testimony about the occurrence and the time is less open to imperfect recollection or judgment than that of the mate, who was being carried away from the dock and who had other things to think of than his whereabouts at a particular moment.

[2] So far as the \$3 is concerned, there would seem to have been some mention of \$3, and it is evident that the mate tried to make a contract of \$3 and also tried to prevent responsibility for salvage service. In other words, the mate apparently tried to compel a towing service by being ready with his ax to prevent being rescued. Under such circumstances the use of violence to prevent rescue is something which the rescued would have to settle with his owner, and his judgment as to whether he was in greater danger from the situation, or whether the danger of the price of rescue was more than that of the situation, has to be viewed from the standpoint of the case, and is, as has been said, of interest to the owner.

But whether or not salvage should be allowed depends upon the actual situation, and whether some one was hired to tow the boat. Such hiring requires a meeting of the minds, and while I am inclined to think something was said about \$3, I have not any idea that such an offer was accepted or that a hiring service was entered into. The mate of the boat apparently minimized his need, and thought that he was going to be able, by persuasion or by force, to accomplish a hiring. I think he failed to do it. I think that a salvage service, even as shown by willingness to pay \$25 to avoid suit, was a better understanding of the situation than the offer of \$3 for a hiring contract.

I am not satisfied, however, to take \$25 as the measure of compensation. A barge of this apparent value should hardly be allowed to go to destruction solely because she was of the "watermelon" type of build and might bring less in the market than if of different shape. It seems to me there is a principle involved that requires more consideration than the dispute as to the fact itself. I have therefore stated the position more or less at length.

There was no danger to the tug. The service was one that Olsen could have hired a boat inside of the Atlantic Basin to perform for perhaps the expense of an hour's towing, if a boat were available. Nor do I think the situation can be viewed from the single stand-

point of having been compelled to bring suit, for that was determined from the amount of the \$25 offer.

A wide divergence of facts and a rescue under such differing statements of the situation (unless bad faith or deceit is shown by the salvors in making their claim) compel a fair award, without thereby making it attractive to litigate salvage claims that ought not to be so productive as they would be if rewarded by a large recovery.

I should say that \$100 was ample for the services rendered under the conditions of wind and tide as shown in this case. I give a decree for \$100, one-half to the crew and one-half to the owner. There was no risk at all to the owner of the boat.

NOTASEME HOSIERY CO. v. STRAUS et al.

(District Court, S. D. New York. November 10, 1913.)

TRADE-MARKS AND TRADE-NAMES (§ 98*)—UNLAWFUL COMPETITION—FRAUDULENT INTENT—PROFITS.

Complainant and defendants were rival manufacturers, complainant putting out its product under the trade-mark label consisting of the word "Notaseme." Defendants innocently employed the same engraver to prepare a label for it which, when finished and accepted, consisted of the word "Irontex," but so arranged that the panels, contrasting colors, etc., indicated that the designer tried to make it so nearly like complainant's label as to deceive purchasers, and defendants, after notice, continued to use the label to complainant's damage. *Held*, that such use constituted a fraudulent intent to engage in unlawful competition and entitled complainant to recover profits after the expiration of a reasonable time after notice of the infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*]

In Equity. Action by the Notaseme Hosiery Company against Isidor Straus and another to restrain alleged infringement of a trade-mark and to recover damages for unlawful competition. Decree for defendants was reversed and the cause remanded. 201 Fed. 99, 119 C. C. A. 134. On report of Special Master as to allowance of profits and damages to complainants, Master's finding modified and report confirmed.

James H. Griffin, of New York City (Robert M. Barr and E. Hayward Fairbanks, both of Philadelphia, Pa., of counsel), for plaintiff.

Wise & Seligsberg, of New York City (Edmond E. Wise, of New York City, of counsel), for defendants.

LACOMBE, Circuit Judge. [1] The Court of Appeals was clearly of the opinion that a case of unfair competition had been made out. The two names "Notaseme" and "Irontex" are wholly dissimilar, but mere inspection of the two labels with their panels and contrasting colors showed quite satisfactorily that the designer of the later label tried to make it so nearly like the earlier one that it would be likely to deceive purchasers. So close a copy of an earlier design is not often

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

seen; manifestly it was not accidentally produced, it was devised with some intelligent purpose, and there is no evidence which would warrant the conclusion that such purpose was other than that which the Court of Appeals has found, viz., an attempt to compete unfairly with the owner of the earlier label.

This is not a case of the use of a man's own name, which use may incidentally lead persons to suppose that his wares are those they have always associated with another dealer having the same name. There has been a carefully planned and deliberate attempt to simulate successfully the dress or earmark of another's goods.

That constitutes a fraudulent intent, and, when there is such a plain intent, the authorities, as I understand them, allow complainant to recover profits as he would in an ordinary registered trade-mark case.

It does appear, however, from the record, that defendants were not concerned in the original concoction of the label. They sent to a designer in Philadelphia, who, as it happened, had been the one who designed complainant's label, to get up a label for them. When they received his design and commenced to sell their own goods under it, they had not seen complainant's label. During the period when they sold their goods in ignorance of the fact that the label they were using designedly simulated that of complainant, it cannot be held that they had any fraudulent or unfair intent; and intent is essential in case of unfair competition. By the latter part of 1909, however, they were advised of the situation and learned of complainant's label. The fact that thereafter, instead of discontinuing the use of the simulating label, they continued to sell their own goods under it, sufficiently shows that at that time they deliberately, intelligently, and knowingly decided to enter into unfair competition with the complainant. For the consequences of that decision, they should respond, allowing a brief period for them to advise themselves as to the facts and to change the design of their own label. January 1, 1910, may be taken as the date from which they should account for profits. So much of the profits as accrued prior to that date should be disallowed.

I see no reason why the profits for the period between original decision in District Court and its reversal should also be eliminated. Appeal was promptly taken, and defendants took their chance of the result.

With the modification above indicated of the master's finding as to the amount of the profits, his report is confirmed.

UNITED STATES v. CZESLICKI.

(District Court, M. D. Pennsylvania. December 23, 1913.)

No. 401.

1. ALIENS (§ 47*)—WRONGFUL ENTRY—DEPORTATION—CONVICTION OF OFFENSE.

Where an alien on entering the United States brought with him a woman for immoral purposes and was convicted of such offense and served a term of imprisonment, the fact that he had been domiciled in the United States for more than three years prior to such entry was no de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fense to proceedings to deport him because of his wrongful entry, nor was it material that the deportation warrant antedated his conviction.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.*]

2. ALIENS (§ 53*)—DEPORTATION—LIMITATIONS—RESIDENCE IN UNITED STATES.

Since the amendment of the Immigration Law (Act Feb. 20, 1907, c. 1134, 34 Stat. 898), by Act March 26, 1910, c. 128, 36 Stat. 263 (U. S. Comp. St. Supp. 1911, p. 499), omitted the limitation of three years for deportation proceedings, an alien who has entered the United States unlawfully may be deported without reference to the length of his subsequent residence here.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.*]

Petition by Peter Czeslicki for writ of habeas corpus to procure his discharge from custody on deportation warrant. Writ denied.

A. B. Dunsmore, U. S. Atty., of Wellsboro, Pa., and Andrew Hourigan, Asst. U. S. Atty., of Wilkes-Barre, Pa., for plaintiff.

Stanley Kuryloski, of Wilkes-Barre, Pa., for defendant.

WITMER, District Judge. Peter Czeslicki filed a petition alleging unlawful detention for deportation on a warrant issued November 11, 1912, by the Acting Secretary of Commerce and Labor. The warrant is based on proof submitted at a hearing before Immigrant Inspector Charles C. Reiss, showing that the petitioner had gained a landing at the port of Philadelphia August 6, 1912, in violation of the act of Congress approved February 20, 1907, as amended by the act approved March 26, 1910, in that the petitioner had imported and brought into the United States a woman for immoral purposes. The evidence on which the officer based his findings fully justifies his conclusion. Since then, however, it appears that the petitioner on the 3d day of December, 1912, on being charged with such offense, to this court confessed his guilt, whereupon he was sentenced and has since served a term of imprisonment.

That the petitioner unlawfully secured entry cannot be doubted, unless he is exempted from the operation of the statute, as contended by him, having previously resided in the United States from June 19, 1906, until November, 1910, with the intention, as he says, of residing here permanently and having been in this country for more than three years.

[1] The matter of domicile is one of fact, and the petitioner has not convinced the court that it was his intention to return when he left in 1910; however, if he had succeeded in this, it would not avail him. He is, notwithstanding an alien, found to be in the United States, having brought with him at the time of entry a woman for immoral purposes, whereof he has been convicted.

[2] The act sets forth specifically that any alien convicted of such offense shall be taken into custody and returned to the country from whence he came. That the warrant antedates the conviction is not material. It follows the illegal entry of which the conviction is contemplated as conclusive. Then again, since the amendment by the act

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
209 F.—32

of March 26, 1910, omitting the limitation of three years, it matters not how long an alien had lived in the United States continuously; he is nevertheless liable to deportation, if he violates the statute, as amended, by entry contrary to and in the face of its express provisions. *Bugajewitz v. Adams*, U. S. Immigration Inspector, 228 U. S. 585, 33 Sup. Ct. 607, 57 L. Ed. 978; *Chomel v. United States*, 192 Fed. 117, 112 C. C. A. 461.

The executive officer, charged with the enforcement of the provisions of the act, has not in any manner exceeded his legal authority; his act, though the court should not be otherwise satisfied of his just conclusions or findings of fact, would not be disturbed. The prisoner is remanded to the custody of the immigration officer, that the warrant of deportation may be executed.

In re KILLIAN MFG. CO.

(District Court, E. D. Pennsylvania. December 18, 1913.)

No. 4,668.

BANKRUPTCY (§ 165*)—PERSONAL PROPERTY—BANKERS' TITLE—ADVANCES TO PAY FOR GOODS—DELIVERY ON TRUST RECEIPT.

Where a bank, in accordance with custom, furnished credit to purchase silk, taking title thereto in its own name and delivering the same to certain bankrupts for manufacture under a trust receipt binding the bankrupts to hold the goods, or the proceeds thereof, for the bank until the purchase price was paid, the title never passed to the bankrupts, and their agreement while insolvent to return the goods to the bank was not a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

In Bankruptcy. Proceedings against the Killian Manufacturing Company. On certificate of referee allowing a claim of Smith & Schipper, agents for William Brandt's Sons & Co., bankers, to recover certain silk purchased and delivered to the bankrupts. Affirmed.

Wessel & Aarons, of Philadelphia, Pa., for trustee.

James Collins Jones, of Philadelphia, Pa., and Irving L. Ernst, of New York City, for claimant.

J. B. McPHERSON, Circuit Judge. Unless the case of *Century Throwing Company v. Muller* (C. C. A. 3d Circ.) 197 Fed. 252, 116 C. C. A. 614, was wrongly decided—to say nothing of other cases cited by the claimants' counsel—the referee's order was right. I agree with the findings of fact, as well as with the conclusion that the title of the bankers was not transferred, either directly or indirectly. I need not set out again the somewhat complicated facts of the transaction, which began in Japan and passed through several stages, ending in Pennsylvania with the delivery of the silk on consignment to the bankrupt corporation. Nowhere in the line can I find anything to show that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the bankers' title—which in the beginning was undoubted—was ever divested, either by any positive act of their own, or by any act of an agent that binds them under the doctrine of estoppel.

The papers that were signed within four months of the bankruptcy neither strengthened nor weakened this title. They were properly disregarded by the referee, and need not be considered now. They might have been relevant, if the question concerned an attempted preference; but, if this silk did not belong to the bankrupt, there would be no preference in returning it to the real owner—still less, in agreeing to return it. In my opinion, the fundamental facts in the controversy are these: The bankers started with the full ownership of this silk, and this ownership has never been lost. The use of trust receipts has become so common in recent years as to lead the courts (which always follow an established business usage sooner or later) to modify in some particulars the stringency of the old rule concerning the effect of divorcing the title and the possession of personal property. Judge Gray deals with this subject more at length in the *Century Company's Case*.

The order of the referee is affirmed.

IN RE MANNING.

(District Court, N. D. California, First Division. November 14, 1913.)

No. 825.

ALIENS (§ 68*)—NATURALIZATION—SUFFICIENCY OF PETITION.

Where an applicant for naturalization has not resided within the state for five years, he may, under Naturalization Act June 29, 1906, c. 3592, § 10, 34 Stat. 599 (U. S. Comp. St. Supp. 1911, p. 533), "establish by two witnesses, both in his petition and at the hearing, the time of his residence within the state," and the remaining portion of his residence within the United States by deposition, but the affidavit of the witnesses, in his petition, must cover the full period of his residence in the state, and it is not sufficient to show merely that such residence was for more than a year.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

In the matter of the petition of Patrick Joseph Manning to be admitted a citizen of the United States. Petition dismissed.

Geo. A. Crutchfield, of San Francisco, Cal., Chief Naturalization Examiner.

Daniel O'Connell, of San Francisco, Cal., for applicant.

DOOLING, District Judge. The petition of Patrick Joseph Manning for naturalization declares that he has resided in the United States for over five years, to wit, since June 2, 1900, and in the state of California for over one year, to wit, since April 10, 1910. The petition was filed June 12, 1913, and shows, further, that petitioner applied for naturalization to the superior court of the state of California in and for the county of San Mateo, on November 8, 1912, but that said petition

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was denied, because it was not verified by two witnesses covering full period of the residence in the state, and the cause of such denial has since been cured or removed.

The affidavit of the witnesses to the present petition shows that they know that petitioner has resided in the United States for at least 2 years, 10 months, and 21 days, and in the state of California for the same period of time. This affidavit accompanies the petition and was made on June 12, 1913. Petitioner's verified petition shows that at that time he had resided in the state for 3 years, 2 months, and 2 days, or nearly 4 months longer than the period covered by the verification of his witnesses.

The Naturalization Act provides that the petition shall be verified by two witnesses, who shall state that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or district in which the application is made for a period of at least one year, immediately preceding the date of the filing of the petition. Manifestly, if this were the only provision of the act bearing on this question, the affidavit of the witnesses herein would be insufficient, as it does not show a residence of petitioner in the United States for a period of five years. Section 10 of the act (U. S. Comp. St. Supp. 1911, p. 533), however, declares:

"That in case the petitioner has not resided in the state, territory or district for a period of five years continuously and immediately preceding the filing of his petition, he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the state, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the depositions of two or more witnesses upon notice to the Bureau of Naturalization and the United States attorney for the district in which said witnesses may reside."

This seems to require that the full time of petitioner's residence in the state must be covered by the affidavit of his witnesses, when it is less than five years. The affidavit of the witnesses here does not establish the time of petitioner's residence within the state within this requirement, and is in this regard as fatally defective as was the petition which was for that reason denied by the superior court of San Mateo county. The cause of the denial of the former petition has not been cured. That denial stands as an adjudication, and is a bar to the present petition, even if the present petition were not fatally defective on its face.

The requirement of the law seems to be clear. In all cases where petitioner has resided in the state for five years, that fact must be shown by the affidavit of two witnesses accompanying the petition. Where petitioner has not resided in the state five years, but has resided therein more than one year, he may establish the period of his residence in the state by the affidavit of two witnesses to his petition; but this affidavit must cover the full period of his residence therein. The affidavit to the present petition does not do so, and the petition must therefore be dismissed.

It is so ordered.

THE TITANIC.

(District Court, S. D. New York. April 21, 1913. Additional Opinion
May 19, 1913.)

- 1. SHIPPING (§ 203*)—LIMITATION OF LIABILITY—CONSTRUCTION OF STATUTE.**
Rev. St. § 4282 et seq. (U. S. Comp. St. 1901, p. 2943), providing for limitation of liability of shipowners, do not pertain to the remedy like ordinary statutes of limitation, but confer absolute legal rights.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 637; Dec. Dig. § 203.*]

- 2. SHIPPING (§ 203*)—LIMITATION OF LIABILITY—GROUNDS OF RELIEF.**
The right of a shipowner to a limitation of liability in the courts of the United States is entirely dependent upon statute, and not upon the general maritime law.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 637; Dec. Dig. § 203.*]

- 3. SHIPPING (§ 205*)—LIMITATION OF LIABILITY—PERSONS ENTITLED TO BENEFIT OF STATUTE.**
The British owner of a British vessel, which foundered in mid-ocean from collision with an iceberg, never having been within the jurisdiction of the United States, cannot maintain a proceeding for limitation of liability against claims arising out of her loss, under Rev. St. § 4282 et seq. (U. S. Comp. St. 1901, p. 2943).
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 641, 642; Dec. Dig. § 205.*]

In Admiralty. Proceeding by the Oceanic Steam Navigation Company, Limited, as owner of the steamship Titanic, for limitation of liability. On exceptions to petition. Exceptions sustained.

See, also, 204 Fed. 259, 260, 295, 298; 206 Fed. 500; 209 Fed. 513.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham, J. Parker Kirlin, and Norman B. Beecher, all of New York City, of counsel), for petitioner.

Hunt, Hill & Betts, of New York City (Frederick M. Brown, George Whitefield Betts, Jr., A. Leonard Brougham, and Francis H. Kinnicutt, all of New York City, of counsel), for exceptants.

HOLT, District Judge. The questions involved in this case arise upon exceptions to a petition for the limitation of liability filed by the Oceanic Steam Navigation Company, Limited, as owner of the British steamship Titanic. The petition alleges, in substance, among other things, that the petitioner, the Oceanic Steam Navigation Company, Limited, is a British registered company, operating a line of cargo and passenger steamships between Southampton and New York; that the petitioner was the sole owner of the steamship Titanic, built in Belfast and launched in 1911; that on April 10, 1912, the Titanic, with passengers and cargo on board, left Southampton on her maiden voyage, bound for New York; that on April 14, about 11:40 p. m., in mid-ocean, in latitude 41° 46' N. and longitude 50° 14' W., the Titanic came into collision with an iceberg, as a result of which she sank about 2:20 a. m. on April 15, 1912; that 711 persons were saved in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

boats; that her master, many of her officers and crew, and a large number of passengers, perished; that the vessel, her cargo, the personal effects of the passengers and crew, the mails, and everything connected with the vessel, except 14 lifeboats and their equipment, became a total loss; that the value of the lifeboats saved and of the pending freight and passage moneys did not exceed the sum of \$91,-805.54; and that the petitioner claimed exemption from liability. The petition prayed that an appraisal be made of the value of the petitioner's interest in the Titanic, and of her pending freight; that an order be made authorizing the petitioner to file a stipulation for the payment into court of the amount of said value whenever the court should order; that the court issue a monition requiring claimants to appear before a commissioner and prove their claims; that an injunction issue restraining the prosecution of suits against the petitioner except in the present proceeding, and that the court adjudge that the petitioner's liability be limited to the value of the petitioner's interest in the steamship at the end of the voyage. Annexed to the petition is a list of claimants who have filed proofs of claims against the owner of the Titanic. Among them are Harry Anderson and William J. Mellor. These claimants have separately filed exceptions to the petition. The exceptions of Mellor are as follows:

(1) That the petition does not state facts sufficient to show a cause of action for limitation of liability under United States law, and the practice of this court; (2) that the petition shows on its face that the acts by reason of which and for which it claims limitation of liability took place on board a British registered vessel on the high seas, and not within the territorial waters of any state or country, and therefore the law of Great Britain with reference to limitation of liability, if any, would apply, and not that of the United States.

The exceptions filed by Anderson, although somewhat more detailed, are substantially to the same effect.

The question whether the owner of a foreign ship could claim exemption from liability under the Limited Liability Act of March 3, 1851, c. 43, § 1, 9 Stat. 635, which was substantially re-enacted in sections 4282 to 4289 of the United States Revised Statutes (U. S. Comp. St. 1901, pp. 2943-2945), is one which was considered early in the cases arising under the act. When that act was passed there was a substantially similar statute in force in Great Britain. The English courts had uniformly held that, in the case of collisions between British and foreign vessels, or between two foreign vessels, neither party could take the benefit of the British act, but each was liable without limit for negligence causing disaster at sea. *The Wild Ranger*, P. C. Lush. Adm. 553; *Cope v. Doherty*, 2 De Gex & J. 614; *The Carl Johan*, 3 Hag. Adm., 186; *The Amalia*, 1 Moore P. C., N. S., 471; *The Zollverein*, Swabey, 96; *The Saxonia*, Lush. Adm., 410. These cases were all based on the general doctrine that the laws of Great Britain have no extraterritorial effect. By the Merchants' Shipping Act of 1894, the previous statutes were repealed, and now by that act the owners of a ship, British or foreign, are liable for damages in respect to loss of life or personal injury to an aggregate amount not exceeding £15 for each ton of the ship's tonnage, and, in

respect to loss or damage to vessels, goods, merchandise, or other things, to an aggregate amount not exceeding £8 for each ton of the ship's tonnage. MacLachlan's Law of Merchant Shipping (5th Ed.) p. 129.

The first of these cases under the American statute to which my attention has been called was the case of *Dyer v. National Steam Navigation Co.*, 3 Ben. 173, 8 Fed. Cas. 204, which on appeal is generally cited as the case of *The Scotland*. The facts in that case were that the British steamer *Scotland* came into collision with the American ship *Kate Dyer* on September 8, 1866, about 180 miles off Sandy Hook. The *Kate Dyer* sank immediately. The *Scotland*, badly damaged, attempted to reach New York, but sank about two miles from Sandy Hook, at a spot where the *Scotland Lightship* has since been stationed. The suit was brought in personam by the owners of the *Dyer* against the owner of the *Scotland*. In that suit, among other defenses, the defendant pleaded that "there is no liability in personam against these respondents for said loss of the *Kate Dyer*." 8 Fed. Cas. 208. There is no reference to this defense in the opinion of Judge Benedict, before whom the case was tried. He decided that the *Scotland* was in fault for the collision, and rendered a judgment in favor of the libelants for the value of the *Kate Dyer*. The case was appealed to the United States Circuit Court, and heard before Judge Blatchford. In his decision he considers the defense pleaded of exemption from liability, and refers to the fact that the answer does not state whether the alleged nonexistence of liability is claimed under the act of March 3, 1851, or under the general maritime law. Considering the question on the theory that the act of 1851 applied, Judge Blatchford says that no proceedings were instituted by the defendant to obtain an exemption from liability, and that no transfer of interest in the vessel and freight to a trustee had been made, that certain anchors, chains, rigging, etc., had been saved from the steamer, which were of the value of several thousand dollars, and that that property or its proceeds should have been surrendered or transferred, if the act of 1851 was to be availed of. He, therefore, held that, there having been no such surrender, and no proceedings taken by the defendants to obtain exemption from liability, the defense could not be maintained. He adds at the close of that portion of his opinion which deals with this question:

"I have not found it necessary to determine the question whether the act of 1851 applies to the owners of a foreign vessel who seek the benefit of that act."

He then considered the question whether, under the general maritime law, the defendant is exempt from liability, and held that, as he had not surrendered what was left of the vessel, such exemption could not be claimed under that law. An appeal was taken to the United States Supreme Court, but the case in that court was not decided until 1881. Meanwhile several other cases arose, and were decided in District Courts.

In *Thommessen v. Whitwill*, 9 Ben. 403, Fed. Cas. No. 13,929, the facts were that the Norwegian bark *Daphne* came into collision with

the British steamship *Great Western*, about 180 miles from Sandy Hook. The master of the bark sued the owner of the steamer. Judge Benedict held that, as the *Great Western* was a British steamer, owned by a subject of Great Britain, and the collision was on the high seas, the owner of the steamer could not claim exemption under the American statute, on the ground that it had no extraterritorial force. He was of the opinion, however, that it could claim exemption under the general maritime law, but that the wreck having been sold at public auction and delivered to other parties, the defendant must, by the general maritime law, be held to have intentionally waived his right to claim exemption. He, therefore, having held the steamship in fault for the collision, gave judgment for the libellant for the amount of the damage. The same view substantially was expressed by Judge Benedict in the case of *Churchill v. The Ship British America*, 9 Ben. 516, Fed. Cas. No. 2,715, while in the case of *The John Bramall*, 10 Ben. 495, Fed. Cas. No. 7,334, decided in June, 1879, a case in which a British ship stranded on the coast of the United States, he held that the owner could take advantage of the American statute because the loss occurred within the territorial limits of the United States. In *Levison v. Oceanic Steam Navigation Co.*, 15 Fed. Cas. 422, decided in January, 1876, the facts, which are fully stated in *Marckwald v. O. S. N. Co.*, 11 Hun (N. Y.) 462, were that the British steamer *Atlantic* was wrecked off the coast of Nova Scotia. Limitation proceedings were brought by the owner in the United States District Court for the Southern District of New York, and resulted in a final decree limiting the liability of the owner, no question having been raised as to the nationality of the steamer. Subsequently a suit was brought by *Levison*, a passenger, against the company in the Circuit Court for the Southern District of New York, and the defendant pleaded in bar the final decree in the limitation proceedings. Judge Shipman held that the decree was a bar, and that the United States statute limiting the liability of shipowners was not in terms confined to American vessels, but was the adoption of a general maritime principle applicable to the owners of foreign, as well as American, vessels.

In this condition of the authorities, the appeal in the case of *Dyer v. National Steam Navigation Co.*, reported under the title of *The Scotland*, 105 U. S. 24, 26 L. Ed. 1001, was decided in the Supreme Court during the term of October, 1881. In that case the decision of the Circuit Court was substantially reversed. The court held that the rule of the general maritime law of Europe was not received as law in England or in this country until made so by statute, and that, while the rule adopted by the statute was substantially the same as the rule of the general maritime law, its efficacy as a rule in this country depends wholly upon the statute, and not upon any inherent force of the maritime law. In respect to the objection that the defendant did not give up or convey to a trustee the strippings of the wreck and the pending freight, the opinion states that the law contains two distinct and independent provisions on the subject, one that the shipowners shall be liable only to the value of the ship and freight, and the other that they may be discharged altogether by surrendering the ship and

freight; that if they fail to avail themselves of the latter proceeding, they are still entitled to the benefit of the former kind of relief; that therefore the defense pleaded below of exemption from liability applied if the act applied to foreign ships. Upon that question Judge Bradley, in the opinion, says:

"In administering justice between parties it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the laws of that state. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence, if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But, if a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum—that is, the maritime law as received and practised therein—would properly furnish the rule of decision." 105 U. S. 29, 30, 26 L. Ed. 1001.

The Supreme Court accordingly held that, as that was a case of a collision between a British steamship and an American ship, the American statute furnished a defense to the owner of the Scotland to the extent of limiting its liability to the value of the remnants of the ship and the pending freight. A reference was ordered to determine such value. Upon that reference the libellant claimed that, in addition to the value of the remnants of the ship and the pending freight, they were entitled to the amount of the insurance collected by the owner of the Scotland. Upon that question the case came again before the Supreme Court (118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153), and the court affirmed the decision of the Circuit Court below to the effect that insurance money should not be included in computing the value of the vessel.

In *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152, decided in 1885, a case in which the Norwegian bark *Luna* and the Belgian steamship *Belgenland* came into collision, the answer contained an exception to the jurisdiction, on the ground that the collision took place between foreign vessels on the high seas. Judge Bradley, in the opinion, in substance restated the doctrine of the *Scotland*, stating that the general rule required the application to such cases of the general maritime law as embodied in the American statute, but with certain qualifications, one of which was:

"That if the maritime law, as administered by both nations to which the respective ships belong, be the same in both in respect to any matter of liability or obligation, such law, if shown to the court, should be followed in that matter in respect to which they so agree, though it differ from the maritime law as understood in the country of the forum; for, as respects the parties concerned, it is the maritime law which they mutually acknowledge. The

Scotland, 105 U. S. 24, 31 [26 L. Ed. 1001]." 114 U. S. page 370, 5 Sup. Ct. page 867, 29 L. Ed. 152.

In 1885 the appeal in the case of *Thommessen v. Whitwill*, reported in the Supreme Court under the title of *The Great Western*, 118 U. S. 520, 6 Sup. Ct. 1172, 30 L. Ed. 156, was decided. In that case the judgment of the Circuit Court, which had reversed the decision of Judge Benedict in the District Court, on the authority of the decision of the Supreme Court in the case of *The Scotland*, was affirmed.

In the case of *La Bourgogne*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973, arising out of a collision between the French steamer *La Bourgogne* and the British ship *Cromartysire*, about 60 miles off Sable Island, limitation was allowed, but Judge White, in the opinion, cites with approval from the opinion of Judge Bradley in the case of *The Scotland*, including his statement that:

"If the contesting vessels belong to the same foreign nation the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly."

Various cases since the decision in the case of *The Scotland* have occurred in which the owners of foreign vessels injured by collision upon the high seas have obtained the benefit of the American statute limiting the liability of shipowners. These cases are *In re Leonard* (D. C.) 14 Fed. 53; *The Thingvalla* (D. C.) 42 Fed. 331; *Id.*, 48 Fed. 764, 1 C. C. A. 87; *The State of Virginia* (D. C.) 60 Fed. 1018; *The Strathdon* (D. C.) 89 Fed. 374; *The Norge* (D. C.) 156 Fed. 845. Of these cases, *In re Leonard* was the case of a collision between the American schooner *Job M. Leonard* and the British steamship *Aragon*, on the high seas, about 15 miles south of Long Island. Judge Brown held that that case was governed by the then recently decided case of *The Scotland*, and allowed a limitation of liability under the American statute. The case of *The Thingvalla* arose from a collision on the high seas not far from Sable Island, between two Danish steamships. The proceeding was in the form of a petition by the owners of the *Thingvalla* for limitation of liability. The court held that the *Thingvalla* was free from fault in the collision, and that the petitioners were therefore not subject to any liability. No question appears to have been raised in the case, either in the District Court (42 Fed. 331), or on appeal in the Circuit Court (48 Fed. 764, 1 C. C. A. 87), whether the law fixing the liability should be the law of Denmark or of this country. The Danish law of limited liability is apparently the same in substance as our own (*Danschewski v. Larsson*, 3 *Revue Int. du Droit Marit.* 348; *Thommessen v. Whitwill*, 9 *Ben.* 403, *Fed. Cas.* No. 13,929), and that may have been the reason why the point was not raised.

In the case of *The State of Virginia* (D. C.) 60 Fed. 1018, the British steamship *State of Virginia*, owned by a British corporation, stranded on Sable Island on a voyage from New York to Glasgow, and was wrecked. There obviously can be no distinction in principle between the case of damage arising from a collision between two ships of the same country and from a ship being wrecked on the coast of the country to which she belongs. The owners filed a petition for limita-

tion of liability, and Judge Benedict held that they were entitled to such exemption. The opinion was very short. He cited no authorities, and, after stating the facts, closed his opinion as follows:

"My opinion is that the extent of the liability of the shipowner, in a case like this, is determined by the statutes of the United States, and not by the statutes of Great Britain."

In view of the reversal, in the cases of *The Scotland* and *The Great Western*, of the earlier decisions of Judge Benedict, it seems to me a fair inference that in deciding the case of *The State of Virginia*, Judge Benedict probably either overlooked the qualification of the general rule stated in the case of *The Scotland*, or was led by those decisions either to change his own opinion, or to conclude that the law would ultimately be determined in favor of the right of any foreign shipowner to limit his liability under the American statute in all cases.

In *The Strathdon* (D. C.) 89 Fed. 374, the owners of the British steamer *Strathdon* petitioned for a limitation of their liability for claims growing out of injuries to the cargo from a fire which occurred in the Suez Canal on a voyage from Java to New York. The substantial questions argued were whether the fire was caused by the design or neglect of the shipowners within the meaning of section 4282 of the United States Revised Statutes, exempting shipowners from liability for loss or damage to merchandise by a fire unless it be caused by their design or neglect. No point seems to have been taken in that case on the question whether the owner of the vessel was entitled to an exemption from liability by reason of the fact that the ship was a British vessel.

In the case of *The Norge* (D. C.) 156 Fed. 845, a Danish steamship was lost on the high seas through striking a derelict or unknown obstruction under the water. The owner filed a petition for limitation of liability, but contested all claims filed against the steamer, and was held not to be responsible for such claims. Judge Adams held that it was not necessary to consider the question whether there were special exemptions from liability under the law of Denmark, as the law of the Norge's flag, on the ground that there was no liability.

In addition to these cases in which a direct proceeding for the limitation of liability has been had, there are other cases which have occurred since the decision of the case of *The Scotland*, but which are instructive as bearing on the general rule that the laws of no country have any extraterritorial effect. In *The Lamington* (D. C.) 87 Fed. 752, a Norwegian seaman who had shipped on the British ship *Lamington* was injured, while attempting to furl a sail, by the breaking of a rope, which caused him to fall to the deck. The court held that the general rule applied that the liability for a tort was determined by the law of the place where the tort was committed; that a British steamer constituted a part of Great Britain; that the liability for negligence resulting in injury to the libelant was a tort governed by the law of Great Britain; and that the law of Great Britain did not create a maritime lien on a vessel, or confer a right of action in rem, for a tort negligently committed upon a seaman. The court

therefore dismissed the libel on the ground that the claim must be determined by the laws of the country to which the vessel belonged, although by the law of this country such a claim is held to give a maritime lien enforceable against the ship.

In *The Eagle Point*, 142 Fed. 453, 73 C. C. A. 569, two British steamers, the *Eagle Point* and the *Biela*, came into collision on the high seas. Each was at fault. The *Biela* and her cargo were totally lost. The *Biela's* cargo owners sued the *Eagle Point* in Philadelphia. Under the British law, in the case of a collision in which both vessels are at fault, the cargo owner injured can recover 50 per cent. of the damage from each party. Under the rule in the United States, the party damaged can recover the full amount of the damage from either vessel, upon the theory that they are joint tort-feasors. In that case the District Court awarded a full recovery under the American law against the *Eagle Point* for the amount of the damage to the cargo owners, but on appeal to the Circuit Court of Appeals this judgment was reversed, on the ground that the British law, under which a person suffering damage from a collision caused by the fault of two vessels was entitled to recover from each vessel only a half of his loss, applied.

From this review of the cases, I think that it certainly cannot be claimed that the right of the owner of the *Titanic* to limit its liability under the United States law is free from doubt. The case of *The State of Virginia* (D. C.) 60 Fed. 1018, is indeed a direct decision in favor of the petitioner. All the other cases, since the decision in the case of *The Scotland*, in which the owners of a foreign vessel injured on the high seas have been permitted to obtain a limitation of liability, are either cases in which the collision was between vessels of different countries, when limitation was authorized by the case of *The Scotland*, or are cases in which no question was raised as to the right to obtain limitation under the United States statute, either because the rule of liability of the country to which the vessel belonged was the same as that of this country, or because the case was decided by the court upon other grounds, and the question not raised in the case. The decision in the case of *The State of Virginia* is, in my opinion, not only in conflict with the rule stated in *The Scotland*, but is entitled to less weight on the merits than the decisions in the cases of *The Lamington* and of *The Eagle Point*. But if these decisions of courts of first instance are to be regarded as simply conflicting, the fact remains that the rule laid down in *The Scotland*, and restated by Judge Blatchford in the decision in the Circuit Court in *The Great Western*, and by Judge Bradley in *The Belgenland*, to the effect that when a collision occurs between two vessels of the same nation the question of their liability will be determined by the law of the country to which they belong, has never been retracted or modified by the Supreme Court, and still stands as the rule of that court. In this case the collision was between the *Titanic* and an iceberg, but I can see no reason for a different application of the rule in a case where a vessel is injured by collision with some floating object belonging to no country, or where a vessel founders on the high seas

without any appreciable cause, than in the case of injuries occasioned by the collision of two vessels of the same nation. The Titanic was a British ship. Her sole owner was a British company. She was sailing on her maiden voyage. She never had been within the territorial limits of the United States, and the question what law governs the liability of her owner seems to me, under the circumstances of the case, to be precisely the same question as would exist if she had sunk from collision with another British steamer.

[1] The petitioner claims that the rule of liability in this case is governed by the *lex fori*, because the statute limiting the liability of shipowners pertains to the remedy and is analogous to ordinary statutes of limitations. It is well settled that the law of the forum governs all questions pertaining to the remedy, such as questions of procedure and practice, under which are included questions arising under the statutes of limitation, but I can see no analogy between an ordinary statute of limitation and this statute limiting the liability of shipowners. Ordinary statutes of limitations provide that after a certain number of years or a certain period of time a party cannot sue. It does not affect the validity of the claim. A person having a claim secured by collateral can enforce the lien for the collateral after a direct suit upon the claim has been barred by the statute of limitations. But the statute limiting the liabilities of shipowners is a statute which affects a right. It limits the liability of a shipowner to the value of the ship and pending freight. It is not a limitation which arises after a certain lapse of time, but it exists from the outset. It seems to me like the statute fixing the amount of liability for injuries causing death. At common law no civil damages could be recovered for negligence causing death. Originally in this state \$5,000 was authorized to be recovered, and no more. That was subsequently modified by a constitutional provision so as to authorize a recovery for any amount a jury might see fit to give. Can such a statute or constitutional provision be construed to relate to a remedy? It seems to me that it confers an absolute legal right, and imposes an absolute legal liability.

Counsel for the petitioner argues that the decisions holding that the Harter act applies to foreign vessels carrying goods to or from a port of the United States (*The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241; *The Chattahoochee*, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801) are authorities which by analogy are applicable to the construction of the statutes limiting the liability of shipowners. This argument seems at first view plausible, but I think, upon consideration, that it is fallacious. In the first place, the third section of the Harter act applies only to vessels transporting merchandise or property to or from any port in the United States. It obviously would not apply to a suit based upon any shipment of goods on a voyage which was not to or from any port in the United States. Before the act was passed it had been established by the English authorities that a common carrier could exempt itself from liability for negligence by contract, with the result that the bills of lading given usually contained such exemptions. The courts of this country had held that a common carrier could not

exempt itself from liability for negligence, and that any contract to that effect was void. The avowed object of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), as shown in the debates in Congress upon its passage, which are fully referred to in the thorough brief of Mr. Betts, was to make the law governing the liability of American shipowners substantially, or to a considerable extent, similar to that existing in favor of British shipowners. There certainly can be no presumption that the object of Congress in passing the Harter act, or the act limiting the liability of shipowners, was to favor British shipowners. The avowed object of the legislation in both cases was to favor American shipowners, and to develop the American mercantile marine. Moreover, in my opinion, the proper construction of the language used in the third section of the Harter act is that it imposed a restriction upon the power of the courts in such cases. It provided that, if the owner of any vessel transporting merchandise or property to or from any port in the United States shall exercise due diligence to make the vessel seaworthy, neither the vessel, her owner, agent, or charterer shall become or *be held* responsible for damages resulting from errors in navigation. The governmental instrumentality which holds persons responsible is the courts. I think that the expression in the third section of the act, "vessel owners shall not be held responsible," imposes a prohibition upon the courts, in any case which comes before them, from holding vessel owners responsible to a greater extent than is provided in the statute. On the other hand, there is no specific language in the statute limiting the liability of shipowners making it applicable to foreign ships. The language is simply "any owner of any vessel." This language, ordinarily employed, might be held to mean any owner of any vessel of any nation, but by the general rule of international law the laws of no country have any extraterritorial effect. There is a legal presumption that mere general expressions in statutes which might include all mankind are restricted to the subjects of the government which enacts the law. I have no doubt that the United States might provide that the liability of the owner of any ship belonging to any country in the world should be limited, in any suits brought in this country, to the extent provided in the American statute, and that the owners of any such ships could take proceedings in the courts of this country to limit their liability, which proceedings would be binding upon the citizens and courts of this country. But the question in this case is whether the language used in the statute limiting the liabilities of shipowners is sufficient to accomplish that result.

In the case of *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047, suit was brought under the Sherman act to recover threefold damages under that act. The facts alleged in the complaint were, in substance, that the defendant had deprived the plaintiff of the use of a plantation and railway, and had monopolized trade, by certain proceedings in Costa Rica. The court held that a statute will, as a general rule, be construed as intended to be confined in its operation and effect to the territorial limits within the jurisdiction of the lawmaker, and words of

universal scope will be construed as meaning only those subject to the legislation, and that the prohibitions of the Sherman act do not extend to acts done in foreign countries, even though done by citizens of the United States and injuriously affecting other citizens of the United States. Judge Holmes, in the opinion, after stating the facts, says:

"It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place, the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress. * * * The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is *prima facie* territorial.' Ex parte Blain, In re Sawers, 12 Ch. Div. 522, 528; State v. Carter, 27 N. J. Law (3 Dutch.) 499; People v. Merrill, 2 Parker, Cr. R. [N. Y.] 590, 596. Words having universal scope, such as 'every contract in restraint of trade,' 'every person who shall monopolize,' etc., will be taken, as a matter of course, to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned."

Counsel for the petitioner urges that the question raised by these exceptions should more properly be left to be determined after evidence is taken upon the final hearing. That course is frequently preferable where there is any doubt about the controlling facts in respect to which evidence should be taken. But the essential facts necessary to raise the question involved in these exceptions appear upon the face of the petition, and are entirely uncontradicted. The Titanic was a British ship, owned by a British company, which foundered in mid-ocean from collision with an iceberg. Those facts are all that are necessary to raise the fundamental question whether her owners can obtain exemption from liability by virtue of an American law. The point can be decided upon these exceptions, and can be taken up on appeal and decided upon a brief record, whereas probably a number of months, and possibly years, would be occupied in taking the evidence in this case, causing great labor, expense, and delay. I think the question should be decided at the outset.

[2] It is settled under the decisions that any exemption from liability in this country must depend upon the provisions of the American statutes, and not upon any general provisions of maritime law. Indeed, the rule exempting shipowners from liability on surrender of the ship and freight does not seem to have ever been universally adopted throughout Europe. It is stated as a rule of maritime law in the Consolato del Mare, the code which is the leading authority on the ancient admiralty law of the countries bordering on the Mediterranean. But there is no reference to such a rule in the laws of Oleron, or of Wisbuy, or of the Hanse towns, which were the maritime codes followed in the northern parts of Europe. No such rule was ever recognized in the English courts, either of admiralty or common law, until the act of 1813 (St. 53 Geo. III, c. 159), which adopted the rule by

statute; and it is now well settled that no such rule was ever in force in this country until the act of 1851. *The Scotland*, 105 U. S. 28, 26 L. Ed. 1001; *The Great Western*, 118 U. S. 534, 6 Sup. Ct. 1172, 30 L. Ed. 156; *The Main*, 152 U. S. 126, 14 Sup. Ct. 486, 38 L. Ed. 381; *La Bourgogne*, 210 U. S. 116, 28 Sup. Ct. 664, 52 L. Ed. 973. The simple question, therefore, is as to the effect of the statute.

[3] Laying out of view the authorities in the case, it seems to me that three great fundamental principles of law relied on are decisive. The rule that the law of no nation has any extraterritorial effect is universal. The rule that a ship on the high seas is a part of the country to which she belongs is universal. The rule that liability for a tort is governed by the *lex loci delicti* is universal. If the owners of the *Titanic* under these circumstances can obtain a limitation of their liability in this court, they could have obtained it if she had foundered in the harbor of Southampton, immediately after she started on her voyage, and while still undoubtedly within the territorial jurisdiction of England. If they are entitled to limitation of liability in this country, they are entitled to limit their liability in all countries, according to the law of each country in which the proceeding is brought. There were undoubtedly upon the *Titanic* citizens of many countries, and property belonging to citizens of many countries. Is the liability of the owner of the *Titanic* to be determined by the laws of each country in which suits happen to be brought, no matter how much those laws differ? Is one claim to be determined by the law of France, if the suit is brought in France, and others by the law of Germany, or Italy, or Brazil, or Japan, merely because the suits are brought there? It seems to me that such results could not have been within the intention of Congress in passing the statute, and that the rule laid down by the Supreme Court in the case of *The Scotland*, that when a collision occurs on the high seas between two vessels of the same country, the liability of their owners is to be determined by the law of the country to which the vessel belongs, applies in this case.

The exceptions are sustained, and the petition dismissed.

Additional Opinion.

HOLT, District Judge. The direction, at the end of the opinion filed, that the petition be dismissed, of course, can only apply to the exceptants Mellor and Anderson. Those parties who do not wish the petition dismissed are entitled to be heard, and to assert their claims by any proceedings under the petition which they may be advised to take. I think, on consideration, that the order should provide that the petitioner have leave to amend the petition within twenty days; that if no such amendment be made the petition be dismissed as to the exceptants Mellor and Anderson only; that if an appeal be taken within twenty days the injunctions shall continue until the final determination of the appeal; and that, if no such appeal be taken, the injunctions shall be vacated as to the exceptants Mellor and Anderson only. An order to the above effect may be presented.

THE TITANIC.

(Circuit Court of Appeals, Second Circuit. November 24, 1913.)

No. 128.

Appeal from the District Court of the United States for the Southern District of New York.

Before LACOMBE, COXE, and WARD, Circuit Judges.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a petition filed by the owner of the steamship Titanic to obtain a limitation of petitioner's liability, under the statutes of the United States. Upon the argument there arose certain questions or propositions of law, concerning which this court desires the instruction of the Supreme Court for its proper decision.

For opinion below, see 209 Fed. 501.

Statement of Facts.

The facts out of which these questions arise are as follows: The Titanic, a British steamship, which had sailed from Southampton, England, on her maiden voyage for New York, collided on the high seas with an iceberg, on April 14, 1912, and sank the next morning with the consequent loss of the lives of a large number of the passengers and crew. The vessel, her cargo, personal effects of passengers and crew, mails, and everything connected with the vessel, except certain lifeboats, became a total loss. The owner, alleging that the collision and consequent loss were due to inevitable accident and were not caused or contributed to by any negligence or fault on the part of the owner or of those in charge of the steamship and were occasioned and incurred without the privity or knowledge of the owner, filed a petition for relief under sections 4283, 4284, and 4285, U. S. Revised Statutes (U. S. Comp. St. 1901, pp. 2943, 2944), and the fifty-fourth and fifty-sixth Rules in Admiralty (29 Sup. Ct. xlv, xlv).

Prior to the filing of the petition a number of actions to recover for loss of life and personal injuries resulting from the disaster had been instituted against petitioner, in federal and state courts. The persons who sustained loss by such collision and sinking were of many different nationalities; many of them were citizens of the United States.

A copy of the petition is hereto annexed, marked "A."

Two of the claimants, one a British subject, the other an American citizen, filed exceptions to the petition. Copies of these exceptions are annexed marked "B" and "C."

The District Court entered a decree dismissing the petition as to these two exceptants, from which decree appeal was duly taken.

A copy of the decree is hereto annexed, marked "D."

Questions Certified.

The questions or propositions of law upon which this court desires the instructions of the Supreme Court are:

A. Whether in the case of a disaster upon the high seas, where (1)

only a single vessel of British nationality is concerned and there are claimants of many different nationalities; and where (2) there is nothing before the court to show what, if any, is the law of the foreign country to which the vessel belongs, touching the owner's liability for such disaster, such owner can maintain a proceeding under sections 4283, 4284 and 4285, U. S. Revised Statutes and the fifty-fourth and fifty-sixth Rules in Admiralty?

B. Whether, if in such a case it appears that the law of the foreign country to which the vessel belongs makes provision for the limitation of the vessel owner's liability, upon terms and conditions different from those prescribed in the statutes of this country, the owner of such foreign vessel can maintain a proceeding in the courts of the United States, under said statutes and rules?

In the event of the answer to question B being in the affirmative:

C. Will the courts of the United States in such proceeding enforce the law of the United States or of the foreign country in respect to the amount of such owner's liability?

New York, November 21st, 1913.

E. HENRY LACOMBE,
ALFRED C. COXE,
H. G. WARD,

Judges of the United States Circuit Court of Appeals for
the Second Circuit Sitting in Said Cause.

CHESAPEAKE & O. R. CO. v. McKELL.

(Circuit Court of Appeals, Sixth Circuit. December 2, 1913.)

No. 2357.

1. TRIAL (§ 177*)—REQUESTS FOR INSTRUCTIONS—EFFECT OF MUTUAL REQUESTS.

Requests by both parties for an instructed verdict do not amount to a withdrawal of all questions of fact from the jury, where it appears that such was not the intention of a party, and that it was not so understood by the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.*]

2. APPEAL AND ERROR (§ 1097*)—REVIEW—SUBSEQUENT APPEALS—SCOPE AND EXTENT OF REVIEW.

While an appellate court has the abstract power upon a second review to reach a result inconsistent with its decision on the first review of the same case, this power is to be exercised very sparingly, and only under extraordinary conditions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.*]

3. CORPORATIONS (§ 390*)—VALIDITY OF CONTRACTS—ULTRA VIRES—QUESTIONS FOR JURY.

Where one contracts to sell to a corporation an article which it has power to buy for one purpose, but has no power to buy for another, the criterion of the validity of the contract in a suit by the seller is twofold: First, did the purchaser buy with a dominant unlawful purpose, and only for incidental use in the rightful way, or with a dominant lawful purpose, intending to devote to the unlawful use only the contingent surplus; and, second, if its purpose was dominantly unlawful, was this with the knowl-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

edge of the seller, or did the latter suppose, and have the right to suppose, that the purchaser was buying mainly and substantially for the lawful purpose? and the latter inquiry is attended with the presumption, in the absence of contrary evidence, that he did not know of any unlawful purpose; but, where there is such contrary evidence, the question is one for the jury.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1572; Dec. Dig. § 390.*]

4. CONTRACTS (§ 323*)—ACTIONS FOR BREACH—QUESTIONS FOR JURY.

In an action for breach of a contract by which defendant railroad company agreed to purchase at stated prices so much of the coal to be mined from certain land owned by the plaintiff as he should elect to sell to it, in which he alleged an election to sell the entire output, whereby defendant's obligation to take it all became fixed, the question whether he made an election, and, if so, whether it extended to all or only a part of the coal, *held*, on the evidence, questions for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1311, 1349, 1466, 1543-1548, 1827, 1827½; Dec. Dig. § 323.*]

5. DAMAGES (§ 218*)—BREACH OF CONTRACT—CONTRACT FOR SALE OF COAL PRODUCTION.

In an action by coal land owner against railroad company, on latter's contract to build railroad to the land and buy from the owner or his lessees all the coal to be mined thereon, and where it appears that the railroad company built the road, that the owner leased portions for a tonnage royalty under leases contemplating that the lessees would exhaust the coal, and the owner retained other portions which he was at liberty to lease or to operate himself, and it further appeared that, after taking some coal from the lessees, the railroad refused to take more, the measure of damages as to the leased lands was the diminution of the present value of the owners' expectant royalties through their definite or indefinite postponement in so far as such postponement was the reasonably probable result of the defendant's refusal to take the coal as agreed, while, as to the lands not leased, the contract must be treated as in the nature of a development or operating facility—a quasi appurtenance to the land—and the measure of damages will be the difference between the value of the unleased tract with the full contract in force and its value with the railroad built and the remainder of the coal-purchasing contract repudiated.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 560-562; Dec. Dig. § 218.*]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard H. Hollister, Judge.

Action at law by Jean D. McKell, administratrix, against the Chesapeake and Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

For former opinions, see 175 Fed. 321, 99 C. C. A. 109, 20 Ann. Cas. 1097; 186 Fed. 39, 108 C. C. A. 141.

Harmon, Colston, Goldsmith & Hoadly, of Cincinnati, Ohio (F. B. Enslow, of Huntington, W. Va., of counsel), for plaintiff in error.

Brown, Jackson & Knight, of Charleston, W. Va., Paxton, Warrington & Seasongood, of Cincinnati, Ohio, and Holt, Duncan & Holt, of Huntington, W. Va. (John H. Holt, of Huntington, W. Va., and Murray Seasongood, of Cincinnati, Ohio, of counsel), for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

DENISON, Circuit Judge. Upon the first trial of this case, judgment was entered for defendant (the railway company) upon an instructed verdict. This court reversed the judgment and ordered a new trial. Our former opinions (on first hearing, 175 Fed. 321, 99 C. C. A. 109, 20 Ann. Cas. 1097, on rehearing, 186 Fed. 39, 108 C. C. A. 141) sufficiently state the nature and history of the controversy. Upon the new trial thus awarded, the District Court instructed the jury that the making of the contract, its validity, and its breach were established as matter of law, and left for the consideration of the jury only the amount of damages. The verdict fixed plaintiff's damages at \$300,000, and defendant brings error to review the judgment entered thereon.

[1] It is urged that, by requests from both plaintiff and defendant for instructed verdicts, the facts were submitted to the court under the rule of *Beuttell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654, and so that some of the errors assigned cannot now be considered; but we are satisfied there was no intent by the court or by defendant's counsel to treat the facts as voluntarily withdrawn from the jury, and that what happened on the trial brings this case within the rule which we have applied in *Minahan v. Grand Trunk Co.*, 138 Fed. 37, 42, 70 C. C. A. 463, and in *Bank v. Maines*, 183 Fed. 37, 41, 105 C. C. A. 329.

The assignments of error are very numerous, but, so far as we think they require consideration at this time, they may all be included in groups as presenting these questions: (1) What are the extent and effect of the former judgment of this court? (2) was the contract in suit *ultra vires* of the railroad company so as to defeat McKell's action? (3) was the contract in suit ever closed by McKell's exercise of his optional right to sell to the railroad all the coal on his land? (4) if there was a valid and completed contract, did its breach appear? and (5) if there were such contract and breach, what was the measure of damages?

1. *The Former Decision.* Counsel urge, in effect, that the only question involved upon the former review was whether there was evidence to go to the jury, that the only point actually decided was to affirm the existence of such evidence, and that, in so far as the opinion of the court went further and declared the character of the contract indicated by the evidence and the duration of rights created by the contract, it was obiter; and they further urge that we are at liberty to and should re-examine the rightfulness of our former conclusions.

[2] We find no occasion to doubt the abstract power of an appellate court, upon a second review, to reach a result inconsistent with its decision on the first review of the same case (*Messinger v. Anderson*, 225 U. S. 436, 444, 32 Sup. Ct. 739, 56 L. Ed. 1152); but this is a power to be exercised very sparingly, and only under extraordinary conditions. The practice that such a decision be treated as the law of the case, to be followed by the appellate court itself as well as by the trial court, is most salutary, and its violation (save in rare exceptions) would intolerably unsettle all litigation. Such practice, indeed, "is necessary to

enable an appellate court to perform its duties satisfactorily and efficiently." *Great Western Co. v. Burnham*, 162 U. S. 339, 344, 16 Sup. Ct. 850, 40 L. Ed. 991.

We should, then, consider just what was determined in the former opinion. We cannot accept the contention that everything was obiter which went beyond the finding that it was error to take the case from the jury. In the question whether the evidence in this case tended to show any contract, there was properly involved the question of the character and extent of the contract, and what the court found upon the latter question constituted, in part at least, the basis for its conclusion upon the former, and became a part of the law of the case for the guidance of the trial court in the directed new trial. In *re Sanford Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; *Jones v. Habersham*, 107 U. S. 174, 179, 2 Sup. Ct. 336, 27 L. Ed. 401.

Approaching the former opinion from this standpoint, we think it clear that the points decided upon this subject (and not hereinafter specially treated) were three: First, that the contract made by the letters was not one contingent upon the making of future contracts with lessees, but was complete in itself, and gave to McKell the option to sell to the railroad all the coal to be mined on his land, with the privilege of exercising the option in installments from time to time; second, that the contract was not at will, but was "permanent," and contemplated that rights created under it might continue until all the coal was exhausted (subject, doubtless, to the condition that the rights of election and delivery should be exercised in a reasonable manner); and, third, that McKell's election might be made and his rights consummated, through his lessees as well as by himself directly. Whatever doubts any members of this court might now feel as to whether the nature of the contract was in all these respects rightly apprehended in the former opinion, we know that these questions were then thoroughly presented and thoroughly considered, and we all agree that such doubts cannot justify any present refusal or hesitation in accepting and following the construction then given.

2. *Was the Contract Ultra Vires?* The railroad is a Virginia and West Virginia corporation, subject to the laws of those states, and chartered only as a common carrier, without merchandizing power. The contract here involved was a West Virginia contract. In 1895 (Acts 1895, c. 16) a West Virginia statute was enacted which forbade railroad companies to engage in the business of buying and selling coal. While this statute was passed later than the making of the contract, yet the railroad was always an interstate carrier, and it is clear that, if it was in fact purchasing coal for the purpose of resale, such shipment and resale were to be outside of the state. It has been authoritatively decided that interstate carriers cannot buy coal for that purpose, where the necessary effect is to substitute a dealer's profit for the published rate (*New Haven Co. v. I. C. Com'n*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515), and such substitution would, we think, have been the necessary effect of this contract, considered as one of purchase for resale. Hence, at the time the contract was made, in 1892, and without reference to the West Virginia statute of 1895 or

the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1288), the railroad company had no power to contract with McKell to buy his coal for the purpose of selling the same at a profit; indeed, we do not understand that the existence of such a power is seriously claimed.

[3] However, the railroad was a large user of coal for its own fuel. It had power to buy and to contract for coal for this purpose. What follows? Where one contracts to sell to a corporation which has power to buy for one purpose, but has no power to buy for another purpose, the criterion of validity in the suit of the vendor is twofold: First, did the vendee buy with a dominant unlawful purpose, and for only incidental use in the rightful way, or with a dominant lawful purpose, intending to devote to the wrongful use only the contingent surplus; and, second, if the vendee's purpose was dominantly unlawful, was this with the knowledge of the vendor, or did the latter suppose, or have the right to suppose, that the vendee was buying mainly and substantially for the rightful use? This latter inquiry would be attended with the presumption, in the absence of any contrary evidence, that the vendor did not know of any unlawful purpose. *Miners' Co. v. Zellerbach*, 37 Cal. (per Sawyer, C. J.) 543, 586-588, 99 Am. Dec. 300; *Colorado Co. v. American Co.* (C. C. A. 8) 97 Fed. 843, 849, 38 C. C. A. 433; *Young v. United Co.* (C. C. A. 1) 198 Fed. 593, 117 C. C. A. 301.

Both these questions are questions of fact, and we are satisfied that the present record requires that the first, and, if that is answered in one way, then the second, should be submitted to the jury. The theory of the present case is not that some small amounts of coal were contracted for, but that the railroad company obligated itself to take nearly 100,000,000 tons. True, deliveries were indefinite, and were, doubtless, subject to considerations of what would be reasonable, but if the contract declared upon was ever closed by McKell's election to sell, both parties had in mind the entire amount, and the inquiry as to the railroad's purpose in buying and McKell's knowledge of that purpose, must be approached from this standpoint. There was evidence, given or offered, tending to show that the railroad was notoriously buying and selling coal on a great scale; that its fuel needs, as existing in 1892, upon the divisions most naturally supplied from this region, could have been met for 300 years by the quantity contracted for, while even its total uses, in 1909, after a development perhaps beyond any one's contemplation in 1892, would have been covered for more than 50 years; that the contract price was higher than it was then paying for its fuel; and that McKell's business situation and experience were such as to support an inference that he must have known the railroad was buying for shipment and sale. Further, the letters and testimony tend to show that the coal about which he and the railroad president were corresponding, was, by both of them, expected to be sold in a competitive market. On the contrary, inference and testimony to the effect that McKell had no knowledge of an intended unlawful use are not wanting.

On the whole record we have no doubt that the defendant was entitled to go to the jury upon the propositions that it bought this coal for the main purpose of shipment and resale, and that McKell was

chargeable with full knowledge of such purpose, and that, if the jury, found with defendant on these propositions, there could be no recovery.

The former opinion does not cover this point. It decides only, and we think it was intended only to say, that, upon the then existing record, the defense of *ultra vires* was not so made out that it would, as matter of law, defeat the action; but whether there was evidence tending to show the unlawful purpose and McKell's participation was neither involved nor discussed.

[4] 3. *Election.* Plaintiff declared upon a contract which obligated the railroad company to buy all the coal which, from time to time thereafter, McKell should elect to sell, followed by his election to sell thereunder all his coal. Under this declaration, and under the theory on which the case was twice tried, McKell's right to recover depended upon the due exercise of his election to sell all the coal. Upon the first trial, plaintiff made an offer to prove such complete election, but he was not permitted to make the proof. The case, therefore, necessarily came into this court on a record implying that the election had been made, and its consideration here was upon that basis. This was not only the necessary implication from the record, but it was expressly mentioned in the opinion, and everything said in the opinion is upon the declared hypothesis that the plaintiff would be able to show, and for the purposes of that discussion must be considered as having shown, a complete election. The question whether the facts which did appear by proof, and not merely by offer, made out, of themselves, as matter of law, the necessary election, was not before the court, and we think was not intended to be decided. Whatever is said that may seem to have that color is only by way of argument in demonstrating that there was a case for the jury, and cannot have the force of a decision. So it becomes necessary for us to examine the question, as an open one, whether the evidence on this trial showed such election so clearly and so conclusively as to justify the instruction given.

To comprehend clearly the issue of election, some segregation seems necessary, first, broadly, as to the lands involved. The 23,000-acre tract was underlaid with two seams of coal—the Sewell and the Fire Creek seams—but not completely by each, so that the Sewell seam existed under only about 11,500 acres. The declaration charges the contract and the election as to all the coal. Testimony was received concerning the diminished value per acre of the 23,000-acre tract by reason of the breach; but counsel now agree that only the 11,500 acres underlaid with the Sewell seam were in fact involved. If so, this testimony was improperly received. So, also, we do not observe any evidences of general election to sell coal which do not apply to both seams as well as to one, or which cover either if they do not cover both. We do not understand how this confusion arose, but it is not necessary to pursue the subject, for we may assume that it will be cleared up on another trial.

Then we find that the coal lands containing the Sewell seam require division into two groups: Those which were at the time of the breach covered by leasing contracts and those not so covered. Within the first two years, and before there was a final breach, McKell had leased four

subtracts to four lessees on a fixed tonnage royalty, and three of these lessees had made individual sale contracts with the railroad. These three leases contain about 2,400 acres; the fourth lease covered 600 acres; a total of 3,000 acres. Each of these leases was for 25 years, and indicates that both parties thought this period reasonably sufficient to exhaust the coal in the leased premises; none contained any restriction on the lessees' right to sell the coal to any one. The three contracts by the lessees with the railroad are similar to each other in terms, are for a 10-year period only, and obligate the lessee to sell and the railroad to take a yearly amount. They clearly leave the lessees at liberty to sell on the general market all their annual product beyond the stated amount, and all their product after 10 years. The total tonnage so sold to the railroad, on this 2,400 acres, could not exceed 6,000,000 tons, which would exhaust the coal on not more than 1,000 acres.¹ We cannot see that these leases or contracts, standing by themselves, tend to show an election by McKell to sell to the railroad any more than the total stipulated tonnage for the 10-year period.

Whether there still remained for McKell's benefit an open right of election to sell to the railroad, through these lessees, all the remaining coal on the leased premises, beyond the 6,000,000 tons sold, such right to be exercised within some reasonable limits of time and conditions, or whether the leases or sales contracts, or both, were necessarily inconsistent with such further open right, or whether the three sales contracts were made and taken by all parties as, pro tanto, satisfaction of, and substitution for, the open contract—these queries we need not consider. We now decide only that the four leases and the three sales contracts did constitute an election by McKell to sell the coal on 1,000 acres, but did not, of themselves, amount to an offer or election to sell the coal on the remaining 2,000 acres of the leased lands.

As to the coal on the remaining 8,500 acres of the Sewell seam, or the remaining coal on the 3,000 acres, we find nowhere any clear and certain election to sell. If the railroad arbitrarily refused to make contracts with the lessees for all their coal, and wrongfully held these purchase contracts down to the specified 6,000,000 tons, such conduct might have been a breach of the existing open contract, but it could not have been the election by McKell to sell the remainder. To say that such refusal (if there was a refusal) was wrongful assumes that there had been a prior election to sell the whole; it cannot, at the same time, close the contract and be the breach. McKell wrote a letter on April 20, 1893, before any one of the four leases was made, in which he says that he will "refuse leases to any not willing to contract to railroad." In view of his almost contemporaneous conduct in giving those leases which he did make, this language is not necessarily to be interpreted as pledging him not to lease except to those who would sell to the railroads their entire output. Still less does it fix his conclusion not himself to sell in the general market any coal that might not be covered by lease. His counsel also seek to make out the requisite election by notices given and offers made by him in 1901, six years after the al-

¹ This estimate, and our other recitals of acreage or tonnage, are intended as illustrative—not necessarily as accurate.

leged breach and while his claim was in the attorneys' hands for prosecution; but, giving to these things their face value, they do not expressly declare a present intention, nor recite a past conclusion to fix upon all the coal on all his land a status as "sold to the railroad." The question may be clearer, if seen from the other side. If McKell had elected to sell all the coal to the railroad under the contract which gave him that right, then the status of the coal was fixed (at least for the time being), and while the situation so remained, McKell would have no right to sell any of it to any one else. If he had made such a sale, the railroad could have brought an action against him, and in such action it would be entitled to an instruction in its favor on the same evidence which would entitle McKell to the corresponding instruction in the present, converse case. We are satisfied that neither the items of evidence to which we have referred nor others argued in the briefs, nor all together, would have entitled the railroad, in the supposed action, or did entitle McKell in this action, to an instruction that, as matter of law, his election to sell all the coal was established.

Counsel for the railroad go further and argue that none of this evidence has any lawful tendency to establish the election in controversy. We do not think it advisable to determine this, both because the point has not been fully argued upon the other side, and because the record upon a new trial may not be the same. Nor is it necessary to consider what the situation will be if it may eventually turn out that McKell had elected to sell a part but not all of the coal. In such case, it might be thought that, as to part of the coal there had been a closed contract of sale, a breach by not taking as agreed and damages appropriate to that situation, while, as to the remainder of the coal there had been only an open contract to take what might thereafter be offered, an anticipatory breach and damages naturally flowing therefrom. In such event, some amendment of the pleadings would seem necessary, and might or might not be proper to permit. We intend to express no opinion on these subjects, but only to make clear that any such rights cannot be worked out at this time on this record.

4. *Breach.* In observing whether the undisputed facts constituted a breach of the contract so as to justify the instruction to that effect which was given, we must keep in mind the contract involved. Upon the theory on which the case was prepared and submitted, viz., that the open contract had been closed by McKell's complete election to sell all the coal, whereby the obligation of the railroad company had become fixed to take all the coal as it should thereafter be reasonably offered for delivery—upon this theory, we think the breach did appear without doubt. After making sale contracts with three lessees, the railroad company announced that it would make such a contract with one more lessee only, and it thereafter consistently refused to receive more coal, and wholly denied its obligation under this theory of the contract.

The alleged failure of the railroad to furnish cars to the various lessees was much discussed in the court below, and defendant was refused permission to show that it had a reasonable supply of coal cars, and that it had distributed them without discrimination among its shippers, including the lessees. This refusal is alleged as error. On

the other hand, such failure is said to be a breach of the contract. The whole subject seems to us practically immaterial. We agree with the court below that if this contract is to be treated as one for the purchase by the railroad company of its fuel coal, it implied the liability to furnish cars, and that the railroad's failure to provide cars to take away the fuel which it had bought and agreed to take when offered would be a breach of such contract, and that the full performance of defendant's duties as a common carrier in impartially distributing a fair supply of cars would be no answer to the breach; but the complete breach already existed, the railroad company continued to refuse to take any coal, and denied its liability to do so (beyond the supposed 6,000,000 tons). It never claimed the right or sought an opportunity to reconsider this conclusion and to change its position. In this situation, evidence of the car refusals adds nothing to plaintiff's case.

If this trial had been, or a subsequent trial should be, upon the other theory heretofore suggested, viz., that as to part of the lands, the contract remained open, and it was the duty of the railroad company from time to time, either to buy coal or furnish the agreed facilities for shipment as the shippers might, from time to time, elect, then the contract obligation apparently would continue in both forms; the contract duty to furnish cars might extend to the coal which the shippers were compelled to send into the general market by the railroad's refusal to take, as well as to coal which the shippers elected, in the first instance, to ship; and the question might arise how far the contract obligation to furnish cars for general shipment did or could supersede defendant's obligations as a common carrier—but this line of inquiry is now premature.

[5] 5. *Damages.* The measure of damages, adopted in the court below, was the difference between the value of McKell's land in connection with and accompanied by a contract of this kind and the value of the land with the railroad, but without such contract, and the jury was permitted to apply this measure of damages to the entire tract, or, at least, to the entire 11,500 acres of the Sewell seam. The intention of the court below was to adopt and apply the rule of damages stated by this court in the case of *South Memphis Land Co. v. McLean Hardwood Lumber Co.*, 179 Fed. 417, 102 C. C. A. 563.

Upon the subject of damages, as well as upon the subject of election, it seems difficult to treat the entire claim as an entity. The lands must be divided into two classes. The first class consists of the 3,000 acres which had been set apart by McKell before the alleged breach into the hands of lessees. Their right to mine all the coal in these tracts was fixed and, though their obligation was not correlative, it was clearly contemplated by them and by McKell that they would do so. In so far as the lands were and continued thus leased, McKell's only remaining interest, in the lands or in the performance of the contract in suit, was that the coal should be mined rapidly, so that the payment of his royalties would be hastened and their present worth thereby appreciated. Accordingly, his damages, in whatever light the contract be viewed, could only be the diminution in the present value of his expectant royalties through their definite or indefinite postponement, i.

so far as such postponement might be thought the reasonably probable result of the railroad company's refusal to carry out its contract with McKell to take all the coal on the leased premises, on the theory on which the case has so far been tried (or its contract with the lessees, inuring to McKell's benefit, to take the agreed 6,000,000 tons). The fact that the breach of this contract could at most only delay McKell's royalties, and did not destroy them, is emphasized by the evidence showing that up to the trial his representatives had received about \$1,500,000 in royalties (computing royalties also on coal mined by the McKell interests).

It seems that the railroad company compromised and settled with each of the three lessees under its contract with each lessee to buy the amounts aggregating the 6,000,000 tons, and if the sale contract between the lessee and the railroad had been, with McKell's acquiescence pro tanto substituted for the railroad company's obligation to McKell, obviously the lessees could cancel the substituted obligation, and the injury to McKell would be too remote to give him damages against the railroad. If, however, the sale contracts for the 6,000,000 tons were only collateral, and an original or independent obligation to McKell still existed, it is equally clear that accord and satisfaction with the lessees would not affect McKell's right of action or damages. Written contracts purporting to show such compromise were offered, but excluded. Their admissibility depends upon the consideration just stated.

So much for the damages as to the leased lands. As to the remainder—the second class—damages would be of the same nature in so far as the lands might be developed through lessees; but at the time of the trial, the McKell interests were mining part of the lands themselves (or through an organization belonging wholly to them, for this purpose the same thing), and they might develop other parts of the land in the same way. As to the coal on such lands, McKell would lose the difference (reduced to terms of present worth) between the contract price of the coal and the market price at the time of mining and sale. Hence we are urged to say that the contract in suit has been put by plaintiff in the position of a contract for the sale of coal, and that, treating it as of that class, the measure of damages should be that ordinarily applied to contracts of sale, viz., the difference between the contract price and market price; and it is said that this measure has been held suitable in cases where it was no more impossible of application than here. That in this case the arrangement contemplated prices shifting over a long term of years; that the contract price was to be fixed by an inconstant comparative standard the variations in which human intelligence could not foresee; that at the time of the breach there could be no market value for this quantity of coal in this condition; and that the future market price was as likely to be more as to be less than the contract price—all these conditions make it difficult to apply the conventional rule or to apply any suitable special formula based on that rule. These difficulties become insuperable when we remember that the contract contemplated development through lessees. At the time of the breach this was apparently the only method which

had been in the mind of either party by which the coal was to be brought into deliverable condition; but if we assume that McKell had the right to mine his coal himself and require it to be taken, it must, at least, have been true that a great part of the coal would be mined by lessees. No one can say that it would have been all; no one can say it would have been less than all. As to this coal which was so to be mined by these supposed lessees, there is no room to consider as measuring McKell's damages the various questions of contrast between market price and contract price. These questions made no direct difference to McKell; he was to receive the same royalty, the same amount per acre, no matter what the market price. It is true that a rise in the market price, considered by itself, would tend to stimulate mining so that McKell would receive his royalties more rapidly, and be thus benefited, that a fall in market price, below Pocahontas (contract) price, would have made the contract more valuable, because it would then have been an inducement to take leases, and that the maintenance of market price above the Pocahontas figure would have the opposite tendency. These things, however, are too indirect and remote to enable us to use the difference between contract and market price as a measure. It must be understood that in this discussion of the measure of damages, so far as it pertains to lands not covered by the four leases, we are considering only the rules appropriate to the theory of fact upon which plaintiff stood, viz., that he had elected to sell all the coal at Pocahontas prices.

These considerations, among others, lead us to the conclusion that while the measure of damages adopted below cannot be supported by wholly satisfactory reasons, yet it is as to the unleased lands, the best and most appropriate measure of which the case permits; and it must be adopted at the peril of otherwise saying that the damages are too speculative to permit recovery.

This contract—even from the point of view compelled by plaintiff's theory that there was an election to sell all the coal—must be treated as in the nature of a development or operating facility, a quasi appurtenance to the land; and the jury must ascertain, if the proofs permit, the difference between the value of the 23,000-acre tract, or of the 8,500-acre tract, as it stood after the breach, with the then existing right to find another outlet and other purchasers, and the value which it would then have had if accompanied by the closed contract on the part of McKell to sell and deliver, and on the part of the railroad company to buy and take all the coal on the tract at Pocahontas prices. The question whether McKell could recover, in addition to or in place of this measure, the expense of procuring another outlet to market is not now before us, and we do not undertake to pass upon it, nor upon the form of the hypothetical value question used upon the last trial.

The judgment must be reversed with costs, and the record remanded for a new trial.

McCALL, District Judge, concurs in the general conclusion reached, reversing the case and awarding a new trial.

FAIN v. UNITED STATES.

BAKER v. SAME.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1913.)

Nos. 3,797, 3,798.

(Syllabus by the Court.)

1. CONSPIRACY (§ 45*)—CRIMINAL OFFENSE—PUBLIC LANDS—EVIDENCE.

The defendants were charged with a conspiracy in violation of section 5440, Revised Statutes (U. S. Comp. St. 1901, p. 3676), to defraud the United States by inducing false homestead entries, and by clouding the title to lands lawfully entered as homesteads, and preventing the entry of such lands by legitimate entrymen, so as to interfere with the due administration of the law, and they were also charged with the overt acts of purchasing and withholding relinquishments of valid homestead entries, and of instituting false contests of the same entries to effect the object of the conspiracy.

Held, the purchasing and the withholding from filing of relinquishments of homestead entries, and the institution and prosecution with probable cause of contests of the same entries, were not acts to effect the object of such a conspiracy, because they were acts authorized by the acts of Congress and the law, and because they did not tend to withhold the lands entered from entry by legitimate entrymen, and evidence of such purchases, relinquishments, and contests was inadmissible to prove the charge in the indictment.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 100-104; Dec. Dig. § 45.*]

2. PUBLIC LANDS (§ 40*)—RELINQUISHMENT OF HOMESTEAD CLAIM—OPERATION AND EFFECT.

A relinquishment of a homestead claim is not a contract with the purchaser. It is only a release of the homesteader's claim to the United States, and it has no effect upon the claim or the entry until it is filed in the proper land office.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 100-102; Dec. Dig. § 40.*]

3. CONSPIRACY (§ 33*)—PUBLIC LANDS (§ 40*)—RELINQUISHMENTS—RIGHTS OF HOLDER.

A homesteader has the absolute right and option (1) to file his relinquishment of his claim at any time, or to withhold it from filing forever, and (2) to sell his relinquishment at any time, or to refuse to sell it altogether.

The purchaser of the relinquishment acquires the same right and option, and his purchase and withholding of it from filing is lawful, and does not tend to withhold the land from legitimate entrymen, to interfere with the due administration of the law, or to defraud the United States.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. § 33; * Public Lands, Cent. Dig. §§ 100-102; Dec. Dig. § 40.*]

4. CONSPIRACY (§ 33*)—OFFENSES—ESSENTIAL ELEMENTS.

It is not criminal or illegal to do, or to conspire to do, that which the law does not prohibit, but recognizes may be lawfully done without prejudice or injury to the United States or the state.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. § 33.*]

5. PUBLIC LANDS (§§ 40, 103*)—HOMESTEAD ENTRY—RIGHT TO CONTEST—RELINQUISHMENT.

Any person is authorized by the acts of Congress to contest a homestead entry, and the fact that he has purchased a relinquishment of it

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

does not disqualify him, nor does the commencement of a contest disqualify him from purchasing a relinquishment of the entry contested.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 100-102, 298, 299, 307; Dec. Dig. §§ 40, 103.*]

6. CONSPIRACY (§§ 33, 45*)—PUBLIC LANDS—EVIDENCE—FALSE STATEMENTS ON IMMATERIAL ISSUES.

Neither the evidence of the contests of valid entries commenced by the defendants, nor the evidence that some of their statements on immaterial issues in their affidavits of contest were false, were either competent or material in this case, because neither had any tendency to prove the withholding of the land from legitimate entrymen, or any interference with the due administration of the law, or any fraud upon the government, because the defendants had the right to contest the entry.

An erroneous statement regarding a fact in a pleading or affidavit in the litigation of a controversy does not subject the maker to a criminal prosecution for an interference with the due administration of the law.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 60, 100-104; Dec. Dig. §§ 33, 45.*]

7. CONSPIRACY (§ 45*)—PUBLIC LANDS—EVIDENCE.

The fact that the entryman Babb was intoxicated once when he bought some groceries for which the defendant Baker paid, and the fact that a witness testified that one Davis, who made a corroborating affidavit in defendant Baker's contest, was a "professional contestor and ringer for Baker & Co.," did not tend to prove any fraud on the government, and these facts were immaterial.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 100-104; Dec. Dig. § 45.*]

8. CRIMINAL LAW (§ 424*)—EVIDENCE—STATEMENTS AND ACTS OF CO-CONSPIRATORS.

While the act of one conspirator in the prosecution of the enterprise is, after proof of the conspiracy, evidence against all, his admissions in his narration of past events after the conspiracy has come to an end, either by success or failure, are inadmissible against his fellows.

A letter written by defendant Baker in reference to Babb's entry and relinquishment, after his relinquishment had been filed and the land he had entered had been entered by Jenkins, was incompetent evidence as against defendant Fain, because all the alleged fraud upon the government which could have been perpetrated by the defendants in regard to the Babb entry had been completed before the letter was written.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

Admissibility on trial of joint indictments of acts and declarations of conspirators and codefendants after accomplishment of object, see note to *Sorenson v. United States*, 74 C. C. A. 472.]

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Logan Fain and another were convicted of conspiracy to commit an offense against the United States, and bring error. Reversed and remanded.

Ernest O. Patterson, of Dallas, S. D., and Frank R. Aikens, of Sioux Falls, S. D. (Harold E. Judge, of Sioux Falls, S. D., on the brief), for plaintiffs in error.

H. B. Durham, of University Place, Neb., and Charles J. Morris, of Sioux Falls, S. D. (Edward E. Wagner, U. S. Atty., of Sioux Falls, S. D., on the brief), for the United States.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

SANBORN, Circuit Judge. [1] The defendants below, Fain and Baker, were convicted of conspiracy to induce persons to make false entries on public lands, to procure and to hold for sale for their own profit relinquishments by homestead entrymen, and to make and cause to be made false and pretended contests of homestead entries for the purpose of preventing the lands covered by them from being entered by other qualified entrymen until they could sell their relinquishments for their own benefit, in violation of section 5440, Revised Statutes (U. S. Comp. St. 1901, p. 3676). That section reads in this way:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty," etc.

The defendants specify as error the admission and the denial of a motion at the close of the trial to strike out evidence of the following acts which were pleaded in the indictment as overt acts committed to accomplish the object of the conspiracy.

It was established by the evidence, and is conceded, that Kammerer, Strunk, and Rogers made honest and valid homestead entries of their respective tracts of land. If a view of the evidence challenged by the objection and motion now under consideration most favorable to the United States be taken, it goes no further than to tend to show that in September, 1909, the defendants purchased the relinquishments of these homesteaders; that in October, 1909, Baker instituted a contest against Kammerer on the grounds that he had offered his relinquishment for sale, and had sold it to one Smith, when the fact was that he had not sold it to Smith, but had sold it to defendants, and that he had abandoned his homestead for more than six months; that Kammerer's relinquishment was not filed until November 3, 1909, when Baker withdrew his contest and Ernest C. Collier, to whom Kammerer's relinquishment had been sold, entered the land as his homestead; that on September 7, 1909, Fain filed an affidavit of contest against Strunk on the ground that he had offered his relinquishment for sale, and had sold it to one Dennis Y. Hennold, when the fact was that he had not sold it to Hennold; that two other contests of Strunk's claim were filed on September 7, 1909; that on October 14, 1909, Fain filed an amended affidavit to the effect that Strunk had abandoned his homestead for more than six months; that five junior contests for this tract of land were subsequently instituted; that the relinquishment of Strunk has never been filed, and Fain's contest is still pending; that on October 25, 1909, the defendants caused K. T. Coffey to file an affidavit of contest of Rogers' entry, on the ground that he had abandoned his tract for more than six months, and Rogers' relinquishment was never filed.

How did these acts of the defendants tend "to effect the object of the conspiracy," how did they tend to "defraud the United States?" Counsel for the government answer:

"The entries of Kammerer, Rogers, and Strunk took the land temporarily from the public domain and placed it beyond the reach of other entrymen, and it retained that status as to the other entrymen and as to the United States until the relinquishments were filed, or until the contests were terminated one way or the other, and if these defendants purchased the relinquishments and withheld them from the records, and in the meantime covered the records with contests, they thereby kept the land out of the public domain and beyond the reach of other entrymen, and in that way interfered with the due administration of the law and worked a fraud upon the government. This is the theory of this case."

And in support of this theory counsel cite and rely upon the authorities which have sustained prosecutions for conspiracies to defraud the commission into the acceptance of candidates for positions by forging vouchers, and by false impersonations at the civil service examinations, and upon other cases of that class. *United States v. Plyler*, 222 U. S. 15, 32 Sup. Ct. 6, 56 L. Ed. 70; *Curley v. United States*, 130 Fed. 1, 11, 12, 64 C. C. A. 369-380; *United States v. Bunting* (D. C.) 82 Fed. 883; *Haas v. Henkel*, 216 U. S. 462, 479, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112; *United States v. Moore* (C. C.) 173 Fed. 122, 124-131; *McGregor v. United States*, 134 Fed. 187, 195, 69 C. C. A. 477, 485.

The preliminary homestead entries of Kammerer, Strunk, and Rogers segregated the lands they entered from the public domain, and withheld them from entries by others until their entries should be canceled of record in the land office. *James v. Germania Iron Co.*, 107 Fed. 597, 603, 46 C. C. A. 476, 482; *Hartman v. Warren*, 76 Fed. 157, 160, 22 C. C. A. 30, 33.

These entries gave to them the right to the use and occupation of the land so long as they remained of record in that office. *Stearns v. United States*, 152 Fed. 900, 906, 82 C. C. A. 48, 54; *United States v. Turner* (C. C.) 54 Fed. 228; *Bentley v. Bartlett*, 15 Land Dec. Dept. Int. 179; *St. Paul, M. & M. R. R. Co. v. Forseth*, 3 Land Dec. Dept. Int. 446. Hence no claim is made, and none could be sustained if made, that any of the acts of the defendants in reference to them tended to deprive the United States of the use or possession of the land, or in any way to defraud it out of anything of pecuniary value. The attempt to sustain the introduction of the evidence regarding these acts is founded on the theory that they "interfere with the due administration of the law," and thereby "work a fraud upon the government." But the chief object of the due administration of the law is to protect every one in his person, his lawful business, and his property, and to secure to him an opportunity, without fear or favor, and without criminal prosecution, to litigate his personal and property claims before impartial tribunals and officers, to receive from them full and patient hearings and just decisions and those who present their claims, even though they are not sustained, to such tribunals or officers are not liable to criminal prosecutions, even though the administration of justice is interfered with and delayed by the use of the time required to adjudge them.

When the defendants bought these relinquishments the lands to which they relate, their use and occupation, were withheld by the entry-

men from entry and possession by others until their entries should be canceled on the records of the land office. The Act of May 14, 1880, c. 89, 21 Stat. 140 (U. S. Comp. St. 1901, p. 1392), provided that the entry of each of these homesteaders might be canceled, and the land he had entered might be opened to settlement and entry again (1) upon his filing a written relinquishment of his claim in the local land office, and (2) upon a successful contest of his claim by any person, and that the successful contestant, in the case of such a contest, should have the right to enter the land in preference to others for 30 days after he received notice of the cancellation of the entry.

These homesteaders had made their entries in April, 1909, under Act March 2, 1907, c. 2536, 34 Stat. 1230, which permitted them to acquire the lands they entered for \$6 per acre by complying with the homestead laws and paying \$1.25 per acre at the time of their respective preliminary entries, and the remainder of the \$6 per acre in five annual payments. Each of them had made his first payment, and had thereby invested in his entry about \$200, and each of their entries was valid, and each entryman had 4½ years in which to perfect his homestead right and to prepare to make his final proof, when in September, 1909, he sold his relinquishment to the defendants. Neither the act of Congress nor the law imposes upon a homesteader any duty to file his relinquishment at any time or under any circumstances. Even if after he makes his preliminary entry, and before he makes his final entry, he is compelled by sickness or misfortune to change his mind, or if without compulsion or reason he does change his mind so that he no longer intends to perfect his homestead right and to take and hold his land for the purpose of actual settlement and cultivation by himself for his own benefit, and not for the benefit of any other person, still he has the absolute right and option to withhold his relinquishment from filing, to negotiate its sale, and to sell it, if he can, at the highest price he can obtain for it. His intention to hold his land for his own home or for his own benefit in no way conditions his right to sell his relinquishment. It is only at two times, at the time he makes his preliminary entry and at the time he makes his final proof, that the acts of Congress and the law require that the homesteader shall have the intention to occupy, cultivate, and take his land for his own home and benefit. Except at such times he has the option and the right to intend to file or sell his relinquishment and to abandon his entry, and the option and right to refrain from filing or selling his relinquishment. This right and option to file, or to refuse to file, or to sell, or to refuse to sell, is indispensable to enable him to realize the value of his relinquishment, for it is only by withholding it until he finds a time when he can sell it for a fair price that he can secure its value.

[2] Moreover, a relinquishment is not a contract of the homesteader with the purchaser. It is only a release to the United States of the claim of the entryman to his homestead, and it has no effect upon the entry or the right of the homesteader until it is filed. *Bailey v. Olson*, 2 Land Dec. Dept. Int. 40, 41; *Armstrong v. Miranda*, 14 Land Dec. Dept. Int. 133, 136, 138; *Robertson v. Messent's Heirs et al.*, 18 Land

Dec. Dept. Int. 301, 303; *Lewis v. Barnard*, 22 Land Dec. Dept. Int. 150, 155.

[3] What the vendee of a relinquishment actually secures by its purchase is the right and option to file or to withhold it, and to sell or to refuse to sell it, which the homesteader had when he sold it. The value of the relinquishment to the homesteader consists in his right and option to withhold it from filing or sale until he can obtain a fair price for it; and, if he cannot obtain such a price, or does not choose to take it, to withhold the relinquishment forever. The purchaser acquires the same right and option which the homesteader had, to file or to withhold the relinquishment from filing, and to sell or to refuse to sell it until he can obtain a fair price for it, and if he cannot obtain such a price, or does not choose to accept it, to withhold the relinquishment forever. In case no contest has been instituted against the claim of the homesteader, and no adverse settlement has been made, there inheres in this option the opportunity to the purchaser to enter the land when he files the relinquishment, and before others may secure that opportunity.

Now there is no doubt that these entrymen had the right to sell their relinquishments at such times as they saw fit. *Lindersmith v. Schwiso*, 17 Minn. 26 (Gil. 10); *Paxton Cattle Co. v. First Nat. Bank of Arapahoe*, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852; *Pelham v. Service*, 45 Kan. 614, 26 Pac. 29; *Forman v. Healey*, 19 N. D. 116, 121 N. W. 1122; *Knapp v. Alexander-Edgar Lumber Co.*, 145 Wis. 528, 130 N. W. 504, 506, 140 Am. St. Rep. 1091; *Chatten v. Walker*, 16 Land Dec. Dept. Int. 6; *Lewis v. Barnard*, 22 Land Dec. Dept. Int. 150; *Cummins v. Crabtree*, 27 Land Dec. Dept. Int. 711; *Stubendordt v. Carpenter*, 32 Land Dec. Dept. Int. 139, 142. The correlative right of others to purchase the relinquishments was indispensable to the exercise of the homesteaders' right to sell them, and therefore the defendants, who were in no way disqualified, had the right to purchase them. The things sold were the absolute rights and options of each of the homesteaders to sell or to refrain from selling his relinquishment, and to file at any time he chose, or to refuse to file his relinquishment forever. This right and option in the homesteaders was granted by acts of Congress, and was free and unrestricted under the law. Therefore, neither it nor its exercise could tend to defraud the United States, to interfere with the due administration of the law which authorized them, or to work a fraud upon the government. The sale of this right and option by each homesteader was authorized by the law. By such sales the purchasers obtained the same right and option which the homesteaders had held, and by the same mark that right and option and its exercise by them by withholding the relinquishments from filing in no way tended to accomplish the alleged object of the conspiracy, because it gave them no greater power, right, or opportunity to withhold the lands claimed by the homesteaders from entry by others than the homesteaders had before they sold the relinquishments, and the evidence concerning these relinquishments should have been withdrawn from the jury.

[4] It is neither criminal nor unlawful to do or to conspire to do that which the law does not prohibit but recognizes may be lawfully done without prejudice or injury to the United States or the state. *United States v. Biggs*, 211 U. S. 507, 521, 29 Sup. Ct. 181, 53 L. Ed. 305.

[5, 6] Nor was the evidence of the contests of these entries by these defendants more relevant or material, and this for two reasons: First, because the contests they instituted did not tend to keep the land out of the public domain and beyond the reach of other entrymen, and in that way to interfere with the due administration of the law and to work a fraud upon the government, but tended to cancel the pending entries, and to restore the land to the public domain, for there is no evidence that the entries would have been canceled sooner if the defendants had not commenced their contests, and the probability is that they would have remained in force until some other person made a contest and carried it to a successful result; second, because these contests were authorized by the acts of Congress, and therefore could not have been criminal or unlawful. Any person was authorized to institute and conduct them, and the fact that one has a relinquishment of an entry does not deprive him of his right to contest it.

But counsel says the affidavits of contest were false. They were not false, however, in regard to any material issue or fact. The extent of their falsity was this: In his original affidavit of contest Baker declared that Kammerer had sold his relinquishment to Smith, when there was evidence tending to show that he had sold it to the defendants, and Baker's contest was well founded in fact. On September 7, 1909, Fain filed an affidavit that Strunk had sold his relinquishment to Hennold when he had not. But Fain filed an amended affidavit in October on the ground that Strunk had sold his relinquishment, and had abandoned his homestead for more than six months, and thereafter, at least, his contest was well founded in fact. There are many reasons why the two statements in the affidavits regarding the sales of the property to Smith and Hennold, respectively, even if false, were immaterial. They did not tend to accomplish the object of the conspiracy to keep the land out of the public domain and beyond the reach of other entrymen; but, if they had any tendency, it was to remove the existing entries, and to open the land to entry by others. Moreover, it was not material whether the homesteaders had sold their relinquishments or not; for, if they had, they had the right to purchase them again and to maintain their homestead rights and their entries until the latter were canceled by contests or by the filing of their relinquishments. The false statements were not material to prove perjury because they related to an immaterial issue, and because that offense was not charged in the indictment and its commission was not in issue. It is not a criminal offense for a litigant to delay the administration of the law by asserting, even under oath, in his pleading or proof the existence of a fact which did not exist. If it were, one or the other of the parties in many a contested lawsuit would either be deterred from asserting the existence of facts the proof of which would be essential to his rights, but doubtful, or would be liable to

punishment for asserting their existence if he failed to prove them. No sound reason is discovered for the introduction in evidence or the consideration by the jury of the affidavits and contests of the entries of Kammerer, Strunk, or Rogers, or of their relinquishments or of the entries themselves. They should have been excluded from the consideration of the jury in the trial below.

In addition to the charges in the indictment which have been discussed, it also charged that in pursuance of the alleged conspiracy the defendants induced Eben H. Babb, on March 3, 1910, to make a false homestead entry, and on September 17, 1910, to deliver to them a relinquishment thereof. Under this charge there was evidence that on March 3, 1910, Babb made a homestead entry and paid \$158 thereon under the same act of Congress under which Kammerer, Strunk, and Rogers made their entries, and that he then made the required affidavit that his application was made honestly and in good faith for the purpose of actual settlement and cultivation, and not for the benefit of any other person; that after he had made his entry he executed a relinquishment thereof on the same day, and delivered it to the defendants; that he then went back to Indiana where he had resided, and in April, 1910, returned and built a small house on the land which he had entered; that he moved into it on May 11, 1910; that he brought his mother there in June, 1910, where she remained for some time; that he left the place about September 17, 1910; and that the defendants furnished him the money to make his entry, to make his improvements, and to live upon the land. Babb testified that when he made his entry his affidavit that he applied for the land honestly and in good faith, for the purpose of actual settlement and cultivation, and not for the benefit of any other person, was false, and that he never intended to occupy or cultivate it. He testified that after he had made his entry on March 3, 1910, the defendants paid him \$200 for his relinquishment, that he had no further interest in his claim after that, and that the money furnished him by the defendants and his occupation and improvement of the land were for their benefit and not for his. On the other hand, the defendants testified that they did not know that his affidavit was false, and that he did not intend to occupy and improve the land (and Babb did not testify that they had such knowledge); that all the moneys they furnished to him were loaned to him to enable him to maintain his claim; that he executed his promissory notes for it; and that they never bought the relinquishment, but took it as security for the money which they loaned. Promissory notes made by Babb, and his written agreement that the relinquishment was delivered to the defendants as collateral security for his debt, were produced and received in evidence. There was evidence that in September, 1910, Babb executed another relinquishment, and that the defendants sold the latter to John F. Jenkins on September 21, 1910, for \$1,500, \$500 in cash, and \$1,000 in a house and two lots. On September 21, 1910, Jenkins filed this relinquishment with the register of the land office, and entered the land described in it as his homestead. There was other testimony in evidence at the trial, and many letters which passed between Babb and the defendants, and the

sufficiency of all this evidence to sustain the charge regarding the Babb entry was challenged by objections and by a motion for a directed verdict. But as this case must be again tried and upon a different theory, upon the theory that it was lawful for any person to purchase relinquishments and to withhold them from the record and to contest the claims relinquished, and as the evidence at the next trial must necessarily differ from that now before us, the court refrains from expressing an opinion upon the sufficiency of the evidence in hand to sustain the charge relating to the Babb entry, and submits the suggestions for the consideration of the court at the succeeding trial that if there was any conspiracy to defraud the United States in the inception and maintenance of Babb's entry, he must have been an accomplice; that his testimony contradicts his affidavit of application for the entry, and is inconsistent with his promissory notes and his written agreement that the relinquishment of March 3, 1910, should be held as collateral security for his debt; that the defendants are presumed to be innocent until they are proved beyond a reasonable doubt to be guilty; and that—

"It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them." *Holmgren v. United States*, 217 U. S. 509, 523, 524, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778); *Sykes v. United States*, 204 Fed. 909, 913, 123 C. C. A. 205.

T. C. Burns, the register of the land office at Gregory, S. D., wherein the entries here in controversy were made, was a witness for the government. He testified that he knew C. H. Davis, who made a corroborating affidavit regarding the facts stated by Baker in his affidavit of contest of Kammerer's entry, and in answer to the question what Davis' business was he replied "professional contestor and ringer for Baker & Co." It is specified as error that a motion to strike out this answer was denied. It should have been granted. The answer disclosed no material fact, nothing that tended to show any defrauding of or intention to defraud the United States by the defendants, nothing but the disposition and intention of the witness.

[7] Cary, a witness for the government, testified that while Babb was living on the land he bought groceries of him, and Baker paid for them. Over the objection of the defendants he was permitted to testify that Babb was under the influence of liquor one day when he bought some groceries. That fact was immaterial, and the evidence of it should have been excluded.

[8] Over the objection of Fain that it was incompetent evidence against him, a letter to Babb was received in evidence, which had been written by Baker on October 14, 1910, 23 days after Babb's relinquishment was filed and his land was entered by Jenkins, in which letter Baker stated his sale of Babb's relinquishment, and that as soon as he could cash out, he would add up Babb's notes and the amounts of cash he had loaned him, and if they could get any balance, would send it to him. The letter was not competent evidence against Fain, because it was not written to effect the object of the alleged conspiracy, but to narrate how that object had been attained after it had been

reached, and such a narration by a co-conspirator is no evidence against his fellow. While the act of one conspirator in the prosecution of the enterprise is, after proof of the conspiracy, evidence against all, his admissions in his narration of past events after the conspiracy has come to an end, either by success or failure, are inadmissible in evidence against his co-conspirators. *Logan v. United States*, 144 U. S. 263, 309, 12 Sup. Ct. 617, 36 L. Ed. 429; *Brown v. United States*, 150 U. S. 93, 98, 14 Sup. Ct. 37, 37 L. Ed. 1010; *Lonabaugh v. United States*, 179 Fed. 476, 481, 103 C. C. A. 56, 61.

Let the judgment below be reversed, and the case be remanded to the court below, with instructions to grant a new trial.

CENTRAL ELECTRIC CO. v. SOCORRO ELECTRIC CO. et al. †

(Circuit Court of Appeals, Eighth Circuit. November 5, 1913.)

No. 3,983.

CORPORATIONS (§ 542*)—VALIDITY OF MORTGAGE—"INSOLVENCY"—NEW MEXICO STATUTE.

Under Laws N. M. 1905, c. 79, § 71, providing that, "whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, neither the directors nor any officer or agent of the corporation shall sell, convey, assign, or transfer any of its estate, effects * * * provided that a bona fide purchase for a valuable consideration, before the corporation shall have actually suspended its ordinary business, by any person without notice of such insolvency, * * * shall not be invalidated or impeached," an electric company, which, before the completion of its plant, became unable to meet its ordinary obligations as they matured for lack of funds or credit, and stated to its creditors that unless they made liberal discounts it would be compelled to go into insolvency, and thereby obtained settlements with most of its creditors for 75 cents on the dollar, was insolvent within the meaning of the statute, and a mortgage executed at that time to secure an issue of bonds purchased by its directors, who foreclosed and bought in the property within two years, paying the purchase price with the bonds, is void as to a creditor which refused to compromise its claim.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154-2160; Dec. Dig. § 542.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3647-3655; vol. 8, p. 7689.]

Appeal from the District Court of the United States for the District of New Mexico; William H. Pope, Judge.

Suit in equity by the Central Electric Company against the Socorro Electric Company and others. Decree for defendants, and complainant appeals. Reversed.

H. B. Jamison, of Albuquerque, N. M. (Vigil & Jamison, of Albuquerque, N. M., on the brief), for appellant.

Before HOOK and CARLAND, Circuit Judges, and VAN VAL-KENBURGH, District Judge.

CARLAND, Circuit Judge. This is a creditor's bill brought by the Central Electric Company against the Socorro Electric Company, Har-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 16, 1914.

ry M. Dougherty, trustee, Aniceto C. Abeytia, Joseph E. Price, James G. Fitch, C. T. Brown, E. A. Drake, and A. W. Chase, as directors of the Socorro Electric Company, for the purpose of having set aside and held for naught a certain mortgage or deed of trust made by the Socorro Electric Company April 8, 1909, to Harry M. Dougherty, trustee, whereby the company conveyed to said trustee all of its property, both real and personal, situate in the city of Socorro, territory of New Mexico, for the purpose of securing the payment of the bonds of said company aggregating \$15,000, as being in violation of section 71, c. 79, of the Laws of the Territory of New Mexico of 1905. The action was commenced in the district court for the county of Socorro, territory of New Mexico, and afterwards removed to the District Court of the United States for the District of New Mexico under the provisions of an act to enable the people of New Mexico to form a Constitution and state government, approved June 20, 1910. The case was heard in the court below on the pleadings and proofs, resulting in a decree dismissing the bill, from which decree this appeal was taken.

The material facts, as they appear in the evidence and the findings of the trial court, are as follows:

The Central Electric Company is a corporation organized and existing under the laws of the state of Illinois. The Socorro Electric Company is a corporation organized and existing under the laws of the territory (now state) of New Mexico. Aniceto C. Abeytia, James G. Fitch, C. T. Brown, and E. A. Drake, named as defendants, were at the time of the execution of the deed of trust directors of the Socorro Electric Company. The defendant Joseph E. Price became a director of the company June 28, 1909. The Central Electric Company recovered judgment in the district court of the county of Socorro against the Socorro Electric Company July 7, 1910, for \$3,795.47, with interest thereon at the rate of 6 per cent. per annum from said date until paid. An execution was issued on said judgment directed to the sheriff of Socorro county, and on March 2, 1911, was returned unsatisfied. On April 8, 1909, the Socorro Electric Company made, executed, and delivered to the defendant Harry M. Dougherty, trustee, a mortgage or deed of trust conveying the property described in the bill, which constituted all of the property and assets of the Socorro Electric Company, and it had no other property or assets out of which to satisfy the claims of its creditors, including the judgment above mentioned. The mortgage or deed of trust was given to secure the payment of bonds, as hereinbefore stated. The mortgage or deed of trust and the bonds to secure which said deed of trust was given were executed, issued, sold and disposed of for cash in pursuance of a resolution passed at a meeting of the stockholders of the said Socorro Electric Company held for that purpose on April 2, 1909, in order to raise money to pay off its indebtedness and put the plant of the company in proper working order. At the time this deed of trust was authorized, the Socorro Electric Company had stated to its creditors that it was unable to pay them in full. At the time the Socorro Electric Company was organized, one E. L. Wood induced citizens of Socorro to contribute and take stock in said company to the amount of nearly

\$10,000, upon his assurance that he would take all the remaining stock and as a consideration therefor would erect a complete plant and put it in successful operation and make all extensions of lines. He commenced to operate the plant in September, 1908, and continued said operation until shortly before his resignation as manager on February 8, 1909. He entirely failed to keep his contract to put up the balance necessary to complete the plant and was found to be hopelessly insolvent; the plant being left in an incomplete condition and not suitable for the purposes for which it was intended. He was very extravagant in the matter of its erection and incurred indebtedness over and above the amount contributed by the stockholders of about \$12,000. During the time the plant was run, it was greatly injured by his lack of experience, which resulted in numerous breakdowns, and a deficit in the cost of operation of about \$100 per month, all of which facts were known to the directors as early as January, 1909.

Up to the 1st of February, 1909, the plant of the Socorro Electric Company had been very inefficiently managed, and this had resulted in considerable damage to the machinery and plant. The Socorro Electric Company, through its officers, represented to its creditors in January, 1909, that it was evident that unless the company could raise more money among the citizens of Socorro it would be compelled to go into liquidation and a receiver be appointed; that it would be impossible for the company to raise sufficient funds even by mortgaging its plant, lines and franchises, unless the creditors of the company were willing to discount their bills liberally; and that if they would not it would be useless for the stockholders or directors to advance what could be raised, and a receivership would probably be necessary. At the time the deed of trust and bonds were authorized, the Socorro Electric Company had stated to its outside creditors that it was unable to pay them in full, and settled with all of such creditors, with the exception of the Central Electric Company and two or three others, for 75 cents on the dollar, which settlement the Central Electric Company refused. The plant of the Socorro Electric Company was never operated at a profit either prior to the time the mortgage and bonds were authorized, or afterwards. It was cramped for funds from its organization, and went into the hands of a receiver in June, 1910, the receiver being compelled to issue receiver's certificates immediately, in order to obtain funds with which to pay the operating expenses of the plant. At the time the deed of trust and bonds were authorized, the Socorro Electric Company had exhausted its general credit at the banks and elsewhere and was unable to raise any money without obtaining personal indorsements or by deed of trust covering its entire plant, and the plant contained as a part of its equipment valuable material and machinery unpaid for of the original cost price of \$10,000, including the machinery and property sold by the Central Electric Company to the Socorro Electric Company, and for which the former obtained judgment against the latter. At the time the said deed of trust and bonds were authorized, the Central Electric Company was threatening the suit which afterwards resulted in the judgment hereinbefore mentioned. On April 20, 1909, in a letter written by the authority of the Socorro Electric Company to the attorney of the Cen-

tral Electric Company, who had the claim upon which suit was threatened in his hands for collection, it was stated that 75 per cent. was all the Socorro Electric Company could raise towards the payment of said claim. Subsequently, Dougherty, as trustee of the bondholders, commenced an action against the Socorro Electric Company, and such proceedings were had therein that a decree of foreclosure was entered, and all the property conveyed by the mortgage or deed of trust was sold to Joseph Price for the benefit of himself and the other bondholders of said company; the purchase price being paid in the bonds of the company secured by the deed of trust. The defendant A. W. Chase was never a director of the Socorro Electric Company. The bonds of the company were sold at par to the following named parties in the following amounts:

C. T. Brown	\$3,500
E. A. Drake	3,500
The Socorro State Bank, by Joseph Price, its president.....	3,500
James G. Fitch	2,000
James G. Fitch, as guardian of Mary Fitch.....	1,200
A. L. N. Fitch	300
H. A. True, by C. T. Brown	1,000

Each of the above-named purchasers of the bonds paid into the treasury of the Socorro Electric Company, in money, the full par value of the bonds so respectively purchased by him. The money arising from the sale of said bonds was used in paying the indebtedness of the Socorro Electric Company, except the indebtedness due the Central Electric Company, and in repairing and improving the plant.

Counsel for the Central Electric Company requested the trial court to find, among other facts:

"That at the time the said deed of trust and bonds were executed, issued, and sold, the Socorro Electric Company was insolvent and unable to meet its pecuniary liabilities in the ordinary course of business as they matured, which facts were well known to the stockholders and directors of said company and to the purchasers of said bonds at the time they purchased the same."

The court refused to make this finding, but found as a conclusion of law that the Socorro Electric Company was not insolvent at the time of the authorization and issuance of the deed of trust and bonds, and that said deed and bonds were not issued in contemplation of insolvency; which conclusion of law resulted in the dismissal of the bill.

Section 71, c. 79, Laws of New Mexico 1905, upon which the bill in this case is founded, reads as follows:

"Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, neither the directors nor any officer or agent of the corporation shall sell, convey, assign or transfer any of its estate, effects, choses in action, goods, chattels, rights or credits, lands or tenements; nor shall they or either of them make any such sale, conveyance, assignment or transfer in contemplation of insolvency, and every such sale, conveyance, assignment or transfer shall be utterly null and void as against creditors: Provided, that a bona fide purchase for a valuable consideration, before the corporation shall have actually suspended its ordinary business, by any person without notice of such insolvency or of the sale

being made in contemplation of insolvency, shall not be invalidated or impeached."

We think the trial court erred in refusing to find as requested by counsel for the Central Electric Company. There is abundant evidence in the record to support such a finding as we understand the meaning of the word "insolvent" as used in the law of New Mexico, above quoted. The trial court stated in its memorandum opinion, as one of the reasons which controlled its judgment, the fact "that the value of the defendant's (Socorro Electric Company) property at the date of the deed of trust considerably exceeded its liabilities." There is no finding to this effect in the formal findings of the court, and, if the statement in the opinion could be considered as a finding, there was no evidence introduced at the trial to sustain it. There are certain affidavits in the record which were used in opposition to the motion for a temporary injunction which contain some statements in regard to the property of the Socorro Electric Company, but no evidence was introduced at the trial along that line. It was assumed by the trial court, and it is claimed here by counsel for the Central Electric Company, that the law under consideration was taken word for word from a law of New Jersey passed in 1896, and the familiar rule is invoked that when New Mexico adopted the statute of New Jersey she adopted the construction which the courts of that state had placed upon it. The Supreme Court of New Mexico, in the case of Department Store Co. v. Gaus-Langenberg Hat Co., 125 Pac. 614, states that the law was taken from New Jersey, and in its opinion in that case further says:

"It is apparent, from the foregoing, that there was no question upon the pleadings as to the insolvency of the plaintiff in error; it being admitted that it was unable to meet its pecuniary obligations as they matured. *Empire State Trust Co. v. Trustees of Fisher*, 67 N. J. Eq. 602, 60 Atl. 940, 3 Ann. Cas. 393; *Catlin v. Vichachi Mining Co.*, 73 N. J. Eq. 286 [67 Atl. 194]; *Reinhardt v. Interstate Telephone Co.*, 71 N. J. Eq. 70 [63 Atl. 1097]."

Following the rule above referred to, the trial court relied upon the following cases as sustaining its judgment: *Regina Music Box Co. v. Otto*, 65 N. J. Eq. 582, 56 Atl. 715; *Reed v. Helois Co.*, 64 N. J. Eq. 231, 53 Atl. 1057. The first case cited was a creditor's suit brought to set aside a mortgage because it was said to have been given by F. G. Otto and Sons, a corporation, while insolvent or in contemplation of insolvency. After quoting section 64 of the Corporation Act of 1896 (Laws 1896, p. 298), which is identical with the statute of New Mexico, the court said:

"This section is identical with section 2 of the old act to prevent frauds by incorporated companies and must receive the same construction. *Frost v. Barnett*, 56 N. J. Eq. 291 [38 Atl. 956]. It forbids the preference of any creditor after insolvency, known or contemplated (*Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 641 [7 Atl. 514]), but does not invalidate a bona fide purchase for value, made before the company had actually suspended its ordinary business by a person not having notice."

The facts in the case cited were stated by the court as follows:

"The evidence in the case at bar shows that Otto & Sons had up to May, 1903, carried on an established business of many years' standing, successfully; that it did not suspend its ordinary business until that time; and that its

assets in the spring of 1900 exceeded its liabilities by \$200,000. One of its selling agents (Paillard & Co.) had become embarrassed. It was thought that this embarrassment had been caused by bad management, and so, by resolution of April 14, 1899, Gustav Otto, its president, was authorized to take it into his own hands. This he did, but without success. When Paillard & Co. failed, Otto & Sons became straitened for funds, and the notes of which I have spoken—which seem to have been nearly all Paillard paper—went to protest. This created an embarrassment, which was, as I have said, met: (1) By a loan of \$40,000 from the president of the East River bank; (2) by an issue of bonds to secure the Paillard paper held by that bank; (3) by an arrangement with the Hoboken bank by which a director first mortgaged and then conveyed certain property of his own in satisfaction of its claim; (4) by an arrangement with the Germania bank, which I must assume was satisfactory to it, for there is no evidence that it pressed its claim. An extraordinary emergency was met by these means, and the company went on. I fail to find in these facts such clear evidence of insolvency, actual or contemplated, on April 1, 1900, as compels me to avoid the mortgage in controversy."

Reed v. Helois Co., supra, was a foreclosure case. The court held the mortgage good for a part of the amount it secured, and void as to the other part. In reference to the statute of New Jersey, the court said:

"The statutory prohibition against the transfer of assets of corporations which are insolvent, or in contemplation of their insolvency, first appears in the statute of 1829. P. L. of 1829, p. 58, § 2. It is entitled 'An act to prevent frauds by incorporated companies.' It continued to be a part of the statutory laws of this state until the revision of the year 1875. In the revision of that year this provision was omitted, but was re-enacted on the 5th of March, 1895. P. L. of 1895, p. 166. It is now a part of the General Corporation Act of 1896. * * *

"The prohibition is against transfers of the corporation's property in contemplation of its insolvency. I do not understand this prohibition to be applicable to conveyances made in good faith by the officers of a corporation at a time when the financial embarrassments of the company are such that its insolvency may be within contemplation, if, as incidental to, and essentially a part of, the conveyance made, a present consideration moves to the company. For instance, if a mortgage be given to secure the payment of money paid in good faith to the company coincidently with the delivery of the mortgage; or a purchase-money mortgage be given to secure the payment of the purchase-money of land conveyed to the company coincidently with the making of the mortgage; or if property be in good faith transferred to the company, and its property, or money, be given in exchange therefor. In all such cases the value of the assets of the company is not materially changed. It is as solvent after such a transaction as it was before."

We do not think these cases rule the case at bar. The facts in the first case were entirely different, and the principle stated in the second case is simply to the effect that, if a corporation is solvent, the giving of a mortgage for cash presently advanced to the corporation does not change its financial condition. So, in the case at bar, if the Socorro Electric Company was insolvent within the meaning of the statute when it gave the deed of trust, then the fact that the bonds which the deed secured were sold at par for cash, and the money used to pay some of the indebtedness of the company and improve the plant, did not change its financial condition. The bonds were simply substituted as an indebtedness for the outstanding indebtedness which was paid from the proceeds of the bonds. The Reed mortgage was held valid

as to a portion of the amount which it secured, for the reason that the statute did not apply to so much of the mortgage as represented actual cash advanced at the time the mortgage was given.

Some other cases decided by the Chancery Court of New Jersey may be noticed. In *National Bank of the Metropolis v. Sprague*, 21 N. J. Eq. 530, the court said:

"The second question regards the validity of the trustee mortgage, bearing date September 1, 1866, acknowledged October 8, 1866, recorded October 10, 1866, and filed as a chattel mortgage, October 15, 1866, given to secure 100 bonds of \$1,000 each, payable in three years to blank or bearer. It is abundantly proved that, when this mortgage was executed, Sprague and Stokes were pressed by their creditors for payment or security for their claims, unable to meet their pecuniary engagements, and involved in debt to an amount beyond their ability to pay, and that their creditors were informed of their condition. Under this state of facts, Sprague and Stokes, in contemplation of law, were insolvent. 'Insolvency' means a general inability of a debtor to answer pecuniary engagements, and it does not follow that he is not insolvent because he may ultimately have a surplus after winding up his affairs. *Sug. on Vendors*, 668; *Bayly v. Schofield*, 1 Maule & S. 338; *Hall v. Swift*, 4 Bingham's N. C., 381."

Skirm v. Eastern Rubber Mfg. Co., 57 N. J. Eq. 180, 40 Atl. 769, was a case arising under the New Jersey statute. The court in this case quoted with approval the language above quoted from *National Bank of the Metropolis v. Sprague*, and cites numerous authorities in line with the New Jersey rule. In *Reinhardt v. Interstate Telephone Co.*, 71 N. J. Eq. 70, 63 Atl. 1097, a failure of the telephone company to pay interest due was held to constitute insolvency under the sixty-fifth section of the Corporation Act.

In *Catlin v. Vichachi Mining Co.*, 73 N. J. Eq. 286, 67 Atl. 194, the court, after having defined "insolvency" as a general inability to meet pecuniary obligations as they mature by means of available assets or an honest use of credit, said:

"Applying these definitions to the case in hand, we find: (1) A going business which is losing money by its operation; (2) that it is seriously embarrassed for want of funds to carry out the project for which the corporation was organized; (3) a call loan, which the company has no means of satisfying; (4) an unsatisfied judgment pressing for payment, which it does not have sufficient funds to meet; (5) an admission of its perilous condition contained in the scheme for financing and continuing the company's operations; (6) an inability to convert its assets into cash, and, indeed, according to the defendant's own showing, a total lack of available assets with which to carry on the business and pay its present debts.

"These circumstances convince me that the company is brought directly within the section of the statute referred to, and that it is insolvent, and its affairs should be wound up by a receiver."

In addition to the above authorities, the following cases may be cited: 11 Enc. of Law, 168; *Thompson v. Thompson*, 4 Cush. (Mass.) 127; *Bayly v. Schofield*, 1 M. & S. 338; *Shone v. Lucas*, 3 Dowl. & R. 218; *Buchanan v. Smith*, 16 Wall. 277, 308, 21 L. Ed. 280; *Sugd. Vend. & P.* 668; *Hall v. Swift*, 4 Bing. N. C. 381; *Brouwer v. Sanger*, 2 Y. & J. 459; *Bouv. Inst.* 187; *Sewell v. Cape May*, etc. (N. J.) 9 Atl. 785.

There can be no question that under the authorities the Socorro Electric Company was insolvent when the deed of trust was given, and we need not further inquire whether it was given in contemplation of insolvency. This being so, the statute made the deed of trust utterly null and void as to the Central Electric Company.

There are certain other features of the case which a court of equity must not overlook. The men who purchased all the bonds, either for themselves or some other party whom they represented, were directors of the corporation, and by April 1, 1911, the trust deed had been foreclosed, the property of the corporation sold, and Price had bid the same in for himself and the other bondholders; the purchase price being the bonds which the deed of trust secured. At the time Price bid in the property at the foreclosure sale, which he states was April 1, 1911, the present suit had been commenced against him and the other bondholders, and he had full notice of what might be the result of the action. The evidence shows that the purchasers of the bonds paid a valuable consideration for them, but it fails to show the other two necessary provisions in order to exempt them from the operation of the statute, namely, good faith and want of notice.

We do not stop to consider whether the trust deed would be voidable by the Central Electric Company on general principles of equity (*Northern Pac. R. Co. v. Boyd*, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931; *Central Imp. Co. v. Cambria Steel Co.*, 201 Fed. 811, 120 C. C. A. 121) as counsel for appellant stands upon the statute, and there seems to be no necessity for going further.

The judgment of the District Court, therefore, will be reversed, and the case remanded, with instruction to the trial court to enter a decree setting aside the deed of trust and declaring the same null and void, and otherwise proceed in the case as law and justice may require.

In re JAMISON BROS. & CO.

MacMORRIS v. McCURDY.

(Circuit Court of Appeals, Third Circuit. November 3, 1913. On Rehearing, December 19, 1913.)

No. 1753.

1. BANKRUPTCY (§ 267*)—WRONGFUL PLEDGE OF CUSTOMERS' SECURITIES BY BROKERS—RIGHTS OF OWNERS IN SURPLUS PROCEEDS.

Bankrupts, who were brokers, wrongfully rehypothecated securities pledged with them by customers with a number of different lenders to secure loans made to them. After the bankruptcy, owners of certain of such securities were able to trace them into the hands of one or the other of such lenders, and by an order of the referee the surplus proceeds of the collateral, after paying the loans secured, was paid into a special fund. *Held*, that it was not a single fund in which all such owners were entitled to share, but that the amount paid in by each lender constituted a separate fund which belonged in equity to those only whose securities helped to produce it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. § 267.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On Rehearing.

2. BANKRUPTCY (§ 228*)—REVIEW OF DECISION OF REFEREE—EFFECT OF REVERSAL.

Where an order of a referee determined the principle on which a fund should be distributed between those having claims thereon, a reversal of such order and the adoption by the District Court of a different principle of distribution affects alike all claims which stand on the same footing, whether or not the claimants joined in the petition for review.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from, and Petition to Revise Order of, the District Court of the United States for the Eastern District of Pennsylvania; John E. Sater, Judge.

In the matter of Jamison Bros. & Co., bankrupts, in which George McCurdy is trustee. Frank H. MacMorris appeals from, and petitions to review, an order of the District Court. Affirmed.

The following is the opinion of the District Court by Sater, District Judge (sitting by designation):

The case will be simplified if it be borne in mind that the only order made by the referee which is on review is that of July 6, 1912. The preceding orders stand unimpeached.

The only petition for review found among the papers is that filed by Sellers, Shoemaker, Rowland, Radford, Prizer, Peel's executor, Hill, and McCurdy. A party feeling aggrieved by any order made by a referee must, to secure its reversal or modification, prosecute a petition to review such order. If he fails to do so, he will not be heard to complain regarding it on a petition for review filed by another party having a different interest. *Loveland, Bank.* (4th Ed.) 222. In view of the foregoing and of *In re McIntyre & Co.*, 176 Fed. 552, 100 C. C. A. 140, 24 Am. Bankr. Rep. 4, and some of the cases cited to support the text in *Jones on Collateral Securities* (3d Ed.) § 512, certain complaints like those of M. D. Smith and John M. Wirgman as to the sale of certain securities are unavailing. Claimants were at liberty by timely action to test each and every of the referee's orders. If they failed to do so, they may not stand upon another's petition for review.

The referee divided the claimants into two classes: (1) Those whose securities were unlawfully converted; (2) those whose securities were lawfully converted. To acquire a standing in either class a party must trace his securities into the possession of a repledgee. This classification and his disposition of the securities which were returned by Toland and identified by their owners are correct.

Jones on Collateral Securities, § 512, announces the following rule, sustaining it by a citation of authority:

"When securities belonging to several persons have been rehypothecated together as security for a single loan, the pledgee taking them should proceed *pari passu* in applying the securities to the satisfaction of the loan, so that each of the several owners of the securities shall bear his just proportion of the common burden. If such pledgee, without notice of the claims of the true owners, sells the securities belonging to one, and therefrom satisfies the claim for which he holds all the securities, leaving the others undisposed of, a court of equity will order the remaining securities to be disposed of, and the proceeds applied in such a manner that the burden of the loan will be borne in equitable proportion by all."

A like rule was followed in *Re McIntyre*, 176 Fed. 552, 100 C. C. A. 140, 24 Am. Bankr. Rep. 4. The rule stated in it and by the above-named text-writer was adopted and broadened in its application by the referee. Neither

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the McIntyre Case nor any of the cases cited by the text-writer were decided with reference to such a statute as that of Pennsylvania (Act of May 25, 1878, P. L. 155, as amended by the Act of 1881, P. L. 107). I incline to the belief that the referee correctly adopted the above-mentioned rule, but whether he did or not is immaterial on this hearing, for the reason that, as above stated, none of the claimants are seeking a review of any of his orders prior to that of July 6, 1912.

In the McIntyre Case and in all those cited by Jones in his work to sustain the above-quoted text, the court had under consideration securities repledged to but a single bank. In the present case there were six repledgees. The securities pledged to the Third National Bank were by agreement, so the referee states, left with it "until determination of title thereto." They were not sold as were the securities held by other moneyed institutions and by Toland. Disregarding, then, the Third National Bank as a repledgee and the securities held by it to protect its loan to the bankrupts, should the several funds returned by the other four moneyed institutions and by Toland, with the increase due to the sale of securities under the referee's order (in so far as securities returned were sold), be consolidated into one fund for distribution among those whose securities were unlawfully pledged? The referee by his order answered this question in the affirmative, thus enlarging the application of the above-quoted rule. If the order thus made rests on sound legal principles, it is difficult to understand why the Third National Bank should be in a class by itself. In the McIntyre Case, *supra*, the securities involved had all been repledged to the National Bank of Commerce. The report of another branch of that case, found in 181 Fed. 955, 104 C. C. A. 419, 24 Am. Bankr. Rep. 626, shows that there was still another bank to which securities belonging to customers of McIntyre & Co. had been pledged. They were dealt with separate and apart from those which had been repledged to the National Bank of Commerce. The inference to be drawn from Jones on Collateral Securities, *supra*, is that the sum realized from the securities rehypothecated with each repledgee is to be shared by the persons—and those persons only—whose securities were so rehypothecated and who may be found to be entitled to share in such sum. They take the whole of the fund realized; their securities having been subjected to a common risk. They are not required to share with some other customer or customers of the bankrupts whose securities were repledged by the bankrupts with some other person or moneyed institution. The text-writer cites *Gould v. Central Trust Co.*, 6 Abb. N. C. (N. Y.) 381, and *Gould v. Farmers' Loan & Trust Co.*, 23 Hun (N. Y.) 322. Both cases arose out of the same failure. The customers whose securities were repledged with the Central Trust Company were limited to what they could get through that company alone. Those whose securities were repledged to the Farmers' Loan & Trust Company were likewise restricted to the recovery of such sums as might be realized from the securities rehypothecated to that company. The same rule should, I think, apply in the present case. The claimants are not general creditors. The proceeding as to each of them is in the nature of a reclamation. Each is seeking the recovery of his own specific property. To illustrate the rule, the ultimate sum realized for distribution from the securities held by the Girard Trust Company, for instance—being the amount of cash returned by it and of the sum realized from the securities returned by it and sold under the referee's order—constitutes a fund to be distributed among the persons and those persons only whose securities were rehypothecated with such trust company and who are found entitled to share therein. The fund for distribution arising from securities held by Toland and by each of the moneyed institutions respectively is to be maintained separate. The several funds cannot be consolidated. With this exception the referee is affirmed, a further review of matters decided by him or discussed in the briefs being deemed unnecessary.

I have made no computation to determine whether a distribution made in accordance with this opinion will let in any of the claimants of the second class, i. e., claimants whose securities were lawfully pledged. The order which will be taken in accordance with the foregoing should be so drawn as to provide for such a contingency, should it arise. All exceptions and rights may be reserved.

R. Stuart Smith and Charles E. Morgan, both of Philadelphia, Pa., for appellant.

Henry A. Hoefer and John C. Gilpin, both of Philadelphia, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. We take the following admirably clear statement of facts from the brief of Mr. Smith:

"Jamison Bros. & Co., a copartnership, were stockbrokers engaged in business in Philadelphia. On May 9, 1911, they filed a voluntary petition in bankruptcy and were adjudged bankrupt. The case was referred to Richard S. Hunter, Esq., referee in bankruptcy, and George McCurdy was appointed receiver and thereafter elected trustee.

"At the time of the adjudication Jamison Bros. & Co. were indebted to the West End Trust Company, Girard Trust Company, Real Estate Title Insurance & Trust Company, Pennsylvania Company for Insurance on Lives and Granting Annuities, Edward D. Toland, and the Third National Bank, on demand loans made by these parties secured by collateral pledged with them respectively by Jamison Bros. & Co. In each case the collateral pledged by the brokers exceeded in value the amount of the loan. It developed that various customers of Jamison Bros. & Co. had pledged with them as collateral security for payment of their respective accounts with the brokers, certificates of stock belonging to the customers, and that in many instances such certificates had been unlawfully rehypothecated by the brokers with one or more of the six institutions or bankers above named.

"Certain of these creditors were able to identify their securities in the hands of the bankers with whom they had been repledged, and these bankers were about to sell the repledged securities for repayment of their loans.

"Thereupon on motion of counsel for the trustee and counsel for various claimants, the referee entered decrees directing the sale of all the securities then remaining unsold, by the bankers, and after deduction of the amounts of their respective loans, the payment by the several bankers to the trustee of the balances in their respective hands, together with a written statement containing all available evidence of identification and ownership of the securities and an account of the sales. These moneys were deposited by the trustee in a special deposit, and all persons making any claims to any of the securities were notified to file their claims with the referee.

"Copies of the two decrees are printed in the appendix to this brief. A separate decree was made in the case of the Toland loan, because Mr. Toland had sold his securities before the decree was entered.

"In conformity with the order of the referee, the bankers sold the securities, collected the amount of their loans, with interest, and paid to the trustee the following sums:

West End Trust Company.....	\$21,541 21
Girard Trust Company.....	1,329 31
Pennsylvania Company.....	10,876 75
Real Estate Title Company.....	294 38
Edward D. Toland.....	76 70

Total \$34,118 35

"In addition to the above amounts, the trustee received certain unsold securities from the Girard Trust Company, Real Estate Title Company, and Edward D. Toland, which were thereafter ordered by the referee to be sold by the trustee, the proceeds of sale to be added to the special fund.

"The securities pledged with the Third National Bank were by agreement left unsold and in the custody of the bank, and are not involved in this appeal.

"Claims were filed with the referee on behalf of thirty-four claimants who asserted title to securities rehypothecated by the bankrupts. The trustee filed answers and testimony was taken before the referee in support of each claim.

"On July 6, 1912, the referee filed his report, in which he held that the owners of securities unlawfully rehypothecated, who were able to trace and identify their securities, were entitled to a priority over the owners of securities which were lawfully rehypothecated by the brokers; and that, where all the claimants were of the same class, they must share pro rata in the fund, if not sufficient to satisfy all the claims in full.

"The referee divided the claimants into two classes:

"First. Those whose securities were unlawfully converted and who could trace these securities into the hands of the subsequent lender.

"Second. Those whose securities were lawfully converted and who could trace these securities into the hands of the subsequent lender.

"The claim of the appellant, Frank H. MacMorris, was found by the referee to belong in the first class. The referee decided that, after deducting from the proceeds of sale of all his securities the amount which he owed the bankrupts, there was an equity due MacMorris of \$14,948.05.

"Various other claimants were found by the referee to belong in the first class, and the total amount of all equities due the claimants of the first class was found to be \$64,584.38. The referee awarded the whole of the special fund, after payment of the costs of the reclamation proceedings, to claimants of the first class pro rata; the fund being insufficient to pay claimants of the first class in full.

"A petition for review of the referee's opinion, and order of award was filed on behalf of certain claimants, and the record was certified by the referee to the District Court under General Order 27.

"The case was heard by Judge Sater, of the District Court for the Southern District of Ohio (sitting by designation), who on April 11, 1913, filed an opinion in which he affirmed the referee in every respect except one. Judge Sater held that the sums returned to the trustee by the four financial institutions and by Edward D. Toland should not have been treated as one fund for ratable distribution among all claimants whose securities were unlawfully pledged. He held, on the contrary, that each loan was to be treated as a separate transaction and that the sum realized from the sale of securities rehypothecated with each repledgee was to be shared only by the persons whose securities were rehypothecated in that particular loan. In the opinion of the court, therefore, there were five separate funds instead of one, each fund distributable among claimants of the first class, the sale of whose securities contributed to that fund.

"Accordingly, a decree was entered on May 26, 1913, the effect of which was to award unequal dividends to claimants of the first class, as follows:

"Claimants on West End Trust Company surplus.....	62%
"Claimants on Girard Trust Company surplus.....	21%
"Claimants on Pennsylvania Company surplus.....	98%
"Claimants on Real Estate Title Company surplus.....	14%
"Claimants on Toland surplus.....	7/10 of 1%"

[1] Judge Sater's reasons in support of the decree will be found in his opinion reported above, and they are so satisfactory that little need be added. We may say a few words, however, to emphasize the proposition that the rights of the claimant were in existence at the date of the bankruptcy; the decree merely recognizing these rights and making them effective. If the claimant had discovered before the bankruptcy that his securities had been wrongfully repledged, he would have found them in the possession of the West End Trust Company and of Edward D. Toland. He would also have found in the hands of each of these repledgees other securities belonging to other persons in the same

plight as his own. But the bankrupts' loan from the trust company was a separate transaction from the loan made by Toland, and we cannot see on what legal or equitable principle the claimant could have consolidated the two transactions, and thus treated them as one. To do so would have had the effect of making new contracts between the bankrupts and the repledgees, for it would have taken the stocks and bonds pledged as collateral for one loan and compelled them to stand as collateral for the other loan also, although in fact they had nothing to do with the second transaction. Moreover, the claimant might also have discovered that the bankrupts had repledged securities belonging to other persons with the Girard Trust Company, the Pennsylvania Company, and the Real Estate Title Insurance & Trust Company, to stand as collateral for separate and additional loans, to which his own securities bore no relation whatever—not even the unimportant relation that existed between the West End and the Toland loans. Upon what ground could he have interfered with these last-named loans, and in effect merged them with the loans made by the West End Trust Company and by Toland? And if he could not have done this before bankruptcy he cannot do so now, for the rights of creditors, as many decisions hold, are fixed in essence as of the time of bankruptcy.

The defect in the claimant's argument is that he treats the surplus arising from the sale of the securities that were wrongfully repledged as if it were a single fund belonging to the bankrupts themselves, and upon this assumption he contends (not without force) that all the owners whose securities were thus dealt with should share pro rata in the surplus. But the assumption is not correct, and the argument based upon it must fail. In reality and in equity the surplus belonged, not to the bankrupts, but to the owners of the securities, and it did not constitute a single fund, but five funds, which belonged respectively to five groups of the bankrupts' customers. In our opinion the right of the individuals composing each group is distinct, and is not held in common with the other four.

What right (legal or equitable) the bankrupts might have had in a surplus arising from the sale of securities that had been rightfully repledged is not involved in this controversy, and we express no opinion thereon.

The decree is affirmed.

On Rehearing.

This rehearing is in effect a new appeal from the decree of Judge Sater (sitting by designation in the Eastern district of Pennsylvania) that was affirmed in the foregoing opinion. Indeed, the rehearing was granted expressly in order to save the delay and expense that would have resulted if the strictly regular course of taking a new appeal had been followed.

[2] The persons whose interests are now specially urged do not attack the principle of Judge Sater's decree, namely, the separation of the fund for distribution into five funds. On the contrary, they approve the principle; but they argue for a modification of the decree, so that no creditor shall be permitted to share in any of these separate

funds except the creditors that appealed from the referee's decision to the district court. There was no appeal from the decision except on behalf of the persons now before us, and, if the modification they ask for should be made, their shares in the respective funds would be much increased. It is true that a large majority of the creditors that were affected by the referee's ruling acquiesced therein, and that only eight creditors appealed to the District Court; but we do not see how these persons could avoid acting in behalf of other creditors whose situation was similar to their own. Only one question of controlling importance was raised in the District Court, and the decision necessarily affected every claimant to the fund, even if he did not join in the appeal. That question was, not whether a particular, independent, claim should be allowed, but what principle of distribution should be applied; and in our opinion all creditors in a similar situation were affected by the decision. If the referee was right, all creditors of a particular class were entitled to share ratably in the fund, considered as a single whole; if he was wrong, a different rule of distribution was to govern. But the present contention goes further, and asks us to hold that eight creditors are to be formed into a new subclass, and are to be entitled to full payment out of five separate funds (if the respective amounts be sufficient to satisfy their claims), while all other claimants, although in a similar situation, are only entitled to receive much smaller proportionate sums. We think this result would be inequitable; and, moreover, that it finds no support in the cited cases that hold a claimant bound by an adverse judgment from which he does not appeal. Such cases do not apply to the situation now presented, where numerous claims stand upon a precisely similar footing, except for the difference in amount.

We therefore decline to modify the decree of affirmance that has been already entered.

FALL v. UNITED STATES (two cases).

(Circuit Court of Appeals, Eighth Circuit. November 28, 1913.)

Nos. 3906, 3907.

1. CONSPIRACY (§ 43*)—SCHEME TO DEFRAUD—INDICTMENT.

Act S. D. March 3, 1905 (Laws 1905, c. 177), provided for an annual appropriation of \$10,000 for wild animal bounty, declaring that a bounty of \$5 should be paid for the killing of grown wolves, for each mountain lion \$3, and for each pup wolf, prairie wolf, or coyote \$2, provided the sum of \$10,000 was sufficient to do so, and if not then the \$10,000 should be paid pro rata upon the claims existing. *Held* that where defendants were indicted for conspiracy to defraud in that they had assisted in the preparation of fraudulent bounty claims, and the indictment alleged that the scheme or artifice was to defraud the state of South Dakota "and divers persons to the grand jury unknown," the fact that the claims for bounty filed that were valid exceeded the appropriation did not render the indictment invalid because under such circumstances it was the holders of good claims that were defrauded and not the state, and that the names of such defrauded claimants were not given.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-90; Dec. Dig. § 43.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. INDICTMENT AND INFORMATION (§ 119*)—SURPLUSAGE—CONSPIRACY TO DEFRAUD—PERSONS DEFRAUDED.

Where an indictment charged defendants with conspiracy to defraud the state of South Dakota "and divers persons to the grand jury unknown" by participating in fraudulent claims for wild animal bounty under Act S. D. March 3, 1905 (Laws 1905, c. 177), and it appeared that, if the claims alleged to have been fraudulent were all rejected, the appropriation for animal bounty would have been exhausted in payments made to valid claimants, the allegation that the scheme was to defraud "divers persons to the grand jury unknown," as well as the state, could be rejected as surplusage, since the state was none the less defrauded by the fraudulent claims, though if they had not been filed it would have paid the appropriation to others.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 311-314; Dec. Dig. § 119.*]

3. POST OFFICE (§ 49*)—MISUSE OF MAILS—INTENT—EVIDENCE.

Pol. Code S. D. § 3118, provides for punishment of any one who shall "intentionally" evade or violate any of the provisions of the article relating to wild animal bounty, and Penal Code U. S. § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]), imposes punishment on whoever, having devised or intended to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, shall, to execute such scheme or artifice, use the mails. *Held* that, where accused was indicted for misuse of the mails in furtherance of a scheme to defraud by means of false and fraudulent wild animal bounty claims, the government introduced proof of a conspiracy to violate the law by filing assigned claims for bounties, evidence that, when such claims were filed with accused, the skins referred to were actually present, and when the claims were certified to the state auditor the skins were clipped as required by the statute, that defendant's administration of his duties as auditor with reference to such claims had been the same as had been followed by his predecessor, and that he had been informed by the chairman of the board of county commissioners that he need not keep the skins for inspection, and that the county attorney had approved assignments, forms, and advised him that assignment of such claims was sufficient, etc., was admissible to negative a fraudulent intent.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. § 49.*]

Nonavailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

John E. Fall and David A. Fall were convicted of conspiracy to defraud the State of South Dakota and of using the mails in connection therewith, and they bring error. Reversed and remanded, with directions.

Chambers Kellar, of Lead, S. D. (James G. Stanley, of Lead, S. D., and Williams & Sweet, of Rapid City, S. D., on the brief), for plaintiffs in error.

Charles C. Houpt, U. S. Atty., of St. Paul, Minn.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. John E. Fall, David A. Fall, and Francis R. K. Hewlett were tried jointly on an indictment against them and another for conspiracy under Penal Code, § 37, to defraud the state of South Dakota under its statutes relating to bounty. Political Code of South Dakota, §§ 3113 to 3116 and 3121, as amended by Laws 1905, c. 177, and for using the United States mails in connection therewith in violation of section 215 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]). They were convicted, and John E. Fall and David A. Fall brought the case here on error. They sued out separate writs, but as both writs have been submitted upon the same record in the District Court it is agreed that the cases be disposed of together. Hereafter the United States will be treated as the plaintiff and the Messrs. Fall as the defendants.

In 1903 the state of South Dakota passed a law for a state bounty for the killing of wolves and other animals, known as sections 3113 to 3121 of the Political Code. On March 3, 1905 (Laws 1905, c. 177), it passed a substitute for sections 3113, 3114, 3115, and 3121. The statute made a permanent annual appropriation of not to exceed \$10,000 not to be disbursed until 30 days after the end of the year. A bounty was to be paid for the killing of grown wolves of \$5, for each mountain lion \$3, and for each pup wolf, prairie wolf, or coyote, \$2, provided the sum of \$10,000 was sufficient to do so, if not, then the \$10,000 was to be paid pro rata upon the claims existing. Any person desiring to claim bounty was required to present the skin to the board of county commissioners of the county in which the animal had been killed within 30 days of the killing or leave the same within that time with the county auditor and at the same time file his affidavit with the county auditor stating that the animal was killed in the county, by whom and when; that the skin and scalp produced were from the animal on the killing of which the bounty was asked; and that no allowance or bounty had been paid for the killing of such animal. The county commissioners were required to examine the skin and scalp and cut the skin from the lower jaw and burn it, and, if from the affidavit mentioned and the examination of the skin and scalp they found the animal was killed in that county, they should direct the county auditor, under the county seal, to issue to the claimant a certificate, in a form prescribed, to the Auditor of State, which certificate should be filed within 30 days after its receipt by the claimant.

The defendant John A. Fall was auditor of Pennington county, and David A. Fall, his twin brother, was his deputy.

It is quite clear that the statute contemplated that each skin should be presented and the evidence made by the individual who killed the animal, but a practice had grown up in Pennington county during the administration of Fall as county auditor, and possibly anterior thereto, for the one who killed the animal to sell the skin and claim for bounty to some dealer in hides. The hide company would then present the claim to the county auditor or his deputy with an affidavit usually purporting to be signed by the one who killed the animal and with an assignment of the claim for bounty to the hide company purporting also to be signed by the man who killed the animal; the auditor or deputy

auditor would then certify that he had sworn to the affidavit before him and then certify the claim for bounty to the State Auditor. Some of the hide companies in question presented claims for more wolves and coyotes than had been killed by the persons alleged to be claimants. Their conduct seems to have been not only reprehensible but highly fraudulent, and Mr. Hewlett, who represented several of these companies, has, as we understand, been convicted and is now being punished.

A question has arisen as to whether the Falls signed the names of some of the supposed affiants to their affidavits.

W. A. Shurtleff of Parker, S. D., testified sufficiently to admit his testimony, as an expert in handwriting, that the signatures to many of the affidavits and assignments were in the handwriting of the Falls. The conduct of the Falls in certifying that men appeared and swore to affidavits before them that did not so appear is of course reprehensible, and if they in addition signed the names of supposed affiants their conduct is still more subject to condemnation, but it does not conclusively follow that they were guilty of the conspiracy to defraud the state of South Dakota and used the mails in connection therewith.

[1] Complaint is first made that the indictment charges that the scheme and artifice was to defraud the state of South Dakota and divers persons to the grand jury unknown. It is contended that, as the claims filed that are undoubtedly correct exceeded the appropriation, the fraud was not upon the state of South Dakota but upon those other claimants, and the names of the defrauded claimants should have been given, if known, and it is further insisted that they must have been known. Appellants cite *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; *Milby v. United States*, 109 Fed. 638, 48 C. C. A. 574. We cannot agree that any of these cases even tend to sustain the defendant's contention.

If it is alleged in such a case that the parties were to the grand jury unknown, that is presumed in the first instance to be true. It is conceded a demurrer which was filed to the indictment could not raise this question, but it is claimed that their motion in arrest of judgment should have been sustained. There was substantially no evidence of who the righteous claimants were, and substantially no more appeared upon the trial in this regard than appeared in the indictment, but the fact, if it appeared before the close of the trial, who the wronged parties were would not show that the grand jury had such knowledge accessible when it returned the indictment.

In the very case of *Coffin v. United States*, 156 U. S. 432, on page 452, 15 Sup. Ct. 394, on page 402 (39 L. Ed. 481), the court quotes with approval from *Commonwealth v. Sherman*, 13 Allen (Mass.) 248, 250, to the effect that:

"It is always open to the defendant to move the judge before whom the trial is had to order the prosecuting attorney to give a more particular description, in the nature of a specification or bill of particulars, of the acts on which he intends to rely, and to suspend the trial until this can be done; and such an order will be made whenever it appears to be necessary to enable the defendant to meet the charge against him, or to avoid danger of injustice.

Commonwealth v. Giles, 1 Gray [Mass.] 469; *The King v. Curwood*, 3 Ad. & El. 815; *Rosc. Crim. Ev.* (6th Ed.) 178, 179, 420."

[2] But entirely aside from this question this court is of the opinion that under the circumstances of this case "and divers persons to the grand jury unknown" may be wholly rejected as surplusage. If the state could have been compelled to pay out the money to some one else if not to the hide dealers in question, if it was fraudulently induced to pay it to the hide dealers the state was no less defrauded because it would have otherwise paid the money to some one else. If this fraud in fact existed, it was a fraud upon the state of South Dakota. *Haas v. Henkel*, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112.

[3] The defendant John E. Fall on the stand was asked by the defendants' counsel whether the skins referred to in the various affidavits, assignments, and certificates were actually present at the time they certified to the fact that affidavits were sworn to before them, and when they certified the claims to the State Auditor, and were then clipped by them. It was sought to show by him that he was deputy auditor before he became auditor, and that the practice of the auditor was to take and accept claims in the names of others than those who presented the skins and to issue certificates on assignments filed to parties other than those who had killed the animals, and that the practice was followed by him; that the board of county commissioners had approved the method in which the business was transacted and the chairman of the board told him he need not keep the skins for inspection of the board; that he consulted the county attorney for Pennington county as to the form of assignment used and the county attorney advised him that the assignment was sufficient and authorized him to issue the certificate to the State Auditor; that he never had any thing to do with procuring any of these assignments; that he never issued any certificates to the State Auditor unless there was at the time presented the skins of the animals to the number stated in the certificate, and there was also exhibited to him at the time the assignment of the claim for bounty; that he never received any compensation, pay, reward, or consideration whatever on account of any wolf bounty claims which were certified to the State Auditor aside from statutory fees as provided by law; that, the assignments being there and the skins, he did not think any person would be defrauded at the time he issued the certificate. All this evidence was excluded upon the objection of the government. This we think was error.

Section 3118 of the Political Code of South Dakota provides a punishment of any one who shall "intentionally evade or violate any of the provisions of this article." Section 215 of the Penal Code provides for the punishment of whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises and shall for the purpose of executing such scheme and artifice use the mails.

These defendants were charged under Penal Code 37 with conspiracy to violate section 215. The indictment specially charges that the

offense was committed, and that defendants did intend to cheat and defraud the state of South Dakota, and that it was "intended" to be made effective by the use of the mails. If these and similar allegations had been omitted, the indictment would probably have been defective. *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830.

"Although an evil or malicious mind or will is necessary to the commission of most offenses, it is not necessary in all cases to aver a guilty intent as a substantive part of the crime in giving its technical description in an indictment or information. In those cases in which the act necessarily includes the intent, it is sufficient to aver the act in apt and technical terms and the intent will be inferred. But where the common law or statute makes a particular intention essential, or there is an attempt, not accomplished, to do a criminal act, and the evil intent only can be punished, it is then necessary to allege the intent with directness and precision, although there are cases in which an attempt to commit a willful and malicious crime imports *ex vi termini* an intent to commit that crime. A specific intent which is made part of the offense by the statute creating it must be charged, as where the intent with which an act is done brings it within a statute punishing as a felony that which at common law was a misdemeanor, or where an act is criminal only if done with a particular intent." 22 Cyc. 329.

Here the question is not one of criminal pleading but of evidence. Would the evidence rejected have tended to refute any of that offered by the government or any just inference that might be drawn therefrom? In this case there was no direct evidence of any conspiracy. The proof of that rested upon circumstances. More than usually in criminal cases the condition of the minds of the Falls was important. It is laid down that in conspiracy there must be intentional participation in the transactions with a view to the furtherance of the common design or purpose. There must have been a scheme or artifice to defraud. What does this mean? Does it not include the intention to defraud? Even in a civil case under the bankruptcy law the Supreme Court has held that under section 67e, in determining whether a conveyance was made with the intent and purpose to hinder, delay, and defraud creditors, the intent is the very essence of the offense. The intent is the gist of the right to avoid a transfer. *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008.

Of course we do not mean that in ordinary cases ignorance of the law or a conscientious conviction that the law was unjust or the like would defeat a conviction. *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244. What we do mean is that an intention to take part in a conspiracy is always essential to the commission of the crime of conspiracy, and, where it is charged that the conspiracy was to defraud some other person, an intention to defraud is essential. It is said that to constitute a crime the act must, except in the case of certain statutory crimes, be accompanied by a criminal intent or by such neglect and indifference to duty or consequences as is regarded by the law as equivalent to a general intent. An act does not make a man guilty unless he be so in intention, but this is not the exact rule on which we rely. A man is presumed to intend the natural and ordinary results of his own acts, and consequently if one does an unlawful act it is presumed that it was done with a criminal intention, but this pre-

sumption is not a conclusive one and may be rebutted by the defendant.

"There are certain crimes of which a specific intent to accomplish a particular purpose is an essential element, and for which there can be no conviction upon proof of mere general malice or criminal intent. In these cases it is necessary for the state to prove the specific intent by either direct or circumstantial evidence." 12 Cyc. 152.

What is here announced is that, where the government relies upon circumstances to prove a conspiracy or the devising of a scheme and artifice to defraud, the case comes within that class where an intent different from the ordinary criminal intent must be shown. Here the government called numbers of witnesses by whom affidavits purported to be on file of the killing of a number of animals in excess of those which they testified upon the trial they had killed. This was a circumstance tending to show a conspiracy and by inference at least tended to show that the number of skins shown in the affidavit were not before the auditor when he made his certificate to the State Auditor. If it had appeared that, when an affidavit and assignment were filed with the county auditor, a corresponding number of skins were then and there exhibited to him and he clipped them, that in the auditor's experience as deputy under his predecessor it had been the practice, upon the presentation of an affidavit apparently signed by the man who killed the animals and his assignment, to certify to his affidavit and to issue a certificate to the State Auditor, that, while the law of South Dakota required the skins to be deposited for inspection by the board of county commissioners, they or their chairman had told him that it was unnecessary to keep these skins for their inspection, and that he consulted the law officer of the county and he advised him that the assignment was sufficient to authorize him to issue the certificate to the State Auditor, that he never had anything to do with procuring any of these assignments, that he never received any compensation, pay, reward, or consideration for certifying these claims, all this would have tended greatly to weaken the contention of the government that the auditor and his deputy were parties to the conspiracy, if one existed. See *People v. Flack et al.*, 125 N. Y. 325, 26 N. E. 267, 11 L. R. A. 807, where an elaborate note will be found on this subject of intent down to 1890; *Wharton's Criminal Evidence* (10th Ed.) pp. 901, 906, 1685, 1698, and 1771; *Potter v. U. S.*, 155 U. S. 438, 439, 15 Sup. Ct. 144, 39 L. Ed. 214; *Rudd v. U. S.*, 97 C. C. A. 462, 173 Fed. 912.

It follows that the judgment in both cases is ordered reversed, and the causes remanded, with directions to the trial court to set aside the verdict and grant a new trial.

UNITED STATES v. UTAH POWER & LIGHT CO.†
(Circuit Court of Appeals, Eighth Circuit. November 14, 1913.)

No. 3,992.

1. PUBLIC LANDS (§ 7*)—AUTHORITY AND CONTROL OF CONGRESS—ACQUISITION OF PRIVATE RIGHTS.

Under Const. U. S. art. 4, § 3, which vests in Congress "power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States," title or rights in the public lands cannot be acquired by a private person or corporation in the exercise of a state sovereignty, but only by virtue of some act of Congress and in accordance with the procedure prescribed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 7, 34; Dec. Dig. § 7.*]

2. PUBLIC LANDS (§ 7*)—AUTHORITY AND CONTROL OF CONGRESS—RECOGNITION BY STATE CONSTITUTION.

By the provision of the enabling act and state Constitution of Utah forever disclaiming on the part of the people of the state all right and title to the unappropriated public lands lying within the state, and providing that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, the government's full right of control over such lands is expressly recognized.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 7, 34; Dec. Dig. § 7.*]

3. PUBLIC LANDS (§ 7*)—WATERS AND WATER RIGHTS IN PUBLIC LANDS—ELECTRIC POWER COMPANIES.

Act May 14, 1896, c. 179, § 2, 29 Stat. 120 (U. S. Comp. St. 1901, p. 1573), which specifically authorizes the Secretary of the Interior, under rules and regulations to be fixed by him, to grant right of way and the use of ground on the public lands or forest reservations to electric power companies, as to such companies supersedes, or at least modifies and limits, the general provisions of Rev. St. § 2339 (U. S. Comp. St. 1901, p. 1437), enacted in 1866, recognizing vested water rights and rights of way for ditches and canals acquired in accordance with local customs and laws, to the extent that since its passage rights in public lands can be acquired by such a company only by a grant from the Secretary.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 7, 34; Dec. Dig. § 7.*]

Appeal from the District Court of the United States for the District of Utah; John A. Marshall, Judge.

Suit in equity by the United States against the Utah Power & Light Company. Decree for defendant, and complainant appeals. Reversed. See, also, 208 Fed. 821.

R. F. Feagans, Assistant Solicitor Department of Agriculture, of Ogden, Utah, and Hiram E. Booth, U. S. Atty., of Salt Lake City, Utah (William M. McCrear, Asst. U. S. Atty., of Salt Lake City, Utah, on the brief), for the United States.

Dwight W. Morrow, of New York City, and E. M. Allison, Jr., of Salt Lake City, Utah (S. A. Bailey, of Salt Lake City, Utah, Clyde C. Dawson, of Denver, Colo., and Waldemar Van Cott and W. D. Riter, both of Salt Lake City, Utah, on the brief), for appellee.

William V. Hodges, of Denver, Colo. (Mason A. Lewis, of Denver, Colo., on the brief), amicus curiæ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied February 23, 1914.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. The United States brings its bill of complaint against the appellee, defendant below, by which it seeks perpetually to enjoin said defendant from maintaining, in whole or in part, an alleged unlawful and tortious possession and occupancy of certain public lands in Cache county, state of Utah, now forming a part of the Cache National Forest.

Appellee is a corporation organized for the purpose of supplying electrical power to all who may desire to purchase and use it. Since December, 1900, it, and its predecessor in interest, have been engaged in the continuous operation of certain hydro-electrical power works, situated on the Logan river in the county and state aforesaid. These works comprise a reservoir and a flume or conduit for conveying the flow of water from the reservoir to the power works, pressure pipes, and power house station, all equipped with the necessary machinery and apparatus. The reservoir, flume, and conduit are situated wholly upon and within the lands of the United States.

It is alleged in the bill that the defendant power company holds no permission for the construction, maintenance, or use of said reservoir, flume, or conduit, nor any permission or authority to occupy or use said lands for the purposes stated from the United States or from any of its officers duly empowered by law to issue or grant the same; this, of course, stands admitted. Appellee claims to have acquired whatever rights it possesses under and by virtue of the customs, laws, and decisions of the state of Utah, as recognized and confirmed by section 9 of the act of Congress of July 26, 1866, appearing as section 2339 of the Revised Statutes (U. S. Comp. St. 1901, p. 1437) as follows:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: Provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

The government claims: (1) That rights of way for power companies cannot be acquired under this act, because such companies and their purposes were not contemplated by Congress at the time of the enactment of these laws, and were not, therefore, within the intent and meaning of those acts. (2) That in any event Congress has since made specific and comprehensive provisions defining the procedure by which, and the extent to which, the use of the public lands may be granted and acquired for the purposes of generating, manufacturing, and distributing electric power; that this legislation withdraws such uses from the terms of section 2339 of the Revised Statutes, if they were ever included therein. The legislation referred to is that of May

14, 1896, c. 179, 29 Stat. 120 (U. S. Comp. St. 1901, p. 1573), which reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the act entitled 'An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes,' approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"Sec. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power."

The government's position is that this act, of subsequent adoption, making specific and comprehensive regulations respecting a subject conceived to be embraced within the terms of the prior more general act, withdraws that subject from the operation of the former act to the extent to which it is governed by the special provision and is pro tanto a substitute for the general statute formerly governing the subject-matter. Under the authority of this act, the Secretary of the Interior fixed and promulgated general regulations; and it is contended that since that time, as against the United States, no rights could be acquired in the public lands for purposes of generating, manufacturing or distributing electric power except in conformity with the act of 1896 and the procedure thus established. The exclusive control of Congress over the disposition of the public lands is asserted. The alleged rights of appellee were attempted to be created since the passage of the act of 1896, and the regulations promulgated thereunder, to wit, in December, 1900.

A motion to dismiss, substituted under the new equity rules for demurrer, was filed by appellee. The court below, being of opinion that the defendant had title to a right of way for its pipe lines and reservoirs under section 9 of the act of July 26, 1866, and was therefore under no obligation to proceed under the subsequent legislation, sustained this motion and dismissed the bill.

It is suggested, rather than insisted, that appellant is not entitled to equitable relief because its remedy at law is complete and adequate. This point, though raised in the briefs for appellee, was not urged at the oral argument. While ejectment would seem to afford adequate relief, nevertheless the proceeding in equity has been recognized and approved. *United States v. Brighton Rancho Co.* (C. C.) 26 Fed. 218; *Light v. United States*, 220 U. S. 523, 31 Sup. Ct. 483, 55 L. Ed. 570. However, we agree with the trial judge that under the new equity rules the objection, if well taken, does not justify a dismissal, and that the question therefore need not be determined.

[1] From the briefs the claim of right asserted by appellee would seem to be twofold in its nature: First. That the power company is entitled to be maintained and protected, so long as it may desire, in the use of rights of way over the public land, which it claims to have acquired for the purpose of putting water to a beneficial use under the

customs, laws and decisions of the state of Utah, as recognized and confirmed by section 9 of the act of Congress of July 26, 1866, Revised Statutes U. S. sec. 2339; that by said act and by the construction and use of its reservoir and flume, it has permission of the highest and most solemn kind from the United States government to occupy the land in question. Second. That it is protected in its tenure because that tenure is authorized by the laws of the state of Utah, exercising sovereign and exclusive jurisdiction with respect thereto.

The proposition that absolute and perpetual rights in the public lands may be acquired for private gain by mere appropriation, without purchase or compensation, and in the exercise of a state sovereignty which transcends the constitutional power of the Congress, is a somewhat startling one, and must be considered first. The Constitution of the United States (article 4, § 3) provides that:

"Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States."

This is the supreme law of the land and embodies an express grant of power to the national government. *Light v. United States*, 220 U. S. 537, 31 Sup. Ct. 483, 55 L. Ed. 570; *Kansas v. Colorado*, 206 U. S. 89, 27 Sup. Ct. 655, 51 L. Ed. 956. It has been construed to mean that title and rights in and to the public lands are created by the acts of Congress, and must be governed by their provisions whether they be hard or lenient, and that no rights whatsoever can be obtained in the lands of the United States except as Congress may consent. *Rector v. Ashley*, 6 Wall. 142, 18 L. Ed. 733; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; *Emblem v. Lincoln Land Co.*, 184 U. S. 660, 22 Sup. Ct. 523, 46 L. Ed. 736; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264; *Jourdan v. Barrett*, 4 How. 169, 11 L. Ed. 924; *United States v. Chicago*, 7 How. 185, 12 L. Ed. 660; *Butte City Water Co. v. Baker*, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409; *Kansas v. Colorado*, 206 U. S. 46-92, 27 Sup. Ct. 655, 51 L. Ed. 956; *Light v. United States*, supra. After quoting this provision of the Constitution, the Supreme Court, in *Jourdan v. Barrett*, 4 How. at page 184, 11 L. Ed. 924, said:

"For the disposal of public lands, therefore, in the new states, where such lands lie, Congress may provide by law; and having the constitutional power to pass the law, it is supreme; so Congress may prohibit and punish trespassers on the public lands. Having the power of disposal and of protection, Congress alone can deal with the title, and no state law, whether of limitations or otherwise, can defeat such title."

Wilcox v. Jackson dealt with public lands within the state of Illinois. Concerning the asserted power of the state to legislate respecting the title to such lands within its borders, the court said:

"The effect of this would be, not that Congress had the power of disposing of the public land, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress, in relation to a subject confided by the Constitution to Congress only. And the practical result in this very case would be, by force of state legislation, to take from the United States their own land, against their own will, and against their own laws."

In *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260, it was held that the government of the United States may legislate for the protection of its lands, though such legislation may involve the exercise of the police power; and may complain of and take steps to prevent acts of individuals, in fencing in its lands, even though done for the purpose of irrigation and pasturing. In the opinion Mr. Justice Brown, speaking for the court, said:

"While the lands in question are all within the state of Colorado, the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to pre-emption or homestead settlement; but it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market."

In *Light v. United States*, *supra*, the United States had suffered its public lands to be used for pasturage; and there thus grew up a sort of implied license that these lands might be used so long as the government did not withdraw its consent. The court held that:

"Failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes."

It held further that:

"The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely."

[2] But it is profitless to discuss further this asserted power of the state to dispose of interests in the public lands, even though it were admitted that the subject otherwise admits of discussion, in view of the express stipulation that such lands shall remain at the sole and entire disposition of the United States. The act enabling the people of Utah to form a Constitution and state government imposes the condition:

"That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; * * * and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States." Compiled Laws of Utah 1907, p. 29.

And in the Constitution of Utah subsequently adopted this provision was incorporated in terms and became a part of the organic law of that state. Constitution of Utah, art. 3, § 2; Compiled Laws of Utah 1907, p. 45. Concerning a similar provision in the Minnesota Constitution, the Supreme Court has said:

"The provisions of the enabling act and the state Constitution, before referred to, secure to the United States full control of the disposition of the public lands within the limits of the state. * * * It would be a part of the power reserved in Congress to determine the terms and conditions upon which title should effectually pass from the government." *Stearns v. Minnesota*, 179 U. S. 223-251, 21 Sup. Ct. 73, 84 (45 L. Ed. 162).

That a power may be injuriously exercised is no reason for a misconstruction of the scope and extent of that power. The government of the United States has shown no disposition to deal unjustly with the states, nor with their citizens in this respect. *Stearns v. Minnesota*, supra, 179 U. S., page 243, 21 Sup. Ct. 73, 45 L. Ed. 162; *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013. We must conclude therefore that the power of Congress to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States, including rights of the nature here involved, is supreme; and, in conferring upon the Secretary of the Interior power to establish such rules and regulations as may be necessary to supplement its legislation, Congress acts within its constitutional power. *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; *Light v. United States*, 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570; *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013. The exertion by Congress of a power which is granted in express terms must supersede all legislation over the same subject by the states. *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59-66, 33 Sup. Ct. 192, 57 L. Ed. 417; *Railway v. Hesterly*, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. 1031; *Gulf, Colorado & Santa Fé Ry. Co. v. Hefley*, 158 U. S. 98-104, 15 Sup. Ct. 802, 39 L. Ed. 910.

[3] To sustain its contention, therefore, appellee must point to some express grant by the government, or at least to subsisting legislation from which the grant may be inferred, or by which its claims have been recognized and preserved. It must be conceded at the outset that statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee. *Wisconsin Central R. Co. v. United States*, 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399; *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260; *United States v. Minidoka & S. W. R. Co. (C. C. A.)* 190 Fed. 491, 111 C. C. A. 323. Appellee relies upon the ninth section of the act of July 26, 1866, now section 2339 of the Revised Statutes. It is important to consider the nature and extent of the rights which that legislation undertook either to confer or to confirm, as the case may be. In *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240, the Supreme Court of the United States had occasion to examine that act with this consideration in mind. Speaking through Mr. Justice Field, it said:

"The position of the plaintiff's counsel is that, of the two rights mentioned in this section, only the right to the use of water on the public lands, acquired by priority of possession, is dependent upon local customs, laws, and decisions of the courts; and that the right of way over such lands for the construction of ditches and canals is conferred absolutely upon those who have acquired the water right, and is not subject in its enjoyment to the local customs, laws, and decisions. This position, we think, cannot be sustained. The object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. * * *

"It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. * * *

"Whilst acknowledging the general wisdom of the regulations of miners, as sanctioned by the state and moulded by its courts, and seeking to give

title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws, and decisions, would be thereby destroyed, unless secured by the act."

It will thus be seen that this legislation constituted no grant of specific rights by the Congress of the United States. The efficacy of local customs, laws, and decisions to supersede the disposing power of Congress is denied. The purpose was to confirm title to possessions acquired under forms and regulations sanctioned by the state and moulded by its courts, with the acquiescence and tacit encouragement of the government. The act "was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." *Broder v. Water Co.*, 101 U. S. 274, 25 L. Ed. 790; *Atchison v. Peterson*, 20 Wall. 507-512, 22 L. Ed. 214. In view of the express power conferred upon Congress by the Constitution, and reserved to it by the organic law of the state of Utah, it cannot be successfully urged that such legislation committed the government to a policy that should be irrevocable. *Light v. United States*, 220 U. S. 523-535, 31 Sup. Ct. 485, 55 L. Ed. 570; *Gutierrez v. Albuquerque Land & Irrigation Co.*, 188 U. S. 545, 23 Sup. Ct. 338, 47 L. Ed. 588; *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136. In the latter case it was expressly held that the act of September 19, 1890, did operate to modify and restrict section 2339. The court said:

"As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes it must be held controlling, at least as to any rights attempted to be created since its passage; and all the proceedings of the appellees in this case were subsequent to this act."

It remains then to consider whether Congress, prior to any possession acquired by appellee, had withdrawn or limited the recognition accorded by the act of July 26, 1866, to such extent that appellee may not rely upon that act in defense of this action.

As has been stated, the government's position is that the act of May 14, 1896, and the rules and regulations promulgated thereunder, by making specific and comprehensive provision respecting a subject, to wit, the generation, manufacture, and distribution of electric power, conceived to be embraced within the terms of the prior and more general act, withdraws that subject from the operation of the former act to the extent to which it is governed by such special provision and is pro tanto a substitute for and repeal of the general statute which formerly governed. It is a well-settled principle of construction that specific terms covering a given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling. *Kepner v. United States*, 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655; *Jackson v. Chicago, R. I. & P. Ry. Co. (C. C. A.)* 178 Fed. 432, 102 C. C. A. 159; *Gilkeson v. Missouri Pacific Ry Co.*, 222 Mo. 173, 121 S. W. 138, 24 L. R. A. (N. S.) 844, 17 Ann. Cas. 763.

"If the two are repugnant in any of their provisions, the later act, without any repealing clause, operates to the extent of the repugnancy as a repeal

of the first; and, even where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." *United States v. Tynen*, 11 Wall. 88-92 (20 L. Ed. 153); *Davies v. Fairbairn*, 3 How. 636, 11 L. Ed. 760; *Tracy v. Tuffy*, 134 U. S. 206-223, 10 Sup. Ct. 527, 33 L. Ed. 879.

The doctrine is very comprehensively stated in *Hawkins v. Bare*, 63 W. Va. 431, 437, 60 S. E. 391-393. It is there said:

"Neither the intention to substitute, nor the intention to create an exception from the general law, depends upon inconsistency between the new or special act and the old or general act, in the sense of repugnancy in terms. It is inconsistency in point of intention, an obvious, but unexpressed, repugnancy. It is a mere question of whether the Legislature intended to make a complete law governing the subject-matter. If that be apparent, there is a substitution or an exception, as the case may be, although there is no express repeal, exception, or substitution; and the two acts might be combined by making the later or special one an addition to the older or general one, and treating it as an amendment, whereby a different result would be obtained. In every case of this kind the two courses are open to the court. Both acts may be allowed to stand and operate together by treating the later or special one as an amendment, and certain results thereby obtained, or the new or special act may be considered a substitute or exception, and the old or general statute thereby set aside either wholly or partially, and a different result so obtained; and the doubt is always resolved by the character of the new act or special provision. Though it fails to denominate itself a substitute or exception in terms, the intent to make it such is gathered from its scope and character and carried into effect."

The government does not contend that section 2339 of the Revised Statutes has been wholly repealed, but merely that the subsequent act of 1896 has withdrawn from the operation of that section the subject of generating, manufacturing, or distributing electric power, the manner of acquiring rights of way over the public lands for those purposes, and the nature and extent of such rights. We think this contention is sound. The terms of the original statute are broad enough to include the specific form of manufacture now under consideration. *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601-632, 15 Sup. Ct. 912, 39 L. Ed. 1108. Control over the disposition of the public lands and all rights and interests therein, remain unimpaired in the Congress. Evidently that body perceived that the time had come when changed conditions and the complex interests and relations of our national life demanded that, with respect to this particular form of industry, the application of the former act, as worded and construed, should be modified and restricted; therefore it enacted the subsequent legislation. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690-708, 19 Sup. Ct. 770, 43 L. Ed. 1136; *Camfield v. United States*, 167 U. S. 518-524, 17 Sup. Ct. 864, 42 L. Ed. 260.

There can be no doubt that Congress intended to and did assume complete control of the subject-matter, and made and authorized specific and comprehensive provisions respecting it. This appears not only from the act in question, but from other legislation connected therewith and supplemental thereto. Act of March 3, 1891, 26 Stat. 1095 (U. S. Comp. St. 1901, p. 1535); Act of January 21, 1895, 28

Stat. 635 (U. S. Comp. St. 1901, p. 1572); Act of May 11, 1898, 30 Stat. 404 (U. S. Comp. St. 1901, p. 1575); Act of February 15, 1901, 31 Stat. 790 (U. S. Comp. St. 1901, p. 1584); Act of February 1, 1905, 33 Stat. 628 (U. S. Comp. St. Supp. 1911, pp. 630, 635, 636, 716); Act of March 4, 1911, c. 238, 36 Stat. 1235-1253 (U. S. Comp. St. Supp. 1911, pp. 103, 106, 107, 656, 657, 720, 1030, 1374, 1375, 1391). Laws passed subsequently to appellee's possession cannot, of course, affect any vested rights theretofore acquired, but they are pertinent as reflecting and revealing the purpose of Congress throughout this legislation. The acts of 1891, 1901, and 1911, contain express provisions for revocation or forfeiture. In that of 1891 is found this exception:

"The privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under the authority of the respective states or territories."

Obviously, that act was not intended to interfere with the operation of section 2339; but no such proviso is found in the act of May 14, 1896. That of May 11, 1898, contains this clause:

"Said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

It will thus be seen that Congress has wisely adapted and molded its legislation to meet the requirements of irrigation in a "dry and thirsty land."

The result is that whatever rights to burden the public lands may have been recognized or confirmed by section 2339 of the Revised Statutes, those involving the generation, manufacture, and distribution of electric power have been withdrawn, modified, and restricted by the subsequent act of May 14, 1896. This later legislation became effective prior to the initiation of appellee's claim. The power company has not availed itself of the provisions of this later statute; therefore its rights, if any, are subordinate to those of the government.

The decree below must be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

UNITED STATES v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1913.)

No. 3,998.

1. MASTER AND SERVANT (§ 13*) — EMPLOYMENT — REGULATION — INTERSTATE CARRIERS—HOURS OF SERVICE LAW—"EMERGENCY."

The term "emergency," as used in the Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), providing that train dispatchers employed in interstate commerce shall not be compelled to be or remain on duty longer than 9 hours in any 24-hour period in stations continuously operated night and day, except in case of emergency, includes any event or occasional combination of circumstances

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which calls for immediate action or remedy; pressing necessity; exigency; sudden or unexpected happening; or unforeseen occurrence or condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 3, p. 2361.]

2. MASTER AND SERVANT (§ 13*)—HOURS OF SERVICE LAW—TRAIN DISPATCHERS—DUTY—EMERGENCY.

Defendant, an interstate carrier, maintained at a division point a chief train dispatcher, who had charge of the office and supervision of six subordinate train dispatchers, who performed their duties by working in pairs, 8-hour shifts in each 24 hours. The chief dispatcher was an executive officer under the superintendent of division, and had no duties to perform with reference to the actual operation of the telegraph. All of the six operators had been continuously employed in the office from 15 months to 8 years, and for 7 years immediately preceding the trial but two occasions had arisen when dispatchers unexpectedly failed to report for duty. On August 27, 1912, one of the dispatchers became suddenly ill and did not report for duty until September 2d. The chief dispatcher made diligent effort to obtain another to take his place, but was unable to do so. During the illness of the absent dispatcher the other operators were required to work more than 9 hours in each period of 24. *Held*, that the chief dispatcher was not required to himself take the place of the absent employé, and that necessary absence constituted an "emergency," within Hours of Service Law (Act March 4, 1907, c. 2939) § 2, 34 Stat. 1415 (U. S. Comp. St. Supp. 1911, p. 1321), prohibiting the employment of train dispatchers for a longer period than 9 hours in any 24, except in case of emergency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

3. TIME (§ 6*)—HOURS OF SERVICE LAW—INTERSTATE CARRIERS—"WEEK."

Hours of Service Law (Act March 4, 1907, c. 2939) § 2, 34 Stat. 1415 (U. S. Comp. St. Supp. 1911, p. 1321), prohibits any interstate carrier to require that a train dispatcher be and remain on duty for more than 9 hours in any 24-hour period at stations continuously operated night and day, except in case of emergency, when such employé may be permitted to remain on duty for 4 additional hours in a 24-hour period on not exceeding 3 days in any week. *Held*, that the word "week," as so used, was intended to mean a period of 7 days, and not necessarily a calendar week, and that the statute was therefore not violated if no employé worked overtime more than 3 days out of 7.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 9; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7427, 7428, 7834.]

In Error to the District Court of the United States for the District of Utah; John A. Marshall, Judge.

Action by the United States against the Southern Pacific Company to recover penalties for alleged violation of the Hours of Service Law. Judgment for defendant, and the United States brings error. Affirmed.

Philip J. Doherty, of Washington, D. C. (Hiram E. Booth, U. S. Atty., of Salt Lake City, Utah, on the brief), for the United States.

George H. Smith, of Salt Lake City, Utah (P. L. Williams, of Salt Lake City, Utah, William F. Herrin, of San Francisco, Cal., and John V. Lyle, of Salt Lake City, Utah, on the brief), for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Repr Indexes

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

CARLAND, Circuit Judge. The United States brought this action to recover from the Southern Pacific Company (hereinafter called the "Company") the sum of \$6,000 as penalties for the violation of an act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon. (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]). The complaint contained 12 counts, on each of which a penalty of \$500 was demanded. At the trial, the facts being undisputed, the court directed the jury to return a verdict for the Company. The United States brings the case here, assigning as error such ruling of the court.

The facts appearing at the trial are as follows: The Company is a common carrier engaged in interstate commerce in the state of Utah. At Ogden, in said state, it maintains a train dispatcher's office continuously operated night and day. H. H. Hoover, C. M. Sewall, F. F. Small, and Edward Miller were employes of the Company in said office, engaged in using the telegraph to report, transmit, receive, and deliver orders pertaining to or affecting train movements. The business of train dispatching at Ogden in the months of August and September, 1912, was performed by a chief train dispatcher, who had charge of the office and supervision and direction of six operators or train dispatchers employed in the same. The division of railroad over which this office had jurisdiction extended from Ogden, Utah, to Carlin, Nev., a distance of 149 miles. The six train dispatchers performed their duties by working 8-hour "tricks," so called. The first trick extended from 7 o'clock a. m. to 3 p. m.; the second, from 3 o'clock p. m. to 11 o'clock p. m.; and the third, from 11 o'clock p. m. to 7 o'clock a. m.—two dispatchers to each trick. The chief dispatcher was an executive officer under the superintendent of division and had no duty to perform with reference to the actual operation of the telegraph. However, he could operate the telegraph. An operator or train dispatcher by the name of Johnson, employed in the Ogden office by the Company, on August 27, 1912, became suddenly ill and did not report for duty till September 2d. By reason of the illness of Johnson, the operators hereinbefore mentioned were required to work as follows:

H. H. Hoover from 3 p. m. August 27, 1912, to 3 a. m. August 28, 1912.

H. H. Hoover from 3 p. m. August 28, 1912, to 3 a. m. August 29, 1912.

H. H. Hoover from 3 p. m. August 29, 1912, to 3 a. m. August 30, 1912.

C. M. Sewall from 3 a. m. August 29, 1912, to 3 p. m. August 29, 1912.

C. M. Sewall from 3 a. m. August 30, 1912, to 3 p. m. August 30, 1912.

C. M. Sewall from 3 a. m. August 31, 1912, to 3 p. m. August 31, 1912.

F. F. Small from 3 p. m. August 30, 1912, to 3 a. m. August 31, 1912.

F. F. Small from 3 p. m. August 31, 1912, to 3 a. m. September 1, 1912.

F. F. Small from 3 p. m. September 1, 1912, to 3 a. m. September 2, 1912.

Edward Miller from 3 a. m. September 1, 1912, to 3 p. m. September 1, 1912.

Edward Miller from 3 a. m. September 2, 1912, to 3 p. m. September 2, 1912.

Edward Miller from 3 a. m. September 3, 1912, to 3 p. m. September 3, 1912.

The chief train dispatcher after diligent effort was unable to obtain an operator or train dispatcher to take the place of Johnson while he was ill. A telegraph operator merely, without further training in a train dispatcher's office, is incompetent to perform the duties of train dispatcher. Of the six operators employed in the office at Ogden at the time in question, all had been continuously employed from 15 months to 8 years, and during a period of 7 years immediately preceding the trial below but two occasions had arisen where dispatchers unexpectedly failed to report for duty.

The statute under which the United States claims a liability is established against the Company by the foregoing facts, is found in the first proviso of section 2, chapter 2939, 34 Stat. 1415. So far as material, it reads as follows:

"That it shall be unlawful for any common carrier, * * * to require or permit any * * * operator, train dispatcher, or other employé who by the use of telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements * * * to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in * * * stations continuously operated night and day, * * * except in case of emergency when the employés named * * * may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week."

[1] Applying the law to the facts, the question arises: Did the illness of Johnson, coupled with the inability of the Company to obtain a man to take his place during the time he was ill, constitute an emergency within the meaning of the statute, so as to relieve the Company from the penalties which would otherwise result from requiring Hoover, Sewall, Small, and Miller to remain on duty for a longer period than 9 hours in a 24-hour period?

It does not appear that Congress used the word "emergency" in any other than its ordinary or popular sense. Webster defines the word "emergency" as:

"Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency."

The Century Dictionary defines the word as follows:

"Sudden or unexpected happening; an unforeseen occurrence or condition."

The definition as given by the Century Dictionary was approved in *Sheehan v. City of New York*, 37 Misc. Rep. 432, 75 N. Y. Supp. 302.

In support of the contention of the United States, the following cases are cited: *United States v. Kansas City Southern*, 202 Fed. 828, 121 C. C. A. 136; *B. & O. R. R. v. I. C. C.*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878; *Ellis v. United States*, 206 U. S. 257, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589; *United States v. Garbish*, 222 U. S. 261, 32 Sup. Ct. 77, 56 L. Ed. 190.

[2] The case first cited was an action under the first clause of section 2 of the law now under consideration. This court in that case simply held that all the usual causes of delay incident to the operation of trains, standing alone, would not excuse the railroad company under the terms of the first proviso of section 3, but that the company must further show that such delays could not have been foreseen and prevented by the high degree of diligence demanded. Of course this must be so. If the usual causes of delay incident to operation were to excuse, then the statute would be wholly ineffective to accomplish its purpose.

B. & O. R. R. v. I. C. C. is a case in which the Supreme Court held that the law in question was a constitutional exercise of the power of Congress.

Ellis v. United States is a case where the Supreme Court decided that the disappointment of a contractor with regard to obtaining some of his materials did not create an extraordinary emergency, within the meaning of Act Aug. 1, 1892, c. 352, 27 Stat. 340 (U. S. Comp. St. 1901, p. 2521). In disposing of this particular question, the court said:

"He found more difficulty than he expected, although he expected some trouble, in getting certain oak and pine piles called for by the contract, and, having been delayed by that cause, he permitted his associate in the business to employ men for 9 hours, in the hurry to get the work done. The judge instructed the jury that the evidence did not show an 'extraordinary emergency' within the meaning of the act. The judge was right in ruling upon the matter. Even if, as in other instances, a nice case might be left to the jury, what emergencies are within the statute is merely a constituent element of a question of law, since the determination of that element determines the extent of the statutory prohibition and is material only to that end."

United States v. Garbish is a case wherein under the act last cited the Supreme Court held that the extraordinary emergency which excuses is not one that is contemplated and inheres necessarily in the work. In so deciding the court said:

"And, besides, the extraordinary emergency which relieves from the act is not one that is contemplated and inheres necessarily in the work. *United States v. Sheridan-Kirk Contract Co.* [D. C.] 149 Fed. 809. It is a special occurrence, and the phrase used emphasizes this. It is not an emergency simply which is expressed by it, something merely sudden and unexpected, but an extraordinary one, one exceeding the common degree."

It is manifest that none of the cases cited decides the question at issue in the present case. The law now being considered does not require an extraordinary emergency, but simply an emergency. And we think the facts as they appear in the record warranted the court in deciding that an emergency, within the means of the statute, existed. As was said in the *Ellis Case*, *supra*:

"What emergencies are within the statute is merely a constituent element of a question of law, since the determination of that element determines the extent of the statutory prohibition and is material only to that end."

It is claimed by counsel for the United States, however, that the Company should have had extra train dispatchers, under pay, ready to take the place of Johnson when he became ill. The law recognizes the fact that emergencies may arise. Congress, no doubt, used the word "emergency" with reference to the business of dispatching trains when conducted in the exercise of the ordinary care required in such business. If Congress had intended that the railroads should provide against all emergencies, then there was no use in granting to the Company the right to require longer hours in the case of emergency. If we decide that it was the duty of the Company to keep extra train dispatchers under pay to take the place of those who became suddenly ill, how many should it have kept in the present case—one or six? And as the extra dispatcher or dispatchers might also have become ill, should not the Company also provide for that contingency? Speaking generally, sickness and death are the common lot of all and must be expected; but, within the expectancy of life, health and not sickness is the general rule. In view of the showing that for a period of 7 years only one other unexpected absence of an employé on account of illness or other cause had occurred, we think the Company was not so negligent in not having an extra dispatcher on hand to take Johnson's place, as to deprive it of the privilege granted by the law. No question is made as to the necessity of the performance of the work required of the employés mentioned. We do not think the chief train dispatcher was required under the circumstances to perform the work of Johnson, as that would have left the business of the office without superintendence or supervision.

[3] We also think that the word "week" in the statute was intended to mean a period of 7 days, and not necessarily a calendar week, and that the statute is not violated if no employé worked over time more than 3 days out of 7.

We do not decide that sudden illness in all cases or standing alone would constitute an emergency. Each case must depend upon its own facts. Sudden illness might continue for such a number of days as to cease to be an emergency. Under our ruling in the *Kansas City Southern Case*, supra, to the effect that the statute in question, being highly remedial, should be liberally construed so that its purposes may be effected, we think the illness of Johnson, coupled with the inability of the Company to secure other help during the time he was sick, constituted an emergency within the meaning of the law.

Judgment affirmed.

VICTOR-AMERICAN FUEL CO. v. PECCARICH. †

(Circuit Court of Appeals, Eighth Circuit. November 15, 1913.)

No. 3,976.

1. TRIAL (§ 420*)—DIRECTED VERDICT—MOTION—WAIVER.

Error, if any, in denying defendant's motion for a directed verdict at the close of plaintiff's testimony, is waived by the introduction of evidence by defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.*]

2. COURTS (§ 356*)—RULINGS REVIEWABLE—DENIAL OF NEW TRIAL.

An order of a federal court, denying a motion for a new trial, is not reviewable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

3. TRIAL (§§ 349, 359*)—SPECIAL INTERROGATORIES—SUBMISSION—EFFECT OF ANSWERS—GENERAL VERDICT.

A trial court has common-law power, in its discretion, to submit special interrogatories for a jury's finding along with a general verdict, and the answers to such interrogatories will control when they clearly compel a different judgment from that which would follow the general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 823-827, 857-860, 875, 877, 878; Dec. Dig. §§ 349, 359.*]

4. MASTER AND SERVANT (§ 297*)—INJURIES TO SERVANT—COAL MINE OPERATIVE—FALL OF ROOF—GENERAL VERDICT—SPECIAL INTERROGATORIES.

In an action for injuries to plaintiff while at work in a coal mine, constructing a wall separating certain entries, by the fall of a part of the roof, due to the alleged negligent shooting of coal pillars, the jury returned a general verdict for plaintiff together with special findings that the superintendent and his subordinate officers were guilty of the negligence specified, that the firing of the shots would have a tendency to loosen the roof, and that the defect in the roof was not of such a character as to be readily discoverable by ordinary inspection. *Held*, that the latter finding should be construed to mean that the defect in the roof was not so plainly obvious as to charge plaintiff with contributory negligence in going under it, and hence such findings were not in irreconcilable conflict with the general verdict.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.*]

5. MASTER AND SERVANT (§ 203*)—INJURIES TO SERVANT—MINERS—ASSUMED RISK.

Where plaintiff was injured by the fall of a portion of the roof of a coal mine while he was employed therein, due to shots fired in certain pillars in the vicinity of his working place, the fact that plaintiff had received no assurance from defendant that no shots would be so fired while he was working there was applicable only to the question of assumed risk and would not defeat his right of action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 16, 1914.

6. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—MINERS—FALL OF ROOF—COMPLAINT.

In an action for injuries to an employé in a coal mine by the fall of a portion of the roof, due to the alleged negligent shooting of pillars in the vicinity, complaint construed and *held* to state a cause of action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

7. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—MINES—QUESTIONS FOR JURY.

In an action for injuries to an employé in a coal mine by the fall of a portion of the roof, evidence *held* to require submission to the jury of the question whether the firing of shots in certain pillars near where plaintiff was employed caused the roof to become unsafe and fall.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

8. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—NATURE OF DUTY.

Where plaintiff, an employé in a coal mine, was directed to wall up an entry to guard against black damp, and a canvas curtain had been erected to turn currents of fresh air into the place where plaintiff was employed, the fact that he was engaged in replacing the curtain, which for some reason had fallen, when he was injured by the fall of a part of the roof, was insufficient to show that he was not engaged in the line of his duty at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

In Error to the District Court of the United States for the District of New Mexico; William H. Pope, Judge.

Action by Frank Peccarich against the Victor-American Fuel Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Caldwell Yeaman, of Denver, Colo. (Frank E. Gove, of Denver, Colo., on the brief), for plaintiff in error.

L. J. Stark, of Denver, Colo. (George S. Klock, of Albuquerque, N. M., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

CARLAND, Circuit Judge. This suit was brought by Peccarich to recover damages for personal injuries received by him as an employé of the fuel company, and which he alleged were caused by its negligence. The fuel company has removed the case here, complaining that error intervened to its prejudice in the trial of the case, which resulted in a judgment in favor of Peccarich.

[1, 2] Before proceeding to consider the errors relied upon, we may observe that the motion for a directed verdict, made at the close of the plaintiff's testimony, was waived by the introduction of testimony by the fuel company, and that the ruling on the motion for a new trial is not reviewable.

In order to intelligently understand the discussion of the errors assigned, it is necessary to state briefly the facts which Peccarich alleged

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to be his cause of action. These facts are stated in the complaint as follows:

"Plaintiff further alleges that on the 12th day of August, A. D. 1909, while this plaintiff was in the discharge of his duty as the servant and employé of said defendant, and while this plaintiff was under the direction and order of said defendant, said defendant ordered and directed the plaintiff to go to the second right entry of one of its mines at Gibson, N. M., and which second right entry was an entry way connecting an old mine with the new mine, and the said defendant ordered and directed the plaintiff to build a wall at the place of the junction of the two aforesaid mines, which said wall would then and there wall up the second right entry connecting the said mines, and would stop the black damp emitted from the fire in the said old mine from coming through into the new mine, which said black damp would interfere with the men and employés of the said defendant working in the said new mine; that the said defendant on said day willfully, wrongfully, and negligently so misbehaved and conducted itself in this behalf that without warning or notice to the plaintiff, and while this plaintiff was in its service and constructing the said wall between the said old mine and the said new mine, caused, ordered, and permitted, and directed its servants and employés to go on and shoot in the pillars in the vicinity of the second right entry and in the vicinity where this plaintiff was building said wall to connect the said mines for the said defendant, and the said servants of the said defendant, yielding to said orders of such defendant, and pursuant to the permission and direction of the defendant, shot in the said pillars at the place aforesaid, and did then and there, by so shooting in the said pillars, weaken the roof at the junction point where this plaintiff was engaged in the construction of said wall as aforesaid, and by so shooting in said pillars by the said defendant and pursuant to its direction, permission, and order, the blanket and covering which had been hung up between and near the junction of the two said mines to prevent the black damp from coming through any part of the entry way between the two said mines and to convey air to the working place of this plaintiff, and which opening and aperture had not been walled up, fell, and while this plaintiff, in discharge of his duty, was attempting to put the said blanket and covering in its place in order to stop the said black damp coming through and to convey air to the working place of the plaintiff as aforesaid, and while plaintiff was engaged in handling the said blanket and covering, a rock then and there fell upon this plaintiff and severely and seriously and permanently injured plaintiff; that the said rock fell upon plaintiff and injured him as aforesaid solely through the negligence, carelessness, and gross want of care on the part of defendant in weakening the roof of the said mine by shooting in the pillars as aforesaid and directing and causing the same to be done through its order to its said employés and by giving permission to its said employés to so shoot in the said pillars without warning or notice to this plaintiff; and that the said injuries to this plaintiff were caused without any negligence on his part contributing thereto."

The jury, in addition to a general verdict for the plaintiff, answered, among others, the following special interrogatories submitted to them by the court:

No. 2. What person or persons was or were guilty of the act or acts of negligence specified? Answer: The superintendent or his subordinate officers.

No. 7. If a shot was fired, what effect did it have upon the roof at the place where the accident occurred? Answer: Would have a tendency to loosen the roof.

No. 9. Was any defect in the roof of such a character as to be readily discoverable by ordinary inspection? Answer: No.

[3] The fuel company moved the court for judgment in its favor

on the special findings, making special reference to those above set forth on the theory that they were inconsistent with the general verdict and should control the judgment to be rendered. The trial court had the common-law power, to be exercised in its discretion, to submit special findings to the jury along with the general verdict and these special findings must control when they clearly compel a different judgment from that which would follow the general verdict. *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837; *Walker v. Bailey*, 65 Me. 354; *Spurr v. Sheldon*, 131 Mass. 429; *Barstow v. Sprague*, 40 N. H. 27; *Richardson v. Weare*, 62 N. H. 80; *Clementson on Special Verdicts*, 133-140.

In view of the claim made in brief of counsel for Peccarich that the ruling of the Supreme Court in *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, compelled a denial of the motion for judgment, we will say that the case is not in point. In the case cited it was held that in the federal courts a motion for judgment non obstante veredicto based on the evidence is unauthorized. In the case at bar the motion for judgment was not a motion non obstante veredicto based on the evidence, but for judgment in conformity to the findings of the jury which were matter of record.

[4, 5] We proceed now to consider whether the special findings above mentioned compel a judgment for the fuel company. It is claimed there was no evidence to support the answer given by the jury to interrogatory No. 2. This is not so. Tony Minrek and Mike Kezle both testified that Jennings, the superintendent, told them to fire the shot, and the jury so found in answer to interrogatory No. 6. There is certainly nothing in this answer that would compel a judgment for the fuel company. The answer to interrogatory No. 7 supports the general verdict. No general verdict could have been rendered unless the jury should find from the evidence that the firing of the shot was the proximate cause of the falling of the rock. It is claimed that the answer to interrogatory No. 9 prevents a recovery by the plaintiff. We think the contention that this interrogatory was submitted with reference to the duty of Peccarich and was so understood by the jury is the true view. The duty of the fuel company to use ordinary care to provide a reasonably safe place for Peccarich to work required the exercise of more care than would be required to discover defects in the roof of such a character as to be readily discoverable by ordinary inspection, and the court so charged. In reference to the duty of Peccarich, the court charged that if he knew that there was a defect in the roof, or it was so obvious to him that he could not but have known it, he would be deemed to have assumed the risk. Every presumption should be indulged in to support the general verdict, and if the special findings may be construed so as to support the general verdict the court should so construe them. In this view we think justice requires us to interpret the answer to interrogatory No. 9 as a finding that the defect in the roof was not so plainly obvious as to charge Peccarich with contributory negligence in going under the same. We therefore conclude there was no error in denying the motion for judgment made by the fuel company. There was no error in the refusal of the court

to charge as requested by counsel for the fuel company in instruction numbered 8, 9, and 14. There was no evidence that Peccarich received assurance from the fuel company that no shots would be fired in the pillars in the vicinity where he was working, but this did not necessarily defeat his right of action. The assurance, if made, would only affect the question of the assumption of risk.

[6] The sufficiency of the complaint was raised by motion in arrest of judgment; but we have no doubt that the complaint stated a cause of action, as is shown by the statement excerpted therefrom and found in this opinion.

[7] There remains to be considered the question as to whether the court erred in refusing to direct a verdict for the fuel company at the close of all the testimony. It is objected in this behalf that there was no evidence that a shot was fired. Minrek and Kezle hereinbefore mentioned both testified that a shot was fired, and the witness Leaden testified that a shot fired as the evidence tended to show would be bound to loosen the roof and the coal, and a witness for the defendant testified that a shot loaded in the way the testimony tended to show the shot in question was loaded would when fired cause an explosion which would have torn the coal in fragments. We think there was sufficient testimony introduced upon the question as to whether the firing of the shot caused the roof to become unsafe as to require the submission of the question to the jury. It must be admitted that the question is not free from difficulty, but it was for the jury to draw all legitimate and proper inferences from the testimony, and they have found against the fuel company upon this question. We think it would be a clear invasion of the province of the jury for this court to find to the contrary. It was a question in the solution of which the jury would have the right to bring to bear the common knowledge of men in regard to the explosion of powder and dynamite under the circumstances detailed in the evidence.

[8] It is next objected that the evidence showed that Peccarich was not in the line of duty at the time of the accident. We think there is no merit in this objection whatever. A decision by this court that he was not in the line of duty would be equivalent to holding that he must remain where he was at work building the wall and have his life gradually snuffed out by foul air, the same as the light in his cap. It is in evidence that this wall that Peccarich was building was a brattice wall, and that at the time of the accident Peccarich was as much of a brattice man as anything else. The canvas which fell and which he went to re-establish in the entry was used for turning the currents of fresh air into places where it was desired, and he would certainly have been guilty of contributory negligence had he not gone and hung the canvas up so as to, as he testifies, turn fresh air into the place where he was working.

It is next claimed that the evidence showed that Peccarich was guilty of contributory negligence. There is no merit in this assignment of error. In our judgment there was no evidence that Peccarich was guilty of contributory negligence, and, if there was any evidence upon the question, it was properly submitted to the jury and they have found otherwise.

The case was carefully and fully submitted to the jury in a charge that was not excepted to, and we have found no error which would warrant a reversal of the judgment. It is therefore affirmed.

LYKINS et al. v. CHESAPEAKE & O. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. December 2, 1913.)

No. 2,431.

1. COURTS (§ 101*)—SUIT TO RESTRAIN ENFORCEMENT OF STATE STATUTE—COMPOSITION OF COURT.

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]) § 266, requiring the presence of three judges for the granting of an interlocutory injunction restraining the enforcement of a state statute on the ground of its unconstitutionality, does not apply to a suit to enjoin the collection of a tax levied for the benefit of a turnpike company under a special act, where the constitutionality of the act is admitted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 344–350, 629; Dec. Dig. § 101.*]

2. TURNPIKES AND TOLL ROADS (§ 10*)—SPECIAL TAX TO AID IN CONSTRUCTION—LIMITATION OF AMOUNT.

A special tax authorized by the charter of a turnpike company to be levied annually in aid of the construction of its road, and continued until the road is built and paid for, is limited to the reasonable cost of such construction.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 22–38; Dec. Dig. § 10.*]

3. TURNPIKES AND TOLL ROADS (§ 10*)—SPECIAL TAX IN AID OF CONSTRUCTION—SUIT BY TAXPAYER.

Where the charter of a turnpike company provided for the annual levy of a tax to aid in the construction of its road, the levy to be continued until it was completed and paid for, and that all persons paying such taxes should be stockholders in the company to the amount of the taxes paid, such a taxpayer may maintain a suit to require an accounting by the company to determine whether or not the power to tax under the statute has been exhausted, and in aid of a prayer for an injunction.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 22–38; Dec. Dig. § 10.*]

4. TURNPIKES AND TOLL ROADS (§ 10*)—JURISDICTION—ADEQUATE REMEDY AT LAW.

In such case, where, under the statute, payment of the tax is enforceable by indictment, complainant's remedy at law is not adequate and equity has jurisdiction.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 22–38; Dec. Dig. § 10.*]

5. APPEAL AND ERROR (§ 954*)—REVIEW—ORDER GRANTING PRELIMINARY INJUNCTION.

The action of a trial judge in granting a preliminary injunction will not be reviewed, where, under the evidence, it was within the limits of judicial discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818–3821; Dec. Dig. § 954.*]

Appeal from the District Court of the United States for the Eastern District of Kentucky.

Suit in equity by the Chesapeake & Ohio Railway Company against George W. Lykins, Orville P. Pollitt, and the Vanceburg & Stouts Lane Turnpike Road Company. From an order granting a preliminary injunction, defendants appeal. Affirmed.

Allan D. Cole, of Maysville, Ky., for appellants.

Worthington, Cochran & Browning, of Maysville, Ky., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This is an appeal from an interlocutory order enjoining the individual appellants, one the clerk of the county court and the other the sheriff of Lewis county, from certifying a certain tax and giving the requisite notice for its collection for the benefit of the corporate appellant, and enjoining all the appellants from attempting to collect the tax. This tax is founded on the charter of the corporate appellant (hereinafter called turnpike company). The turnpike company was incorporated by special statute enacted April 24, 1890, "for the purpose of building and operating a turnpike road" something more than seven miles in length, between named points, in Lewis county. The road was to be located as near as might be along an existing county road running parallel with the Ohio river. 2 Loc. & Priv. Acts 1889-90, p. 1385. This statute in terms created a special taxing district and imposed on each \$100 worth of taxable property therein an annual tax of 50 cents, which was to commence in 1891 and continue until the road was "built and paid for."¹ By an order of the Railroad Commission of Kentucky the tax complained of was apportioned for the years 1908, 1909, 1910, and 1911, and directed to be certified to the board of valuation and assessment and to the county clerk of Lewis county "for proceedings according to law."

[1] 1. The hearing took place before a single District Judge, upon a motion of appellee for a temporary injunction and a general demurrer of appellants to the bill. It was claimed then, as it is now, that the case required the presence and action of three judges within the meaning of section 266 of the Judicial Code. The interlocutory order was entered October 29, 1912; and the claim respecting the necessity for

¹ "Sec. 12. That in order to enable said company to build their said turnpike road as speedily as possible * * * there is hereby levied on all and every species of property * * * including therein all railway company or companies property situate within the bounds of the taxing district herein created, subject to taxation for state revenue purposes * * * the sum of fifty cents upon each one hundred dollars worth of taxable property * * *, each year, commencing with the year of one thousand eight hundred and ninety-one, and continuing until said road is built and paid for; the tax herein levied * * * shall be expended solely in the location, building and construction of the road, including therein the sums required and necessarily expended by the company in procuring rights of way and other proper expenses incurred by the company in so doing, and in building the road."

The taxing district so created embraced all property "situate within said termini and a line parallel with the Ohio river and within two miles of said river."

additional judges was denied, and we think rightly, no matter whether section 266 as it then existed or as it was amended March 4, 1913 (chapter 160, 37 Stat. 1013) be considered. The object of the enactment was to prohibit the use of the process of injunction to obstruct the enforcement of statutes, or any proceeding based on them, upon any theory of their constitutional invalidity, except through the sanction of the special tribunals there provided for. The bill does not seek to suspend or restrain the enforcement, operation, or execution of any statute of the state, upon the ground of its unconstitutionality. The only statute involved is the special charter enactment before cited; and the constitutional validity of the act, so far as it is pertinent here, is admitted by appellee. Indeed, while the Court of Appeals of the state has held that the portion of this statute relating to the selection of a person to assess the tax is void, yet it also held that in virtue of the general law "the assessor of the county should assess the property in the taxing district, and return the same as other tax lists are returned," and the decision in terms sustained the rest of the act. *Bruce v. Vanceburg & Stouts Lane Turnpike Road Co.* (Ky.) 35 S. W. 112, 113; *Vanceburg & S. L. Turnpike R. Co. v. Maysville & B. S. R. R. Co.*, 117 Ky. 275, 281, 77 S. W. 1118. It is true that the proceedings enjoined are based upon an order of the State Railroad Commission, and that an order of such a commission is for some purposes regarded as a law of the state (*Grand Trunk Ry. v. Indiana R. R. Comm.*, 221 U. S. 400, 403, 31 Sup. Ct. 537, 55 L. Ed. 786); but here again, as stated, the order is not resisted on any ground of unconstitutionality of the statute in virtue of which the order was made, nor was the interlocutory order granted upon any such theory, and so a case was not presented demanding the presence or action of three judges (*Cumberland Telephone & Telegraph Co. v. City of Memphis* [D. C.] 198 Fed. 955).

[2] 2. The theory of the bill and the evidence is, in the main, that the turnpike company had long before received aid through taxation, proceeds of stock subscriptions, and the construction at the expense of the county of a necessary bridge, sufficient for all purposes authorized by its charter and for completing the road; and that the turnpike company either has the funds necessary to complete the road or that they have been diverted. In truth, the evidence tends strongly to show that the turnpike company has through the sources indicated received much more money than could have been reasonably expended in building the road contemplated by its charter; and the turnpike company offered no evidence either in explanation or denial of this showing, but rested on its demurrer. Judge Evans in disposing of this feature of the case in part said:

"Now, here is a remarkable case, as it strikes me. A turnpike road company authorized to use the whole power of the state of Kentucky to assess a tax upon individual citizens and upon corporations has proceeded for some 15 or 18 years to collect the taxes due from those persons, but has never performed the object for which the statute authorized it to collect the taxation, viz., the building and completion of the turnpike road, that was supposed to be built for the benefit of that community. They have been called upon year after year to pay the tax, but they have gotten no benefit from it. The money has been kept by the turnpike road company, or somebody else. * * * This

has gone on now until they have accumulated something like \$10,000 more than would be necessary, according to the testimony, to complete the turnpike road. Now, under these circumstances, should the court permit it to go on indefinitely?"

If the evidence contained in the record and upon which the learned trial judge acted is not true, the turnpike company should have met it by denial and proof, not by admission. Presumably the turnpike company either knew or had the means of ascertaining all the facts; and in the absence of explanation the facts disclosed by the other side must for the purposes of this appeal be accepted as true. In testing the effect of such evidence, it is to be observed that, although the turnpike company's corporate powers respecting the authorized road included the right of maintenance (section 1 of the act), yet its right to secure aid through taxation was expressly limited to the cost of construction (section 12). True, "construction" was to include cost of rights of way; but, as we have seen, the road was to be located as far as practicable along an existing county road. The entire turnpike road is open and traveled and is partly macadamized, but it is not suggested that anything whatever was expended for rights of way. Why then on the present showing was not the right to tax exhausted? The statute was special, and the object designed to be accomplished by it was special. It is too plain for argument that power thus bestowed and restricted cannot be exercised beyond the reasonable cost of the thing specified. If illustration of this were necessary, it might be found in *Board of Education of City of Newport v. Nelson*, Mayor, 109 Ky. 203, 208, 209, 58 S. W. 700, 702, where the court approved language of the Circuit Judge:

"While the school board is authorized to demand and receive from the city a sum equal to 35 cents on each \$100 of taxable property, yet the right is not an arbitrary one, and must arise out of the necessities of the case. No more may be demanded than is reasonably necessary, nor must the estimate be extravagant."

It is not perceived why the principle of such a restriction is not the equivalent of an express limitation to a distinct amount, for reasonable cost is open to definite ascertainment; and plainly definite limitation cannot be exceeded. *Corbett v. City of Portland*, 31 Or. 407, 418, 48 Pac. 428, and citations; *Cummings v. Fitch*, 40 Ohio St. 56, 61; *Dumphy v. Supervisors of Humboldt County*, 58 Iowa, 273, 276, 12 N. W. 306; *State ex rel. Dillon v. County Court*, 60 W. Va. 339, 348, 349, 55 S. E. 382.

[3] 3. The bill contains a prayer for "an accounting showing the amounts of all funds, from whatever source, obtained or collected by it (the turnpike company), and of all expenditures of whatever kind made by it." The relation of the appellee to the tax under review is that of a taxpayer, and its relation to the turnpike company is that of a stockholder. The railroad passes through the taxing district. Section 15 of the act provides that all persons paying taxes during the building of the road shall be stockholders in the company to the amount of the taxes paid, and that certificates of stock shall be delivered to them from time to time "until the road is completed and paid

for." In 1908 the appellee paid to the turnpike company \$10,481.21 in full of all taxes due or claimed upon the tangible property and franchise of the railroad, subject to taxation in the taxing district, for the years prior to and including 1907. We are therefore unable to see why an accounting should not be allowed and enforced. If the present effect of the evidence should thus be established, it would seem clearly to follow that the right to tax in aid of the turnpike company has been exhausted. The practical situation would be tantamount to the absence of any law at all to authorize the tax; and of course there can be no tax without a law. *Auditor General v. Duluth, etc., R. Co.*, 116 Mich. 122, 125, 74 N. W. 505; *Sebastian, Treas. of Hamilton Co., v. Ohio Candle Co.*, 27 Ohio St. 459, 463; *Greenwood v. Gmelich*, 175 Ill. 526, 531, 51 N. E. 565.

[4] 4. In these circumstances we cannot yield to the insistence that appellee has a plain and adequate remedy at law. Until an accounting is had it cannot be known finally whether the power to tax has been exhausted or not; and the statute of Kentucky imposes severe daily penalties for default in payment of such taxes as these, which are recoverable through indictment. The risk of incurring such penalties in case the suit should fail affords another ground in support of the interlocutory order. *Ex parte Young*, 209 U. S. 123, 148, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

[5] It scarcely need be added that the interlocutory order was, under the evidence, well within the range of judicial discretion; and, where this appears, the rule is not to disturb the action of the trial judge. *City of Shelbyville, Ky., v. Glover*, 184 Fed. 234, 238, 106 C. C. A. 376 (C. C. A. 6th Cir.); *Acme A. Co. v. Commercial Acetylene Co.*, 192 Fed. 321, 323, 112 C. C. A. 573 (C. C. A. 6th Cir.).

The other questions presented have been considered; but, in view of what has been said, they do not require discussion. We have passed by the averment and contention of appellee that the tax provision of the special act has been repealed, because the question may not arise in the further progress of the case.

The order is affirmed, with costs, and the cause remanded for further proceedings.

DENVER & R. G. R. CO. v. BAER BROS. MERCANTILE CO.

(Circuit Court of Appeals, Eighth Circuit. November 17, 1913.)

No. 3,915.

1. CARRIERS (§ 202*)—INTERSTATE COMMERCE ACT—ACTION BY SHIPPER FOR DAMAGES—PLEADING.

In an action by a shipper against a railroad company under Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (U. S. Comp. St. Supp. 1911, p. 1301), to recover for overcharges on interstate shipments for which an award of damages was made by the Interstate Commerce Commission, an allegation in the petition that such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 209 F.—37

charges were unjust, unreasonable, and in violation of law is one largely of fact and is sufficiently specific as against a general demurrer.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906-915; Dec. Dig. § 202.*]

2. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—AWARD OF DAMAGES—INTEREST.

In making an award of damages to a shipper for excessive charges collected by a railroad company, under section 16 of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (U. S. Comp. St. Supp. 1911, p. 1301), the Interstate Commerce Commission has power to allow interest on the excess payments where they were made under protest.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

3. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—POWER TO REDUCE RATES.

When a local rate between points within the same state is found by the Interstate Commerce Commission to be excessive when charged as a part of a joint through rate, the commission has power to order its reduction when so used without establishing a new joint through rate.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

4. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—ORDERS AWARDING DAMAGES TO SHIPPER.

Where the Interstate Commerce Commission on complaint of a shipper has made an order fixing a reduced rate to be charged by a railroad company in the future on certain shipments, it is not required to repeat such order in subsequent orders awarding reparation to the shipper on shipments made under the rate condemned in the first order.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

5. CARRIERS (§ 202*)—ACTION BY SHIPPER FOR DAMAGES FOR EXCESSIVE CHARGES—ALLOWANCE OF ATTORNEY'S FEES—CONSTITUTIONALITY OF STATUTE.

The provision of section 16 of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (U. S. Comp. St. Supp. 1911, p. 1301), authorizing the court to allow a reasonable attorney's fee to the prevailing petitioner in an action for damages brought thereunder, is constitutional.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906-915; Dec. Dig. § 202.*]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action at law by the Baer Bros. Mercantile Company against the Denver & Rio Grande Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 200 Fed. 614.

R. G. Lucas, of Denver, Colo. (E. N. Clark, of Denver, Colo., on the brief), for plaintiff in error.

William B. Harrison, of Denver, Colo., for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

CARLAND, Circuit Judge. This is an action to recover excessive and unreasonable charges for the transportation of beer in car load lots from Pueblo, Colo., to Leadville, Colo., when used as a part of a through transportation charge from St. Louis, Mo., to Leadville.

The railroad company demurred to an amended complaint, and, the demurrer being overruled, it refused to plead further, whereupon the damages claimed were assessed and judgment entered therefor. The railroad company has brought the case here on writ of error complaining of the ruling of the court in overruling the demurrer and as to certain rulings which occurred in the assessment of damages. The ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action. The complaint contained two counts, which for the purposes of the demurrer were the same except that each count referred to a different order of reparation, and except also that the order of reparation in the second count did not fix a rate for the future, but instead thereof there was an allegation that the rate for the future was fixed by the order set forth in the first count.

[1] Section 16 of the act to regulate commerce, as amended, provides that, if a carrier does not comply with an order of the Commission requiring the payment of money, any person for whose benefit such order was made may file in the proper court "a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises." It is objected that the allegation of the complaint that the rates collected were unjust, unreasonable, and in violation of law states no cause of action but mere conclusions of law. Whether a rate is unreasonable or not is largely a matter of fact. A chancellor asked to grant an injunction on a bill simply alleging a rate to be unreasonable might ask for more particulars, and so the railroad company might have had the complaint made more definite and certain by a motion to that effect if the court should have considered the allegation indefinite and uncertain, but as against a general demurrer the allegation is clearly sufficient. A rate is unreasonable either as being too low or too high. Certainly the railroad company could not be misled by thinking the mercantile company was complaining of a low rate. However this may be, the complaint does not stop with the above-mentioned allegation, but alleges that the rate of 45 cents demanded and received by the railroad company per 100 pounds for the transportation of beer from Pueblo to Leadville was unjust and unreasonable, and that any rate or charge for such service in excess of 30 cents for each 100 pounds of beer transported between the two places would be unjust and unreasonable, so that the railroad company was distinctly informed as to the contention of the mercantile company. We see no merit in this objection to the complaint.

[2] It is next objected that the orders of reparation set out in the complaint show that the Commission allowed interest upon the excess rate paid to the railroad company and which it found to have been unreasonable and excessive. It is therefore claimed that the Commission had no authority to so allow interest, and that the orders are void on the theory that this court must condemn the order if it is erroneous in any respect. We think the Commission had full authority and ju-

risdiction to allow interest, as it appears from the complaint that the excessive rates were paid either by the consignor or consignee under protest, and so the railroad company must have known at the time the money of the mercantile company was had and received that the latter claimed the payment to be unlawful.

[3] It is next claimed that the order of the Commission is void because it did not establish a through or joint rate but merely ordered a refund out of the local rate between Pueblo and Leadville. This objection cannot prevail, for the reason that the Missouri Pacific and the Denver & Rio Grande made their own through rate and the Commission treated it as the roads had made it and simply decided that the local rate between Pueblo and Leadville, when used by the companies as a part of a joint through rate, was excessive. The Commission did not pretend to have anything to do with the rate when used as a local rate, but when it became a part of a through rate by the action of the railroad companies the Commission had jurisdiction to make the through rate reasonable. *Denver & R. G. R. R. Co. v. Interstate Commerce Commission* (Com. C.) 195 Fed. 958.

It is next objected that, if the Commission had jurisdiction to reduce the Pueblo to Leadville rate in a proper case, it did not have such jurisdiction in the present case because that rate was not in issue before the Commission. The pleadings before the Commission are not a part of the complaint in this action, and therefore we cannot say what the pleadings actually presented, but, so far as the complaint does state the proceedings had before the Commission, it clearly appears therefrom that it was the charge from Pueblo to Leadville when used as a part of the through rate that was objected to before the Commission.

[4] It is next objected that the order set forth in the second cause of action nowhere fixes a rate for the future and that therefore the order is void under the ruling of this court in *Railroad v. Baer Bros.*, 187 Fed. 490, 109 C. C. A. 337, but the Commission had already, in making the order set forth in the first count of the complaint, established a rate for the future and it was not required to establish a rate for the future in every order making reparation for shipments made under the rate condemned in the first order. To do this would have created great confusion and would have been idle and unnecessary.

This disposes of the matters urged in support of the demurrer, and we find no error in the ruling of the court overruling the same. After the demurrer was overruled and the railroad company had elected to stand upon its demurrer, counsel for the railroad company remained in court and, as the record shows, interposed some objections in the matter of the assessment of damages. Counsel for the railroad company objected to the allowances of interest as provided in the orders of reparation, and the objection was overruled. For reasons hereinbefore stated, there was no error in this ruling.

[5] Section 16 of the act to regulate commerce provides in regard to a proceeding to recover an award of damages by the Commission as follows:

"If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit."

The court, as appears by the record, allowed an attorney's fee of \$250, which it appears counsel for the railroad company objected to and the objection was overruled and an exception taken. The matter of the attorney's fee appears in the record as follows:

"Petitioner thereupon requested the court to tax an attorney's fee for the services of the attorney for the petitioner before the Interstate Commerce Commission and before the court. Defendant then and there duly objected to the granting of such request and to the allowance of such attorney's fee for such services."

It is now objected in this court that the trial court had no authority to allow a fee for services before the Interstate Commerce Commission and that the court had no authority to allow any attorney's fee at all, because the statute providing for the same is unconstitutional. Counsel for the railroad company made no complaint that an attorney's fee was asked for services before the Interstate Commerce Commission in the trial court. The objection simply goes to the allowance of an attorney's fee. It does not appear that the court allowed the \$250 or any part of the same for services before the Commission. We do not think the objection of counsel in the trial court was specific enough to raise the question which he now presents. If the attention of the trial court had been called to the fact that no attorney's fee could be allowed for services before the Commission, the record would probably show that the attorney's fee allowed was for services in the present proceeding in the District Court.

It is objected also that the attorney's fee was fixed arbitrarily without evidence. There is nothing to support this except the assertion of counsel. The record shows the following:

"Petitioner introduced evidence in support of the allegations of its said amended petition."

We do not wish to be understood as deciding that it was necessary for the court to take testimony as to the value of the services rendered by counsel in the present proceeding, but simply that the record does not show that evidence was not taken in fixing the amount of the attorney's fee. The provision in the Interstate Commerce Act allowing an attorney's fee is constitutional. *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746; *Air Line R. R. Co. v. Seegers*, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108; *Ill. C. R. Co. v. Crider*, 91 Tenn. 489, 19 S. W. 618; *Fidelity Mut. Life Ins. Ass'n v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; *Engelbrechtsen v. Gay*, 158 Cal. 30, 109 Pac. 880, 28 L. R. A. (N. S.) 1062, and note, *Ann. Cas.* 1912A, 690.

This disposes of all the objections and exceptions appearing in the record, and, finding no error in the ruling of the court, the judgment below must be affirmed. And it is so ordered.

ALBERT MILLER & CO. v. WILKINS.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1,964.

1. MASTER AND SERVANT (§§ 101, 102, 235*)—INJURIES TO SERVANT—DUTIES OF MASTER—SAFE INSTRUMENTALITIES—DUTY TO PROVIDE.

A master is bound to provide safe instrumentalities for his servants while at work, and the servants may absolutely rely on the performance of such duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192, 710-722; Dec. Dig. §§ 101, 102, 235.*]

2. MASTER AND SERVANT (§ 106*)—INJURIES TO SERVANT—USE OF APPLIANCES OF ANOTHER.

Where defendant, by whom plaintiff was employed, used the premises and appliances of the M. Company in removing a quantity of potatoes purchased from said company, he was chargeable with knowledge of, and answerable for, defects in a hoist used on such premises, and belonging to the M. Company, by reason of which defects plaintiff was injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 193-198; Dec. Dig. § 106.*]

3. MASTER AND SERVANT (§ 106*)—INJURIES TO SERVANT—DUTY OF MASTER—SAFE PLACE.

A master is bound to use reasonable care to provide a safe place in which his servants may work, and, if the master contracts to do work on the premises of another, he must exercise the same care for the safety of his servants there as on his own premises.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 193-198; Dec. Dig. § 106.*]

4. DAMAGES (§ 98*)—PERSONAL INJURIES—AMOUNT OF RECOVERY—DETERMINATION—INTEREST METHOD.

In an action for injuries to a servant, an instruction that one way of ascertaining plaintiff's damages would be to award him such a sum as, placed at 5 per cent. interest, would produce the amount he earned, was improper, since the interest method is not a proper way of ascertaining damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 235, 236; Dec. Dig. § 98.*]

5. APPEAL AND ERROR (§ 1068*)—EXTENT OF INJURIES—DAMAGES—PREJUDICE.

Where, in an action for injuries to an employé, the jury awarded only \$3,000, and so could not have found that the injuries were permanent, nor estimated such damages by the interest method, an instruction authorizing them to so estimate the damages was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

6. APPEAL AND ERROR (§ 880*)—RIGHT TO ALLEGE ERROR—CODEFENDANTS—JOINT AND SEVERAL LIABILITY.

Where an injured servant sued his master and the M. Company, charging them with joint and several liability, and the jury found for plaintiff only against the master, the latter could not successfully urge error in the instructions given in regard to the M. Company.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584-3590; Dec. Dig. § 880.*]

In Error to the District Court of the United States for the Western District of Wisconsin; Arthur L. Sanborn, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Louis E. Wilkins against Albert Miller & Co. and another. Judgment for plaintiff, and defendants Albert Miller & Co. bring error. Affirmed.

Defendant in error recovered a judgment against plaintiffs in error, a co-partnership, in the sum of \$3,000 for personal injuries received as a result of a defective hoisting device, while in the employ of plaintiffs in error upon the premises of the Murphy Company, a corporation, which was made a party defendant to the complaint herein, but which the jury failed to include in its verdict of guilty.

From the record it appears that plaintiffs in error were using the premises of the Murphy Company in removing therefrom a large quantity of potatoes which they had purchased from the Murphy Company and which they were to remove at their own cost. In doing so, they were given the right to use so much of the Murphy Company's premises as necessary, including the hoisting apparatus. This latter consisted of a block and tackle fastened to a joist near the ridge of the roof by means of a number of strands of wire passing through the eye of the block and around the joist. A rope was run through the block and over the sheave. One end of the rope was attached to the object to be hoisted from the cellar of the warehouse, while the other was used by the operator in applying power for hoisting. The Murphy Company had been accustomed to lift by horse power. Plaintiffs in error substituted their own rope and the weight of a man upon the free end of the rope, whereby a bag of potatoes, being of less weight than the man, was lifted to the desired elevation. In adjusting the device, plaintiffs in error were obliged to send a man up to the block, so that, had plaintiffs in error so directed, the condition of the block and its wire lashing might have been ascertained. After all of the potatoes save a few bushels had been removed, and after some five or six days' use of the device, the wire lashing gave way under the weight of defendant in error and he was precipitated into the cellar, a distance of about ten feet, whereby he was injured. Thereupon he brought this suit, charging plaintiffs in error and Murphy Company jointly and severally with negligence in not furnishing him with a safe place in which, and safe appliances with which, to work. The trial resulted as above set out. Plaintiffs in error have brought the cause to this court, assigning as error that the court refused to take the case from the jury as to Miller & Co. and in telling the jury that it was the duty of Miller & Co. to use ordinary care in providing a safe working place and a safe appliance in and with which defendant in error was to work, and also that the court committed further error in telling the jury how they might arrive at the amount of damages if they found defendants guilty, and in giving certain instructions as to what facts must be proven before Murphy Company could be held liable.

S. T. Swansen, of Madison, Wis., S. L. Lowenthal and Fred Lowenthal, both of Chicago, Ill., and T. C. Richmond and R. W. Jackman, both of Madison, Wis., for plaintiffs in error.

W. H. Frawley and T. F. Frawley, both of Eau Claire, Wis., for defendant in error.

John Evans, for Murphy Co.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] There can be no doubt, under the facts presented, as to the liability of plaintiffs in error for the injuries sustained by defendant in error. They were clearly charged with the duty of providing safe instrumentalities for their servants while at work, and defendant in error had a right to rely upon their performance of that duty.

[2] It is said in *Labatt, Master & Servant*, § 172:

"Both upon principle and authority it is clear that a master is answerable for defects in any instrumentalities which he has temporarily taken over from the owner and made a part of his own plant. In such cases the elements of possession and the exercise of control are decisive. * * * So far as regards his obligations to his servants, he must be considered as the owner *pro tempore*. This principle is applicable whether he has borrowed the appliance in question or has hired it for a specific consideration or has taken possession of it for a definite or an indefinite period with a view to the performance of certain work in which he and the owner are both interested."

Where an elevator company took a car from a railway company by means of an inclined track, an employé of the elevator company was injured, while engaged in conducting a car by gravity down this incline, by reason of a defective brake on the car. Held, that the defect might have been discovered by the use of ordinary care on the part of the elevator company, and that the question of the liability of the elevator company was properly submitted to the jury. *Republic Elevator Co. v. Lund et al.*, 196 Fed. 745, 116 C. C. A. 373 (C. C. A. 8th Cir.).

[3] That a master is bound to use reasonable care to provide a safe place in which his servant may work is now too well established to require citation of authority, and it can make no difference, so far as the servant is concerned, whether the master is using his own property or that of another. As was said in *American Machinery Co. v. Ferry*, 141 Ky. page 374, 132 S. W. page 547:

"The master who contracts to do work on the premises of another must exercise ordinary care for the safety of his servants there, no less than on his own premises."

Miller & Co. were not excused from the duty of providing a safe place and safe appliances. They had full opportunity to satisfy themselves that the premises and appliances were in good and safe condition, and were bound to do so as to defendant in error. Therefore the court properly left it to the jury to determine from the evidence whether they discharged their duty in that respect toward defendant in error.

[4] Plaintiffs in error contend that the court erred in telling the jury that one way of ascertaining the amount of damages, if they found plaintiffs in error and said *Murphy Company* guilty as charged, would be to award defendant in error such a sum as, placed at 5 per cent. interest, would produce the amount he earned, and that it was error, on the facts of the case, to tell the jury it was for them to decide whether the injuries of defendant in error were permanent, at the same time advising them that he did not think, from the evidence, that they were permanent.

The interest method above stated was not a proper way in which to ascertain the amount of damages. *Houston Railway Co. v. Willie*, 53 Tex. 318, 37 Am. Rep. 756; *Rudiger v. C. St. P. M. & O. Ry. Co.*, 94 Wis. 191, 68 N. W. 661; *Crouse v. C. & N. W. Ry. Co.*, 102 Wis. 196-208, 78 N. W. 446, 778; *Hackett v. Wis. Cent. Ry. Co.*, 141 Wis. 464-473, 124 N. W. 1018.

[5] As to the extent of the injuries, we are of the opinion that that question was properly left to the jury. However that may be, it is plain from the small amount of the verdict that the jury neither considered the injuries permanent nor estimated damages in the manner suggested by the court.

In *Press Pub. Co. v. Monteith*, 180 Fed. 356-362, 103 C. C. A. 502, 508, the United States Circuit Court of Appeals for the Second Circuit states the rule as follows, viz.:

"The more rational and enlightened view is that in order to justify a reversal the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights. Prejudice must be perceived, not presumed or imagined."

Here, whatever presumptions there are rebut the theory of prejudice or injury.

[6] With reference to the contention of plaintiffs in error that they were prejudiced by the instructions of the court bearing upon the liability of Murphy Company, it is sufficient to say that the complaint joins both parties, charging them with joint and several liability. The jury found only plaintiffs in error to be guilty, as, under the pleadings and evidence, it lawfully might do. Having been found guilty, they are not in position to urge error in the instructions given by the court in regard to Murphy Company. This is a suit brought by defendant in error and not one for the adjustment of the relative rights between the defendants to the suit. The only question is: Were the plaintiffs in error guilty of negligence? The jury found they were, and the court entered judgment on the verdict, wherein we concur. Other errors assigned we do not deem it necessary to decide.

The judgment of the District Court is affirmed.

JONES v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1,965.

1. CONTEMPT (§§ 40, 60*)—CIVIL OR CRIMINAL CONTEMPT.

A contempt proceeding, entitled as such and instituted in the name of the United States to punish a proposed surety on the bond of a person accused of crime, for alleged perjury in attempting to qualify, is criminal in its nature, entitling accused to all the presumptions which obtain in a criminal prosecution, including the presumption that he is innocent until his guilt has been established beyond a reasonable doubt.

[Ed. Note.—For other cases, see *Contempt*, Cent. Dig. §§ 122-124, 183-187; Dec. Dig. §§ 40, 60.*]

Civil and criminal contempts distinguished, see note to *Merchants' Stock & Grain Co. v. Board of Trade of City of Chicago*, 120 C. C. A. 593.]

2. CONTEMPT (§ 60*)—PERJURY—OWNERSHIP OF LAND.

Where, in a prosecution of a proposed surety on a bail bond for contempt in testifying that he was the owner of the fee of certain real property, it was shown that after he had acquired title to the property, and before he offered himself as surety on the bond, he had executed a deed of the property to his wife, but with the understanding that it should only

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be delivered and recorded in case he predeceased her, such deed did not vest in her any interest in the property, and its existence and the fact that she was able to produce it when she was sent home without her husband to get it did not establish beyond a reasonable doubt that accused had testified falsely in stating that he was the owner of the property.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 183-187; Dec. Dig. § 60.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Albert Charles Jones was convicted of contempt of court in committing alleged perjury on his examination to qualify himself as surety on the bail bond of one Johnson, and he brings error. Reversed, with directions to discharge.

This matter is before us on writ of error based upon the judgment of the District Court committing plaintiff in error, hereinafter termed "respondent," to prison for alleged contempt of court, in that he tendered himself on November 8, 1912, to said court as a surety upon the bail bond of one Johnson, who was before said court under indictment, and represented to the court under oath that he was the owner in fee of premises known as No. 2969 Michigan avenue, Chicago, Ill.

From the record it appears that on August 24, 1912, one Mary Meyer, who four days thereafter became the wife of respondent, deeded to him said real estate, which was, approximately, of the value at which it was scheduled, for considerations which are not clearly set out but some of which were valuable. This deed was duly recorded on August 28, 1912. During the examination to which respondent was subjected at the time he tendered himself as a surety, he disclosed to the court, somewhat reluctantly and under the pressure of rigid inquiry, that on the day he recorded his deed to said premises he executed a deed back to his said wife. Just what was to be done as to the custody of this deed he does not clearly remember, but does testify that it was to be delivered to her only in the event of his death, in order to prevent any interest therein vesting in his child by a former marriage. In this he is corroborated by his said wife and by Levering, the lawyer who prepared both deeds and acted as attorney for both parties in regard to their said transactions. The latter remembers little concerning the understanding had at the time as to what immediate disposition was to be made of the deed, but testified unqualifiedly that it was not to be placed of record during the grantor's lifetime. He supposes it was taken away with the rest of the papers. Respondent testifies that he supposed his lawyer would keep it. It was never recorded. Just what was done with it does not appear, except that, when the District Court had ordered respondent into the jury room after hearing his testimony for the purpose of investigating whether the same were true or false, he directed the court bailiff to accompany Mrs. Jones to their home and bring the deed back to the court. This was done, and the deed impounded. The bailiff testified that he remained downstairs in the premises, while Mrs. Jones went upstairs and then came down and delivered the deed to him. He knew nothing of the circumstances under which she obtained it. All of the foregoing proceedings were had and entitled in the matter of Johnson's application for release on bail. Respondent, having been sent to and directed to remain in the jury room, at the close of his testimony as above stated, was not present in court during said subsequent proceedings in re said Johnson's bond. Thereupon on said 8th day of November, 1912, the District Court entered an order based upon the testimony adduced in re said Johnson's application for release on bail aforesaid, finding that respondent had testified falsely in deposing before the court that he was the owner in fee of said premises and that the same were free from all incumbrance; that he had, by the name of A. Charles Jones, executed and delivered a warranty deed to said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

premises to Mary M. Jones on August 28, 1912, which deed was in her possession and produced in open court; that respondent had committed perjury and, by reason of his said attempt to impose on the court, did willfully and maliciously attempt to obstruct and impede the due administration of justice in said court, and ruled that he show cause by a day named before said court why he should not be punished for contempt; and that, pending further hearing, he be held under bond in the penal sum of \$10,000. Thereupon, and on November 8, 1912, respondent was committed to jail in default of bond.

For answer to said rule, respondent charged that the court was without jurisdiction to try or punish him because no sworn complaint had been filed advising him of what he was charged with; that he had been excluded from the courtroom at the time testimony was taken as to his qualification as surety; that no copy of said testimony was filed in the present cause; that the said contempt order was based upon the testimony of his wife and his attorney, neither of whom should have been permitted to give evidence against him. For further answer respondent stated under oath that he was the owner of the premises in question when he so deposed in court and that his testimony in that behalf was not false; that he gave his present wife valuable consideration for said conveyance to him, and that the same was a bona fide conveyance to him, and that his deed back to his said wife was not to be recorded or take effect until after his death; that said deed had never been recorded; that at the time he deposed as aforesaid he had been advised by his lawyer, and believed, and still believes, himself to be the owner of said lot and house, and that his attorney, Levering, took said deed, as he supposed, in escrow, and that he was of that mind at the time he so attempted to qualify as bondsman. A hearing was had upon said rule on November 14, 1912, at which witnesses were examined. At the close of the evidence, respondent by counsel moved the court for discharge from said rule because it was entered without the filing of a complaint or information, and for the further reason that the testimony was incompetent and was taken in his absence; also, because perjury was punishable by indictment and not as for contempt of court, and also because of his sworn answer and because the evidence did not show respondent to be guilty as charged, beyond a reasonable doubt. All of which motions were overruled by the District Court, and respondent, having been adjudged to have failed to show cause, was adjudged to be guilty of contempt and ordered to be confined in the jail of Will county, Ill., at Joliet, for a term of 12 months.

For error respondent assigns:

- (1) That no sworn complaint was filed informing him of what he was charged with.
- (2) That the rule to show cause was based upon testimony taken while he was excluded from the courtroom.
- (3) That said order was based upon the testimony of his wife.
- (4) That the court held that perjury constituted contempt.
- (5) That the evidence did not sustain the charge of perjury.
- (6) That counsel of respondent was permitted to testify.

David K. Tone, of Chicago, Ill., for plaintiff in error.

James H. Wilkerson, U. S. Atty., of Chicago, Ill.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] Under the authorities, the present contempt proceeding, having been entitled as such and brought here on writ of error and being entirely punitive in its character, is criminal in its nature, and respondent was clothed with the presumptions that obtain in a criminal prosecution. He was presumed innocent until that presumption was overcome and his guilt established beyond a reasonable doubt. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34

L. R. A. (N. S.) 874; *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746.

In *Coffin v. United States*, 156 U. S. 459, 15 Sup. Ct. 404, 39 L. Ed. 481, the court says:

"Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, where by his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created."

This case was followed in *Dalton v. United States*, 154 Fed. 461, 83 C. C. A. 317, by this court. In *Garrigan v. United States*, 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295, this court again approved the rule and applied it to a proceeding to enforce a criminal contempt and held that the mere inference of full knowledge based upon the facts of that case was not sufficient to overcome the express denial of the accused, fortified by the presumption as defined in *Coffin v. United States*, *supra*.

With this presumption—an active instrument of proof created by the law in his favor, on the one hand, and his sworn denial of the crime of perjury, or attempt to impose upon the court, on the other, both standing guard over his liberty—can it be said that, upon the merits, respondent was proven guilty beyond a reasonable doubt of the charge laid and found against him by the District Court?

[2] Under the laws of the state of Illinois, no lien attaches to lands scheduled by one offering himself as a surety upon a bail bond. Thus it may happen, and, as a matter of common knowledge, often has happened, that the surety disposes of his holdings in order to escape liability as such, in which case there is no protection whenever the purchaser can show good faith. In the present case, so far as the validity of the bond in question was concerned, Jones was the owner of the land in question at the time when he tendered himself as surety. The evidence is clear to the effect that the deed to the wife was not to be delivered or recorded during the husband's lifetime. There is nothing in the record to show that there had been any delivery to the wife to make it effective as a present conveyance. Where it was intended that a deed should remain in escrow, in such a case as this, it was held in *County of Calhoun v. American Emigrant Co.*, 93 U. S. 124, 23 L. Ed. 826, that delivery prior to the happening of the event upon which delivery depended would not vest title in the grantee. In *Fearing v. Clark*, 16 Gray (Mass.) 74, 77 Am. Dec. 394, it is said:

"The rule is different in regard to a deed, bond, or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted."

This statement of the law was approved in *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 604, 18 Sup. Ct. 793, 42 L. Ed. 1156. "The principle upon which the doctrine rests," says the United States Circuit Court of Appeals for the Ninth Circuit in *Balfour et al. v.*

Hopkins et al., 93 Fed. 569, 35 C. C. A. 449, "is that a deed delivered in violation of the terms on which it has been placed in escrow is not in fact delivered, and that its possession by the grantee is no more effective to convey title than would be the possession of a forged or stolen instrument."

It is said in *Hollenbeck v. Hollenbeck*, 185 Ill. 101, 57 N. E. 36, that:

"The mere placing of a deed in the hands of the grantee does not conclusively establish a delivery thereof, within the legal meaning of that word. Delivery is a question of intent, and depends upon 'whether the parties at the time meant it to be a delivery to take effect at once'"—citing *Jordan v. Davis*, 108 Ill. 336.

To the same effect are *Wilson v. Wilson*, 158 Ill. 567, 41 N. E. 1007, 49 Am. St. Rep. 176, and *Elliott v. Murray*, 225 Ill. 107, 80 N. E. 77.

In the present case it appears that respondent either hesitated to disclose the fact of the deed back to his wife as above stated, or was advised by counsel, and believed that that transaction, modified by the agreement not to record the deed, did not affect his title to the premises in question for the purpose of qualifying upon Johnson's bail bond.

We find nothing in the record justifying the judgment of the District Court unless it be inferences based upon respondent's failure to disclose, at the earliest opportunity, the facts attending the transfers of said lot as aforesaid. There is nothing inconsistent with an honest intention on respondent's part to furnish ample security on said bond. As in *Garrigan v. United States*, supra, mere inferences derived from the facts of that case were held to be without force to overcome the presumption of innocence and the accused's sworn answer, so here, even weaker inferences cannot be held to furnish a basis for the exercise of this extraordinary power of the court. The findings of fact of the District Court when predicated upon evidence tending to support them will not be lightly disregarded. Here, however, the record entirely fails to support the findings and judgment.

In view of the foregoing, we deem it unnecessary to discuss the other errors assigned. The judgment of the District Court is reversed, with direction to vacate the same and discharge respondent from said rule.

CURTICE BROS. CO. v. BARNARD et al.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1,991.

1. APPEAL AND ERROR (§§ 901, 1017*)—FINDINGS OF MASTER—REVIEW.

Findings of fact by a master may not be set aside, in the absence of convincing evidence to the contrary; the burden resting on appellant to show that the master's report is erroneous and not justified by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670, 3911, 3961, 3996-4005; Dec. Dig. §§ 901, 1017.*]

2. FOOD (§ 1*)—REGULATION—LEGISLATIVE AUTHORITY—BENZOATE OF SODA.

Whether the use of benzoate of soda as a food preservative is harmful, being still an open scientific question, the Legislature has power to pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hibit its use in the exercise of its police power to preserve the public health.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

3. CONSTITUTIONAL LAW (§ 278*)—POLICE POWER—FOOD PRESERVATIVES—REGULATION—STATE LAWS—DUE PROCESS OF LAW—"ADULTERATED."

Laws Ind. 1907, c. 104, § 2, par. 7, provides that if prepared food contains any added substance except common table salt, saltpeter, cane sugar, vinegar, spices, etc., or other harmless preservatives whose use is authorized by the State Board of Health, it shall be deemed adulterated, and a rule adopted by the State Board of Health prohibits the use of benzoate of soda as a food preservative. *Held*, a proper exercise of police power, and was not a violation of the federal or state Constitution, as depriving food manufacturers of their property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 763, 765, 767-770, 772-777, 779-806, 808-810, 816-824, 907-924, 942; Dec. Dig. § 278.*]

For other definitions, see Words and Phrases, vol. 1, pp. 210-212.]

4. FOOD (§ 1*)—REGULATION—STATUTES—CONSTRUCTION—POWERS OF BOARD OF HEALTH.

Laws Ind. 1907, c. 104, § 2, par. 7, provides that for the purposes of the act an article shall be deemed adulterated if it contains any antiseptic or preservative substance except common table salt, saltpeter, cane sugar, vinegar, spices, or other harmless preservative the use of which is authorized by the State Board of Health, and that the board shall adopt such rules as may be necessary to enforce the act, and regulating minimum standards for food and drugs, defining specific adulteration and declaring proper methods of collecting and examining drugs and articles of food, and a violation of such rules shall be punished, etc. *Held* that such act did not authorize the Board of Health to exclude the use of any preservative which it finds to be harmless, but only authorized it to distinguish between preservatives, and prohibit the use of those found to be harmful.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

5. FOOD (§ 5*)—ADULTERATION—"COMMON SALT"—"CANE SUGAR."

Laws Ind. 1907, c. 104, § 2, par. 7, provides that an article of food shall be deemed adulterated if it contains any added antiseptic or preservative substance except common table salt, saltpeter, cane sugar, vinegar, spices, or other harmless preservative, the use of which is authorized by the State Board of Health. *Held*, that the words "common salt" and "cane sugar" were used generically, and applied to and included beet sugar and rock salt.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

6. CONSTITUTIONAL LAW (§ 62*)—DEPARTMENTS OF GOVERNMENT—LEGISLATIVE POWER—BOARD OF HEALTH.

Laws Ind. 1907, c. 104, § 2, par. 7, in so far as it authorizes the State Board of Health to adopt rules to enforce the act with reference to the manufacture of foods and drugs, and to provide minimum standards, defining specific adulteration and declaring proper methods of collecting and examining foods and drugs, etc., was not unconstitutional as conferring legislative power on the State Board of Health.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit by the Curtice Bros. Company, against Harry E. Barnard and others. Judgment for defendants, and complainant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Appellant and another filed their sworn bill against the Food and Drug Commissioner and the members of the State Board of Health of the state of Indiana, praying that they be restrained from enforcing their determination to prosecute criminally those who sold complainants' goods containing benzoate of soda, and from publishing statements that such sale was illegal, and from criminally prosecuting complainants, from intimidating dealers, and from passing any rule forbidding the use of benzoate of soda in catsup or bulk sweet pickles. The bill charges that the use of this article is harmless and very desirable in such manufactures as a preservative, that complainants have large sums invested in such business which will be lost if said proposed enforcement of said rule is carried out with reference to the manufacture of catsup and bulk sweet pickles, and that defendants have notified orators and persons dealing with them that such manufactures do not comply with the Indiana statutes, and that any person found selling foods so containing benzoate of soda in Indiana will be criminally prosecuted. The bill further alleges that defendants purport to be acting under chapter 104 of the laws of Indiana for the year 1907, wherein by section 1 the sale of impure and misbranded foods within the meaning of the act is forbidden. By paragraph 7 of section 2 thereof it is provided that, "If it [a food] contains any added substance except common table salt, saltpeter, cane sugar, vinegar, spices, * * * or other harmless preservatives whose use is authorized by the State Board of Health," it shall be deemed adulterated. By section 7 the State Board of Health is required to adopt such rules fixing the minimum standard as may be necessary to enforce the act, regulating minimum standards for food and drugs and defining specific adulteration. Said section also provides that the violation of such rules shall be punished as set forth in section 10 of the act, by fine for the first two violations, and fine and imprisonment for further violations. The bill further charges that the act was never legally published, and that said section 2, by exclusion, prohibits the use of benzoate of soda in foods. The bill further charges that complainants are advised that said chapter 104 of the Laws of 1907, and particularly said enumerated sections, are unconstitutional and void, especially said section 2 thereof, in that: (1) It is contrary to the fourteenth amendment to the Constitution of the United States; (2) said chapter, and especially said section 7 thereof, vests legislative power in the State Board of Health, contrary to the Constitution of Indiana; (3) it makes the United States pharmacopœia and the act of Congress of June 30, 1906 (34 Stat. 168, c. 3915 [U. S. Comp. St. Supp. 1911, p. 1354]), a part thereof by reference, contrary to the Indiana Constitution; (4) it attempts to deprive orators of their property without due process of law and due compensation, contrary to the Indiana Constitution. The bill further charges that said board has adopted rules which in effect prohibit the use of benzoate of soda, and that the promulgation of said rules is unreasonable and an abuse of power, and that defendants have conspired with their servants and employés to ruin orators' business in Indiana, and that by threats of prosecution orators' business in said state will be ruined, unless defendants be restrained. The bill charges that orators make many shipments of such goods into said state, whereby a multitude of harassments will arise, amounting to a confiscation of orators' property rights if said rules are enforced. Orators further allege that their manufactures are pure and wholesome and do not violate the constitutional laws of Indiana. The bill thereupon asks for a temporary injunction, restraining defendants, their officers and agents, from said acts. Answers were filed denying all conspiracy and all intention to injure orators, denying that benzoate of soda is healthful or necessary, denying the allegations of the bill with regard to confiscation, denying that chapter 104 aforesaid is unconstitutional, admitting their establishment of said rule in accordance with said act. Replication was filed and said cause referred to the master, who filed his report, together with the evidence adduced, finding as matter of fact that it is not an accepted fact that in the scientific world benzoate of soda, even in limited quantities, when ingested in the food of human beings, is harmless, and, as matter of law: (1) That such being the case, the state of Indiana has the power to enact a law forbidding its use in any quantity in food products; and (2) that said chapter 104 of the Acts of 1907, and each section thereof, is not violative of the Constitution of

either the state of Indiana or the United States, and recommending that said bill be dismissed at complainants' cost. Numerous exceptions to the report were offered, all of which were overruled by the court. Thereupon the court dismissed said bill for want of equity, from which decree appellant took this appeal. The errors assigned are numerous, but so far as they have been deemed important, may be summed up as follows, viz: (1) That the court held that the act of the state of Indiana approved March 4, 1907, being chapter 104 of the Acts of 1907, is not, nor is any of its sections, violative of any provision of the Constitution of the state of Indiana or of the Constitution of the United States or its amendments; (2) that the court did not find that benzoate of soda as used by appellant was harmless beyond a reasonable doubt, and so conceded to be in the scientific world; (3) that the court approved the master's report.

Willis Baldwin, of Monroe, Mich., and E. O. Grosvenor, of Detroit, Mich. (John Barton Payne, of Chicago, Ill., of counsel), for appellant.

Thomas M. Honan, Atty. Gen. of Indiana, and William H. Thompson, James E. McCullough, and Miller, Shirley, Miller & Thompson, all of Indianapolis, Ind., for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1, 2] From the evidence and the master's report thereon, it is evident that the question of the harmfulness and harmlessness of benzoate of soda is, as yet, an open one in the scientific world. While the voluminous record of this case deals largely with that question, it is a question of fact. The finding of fact of the master may not, in the absence of convincing evidence to the contrary, be set aside. To show that the report is erroneous and not justified by the evidence, the burden rests upon appellant. That burden is not convincingly sustained by the record. We, therefore, start with the proposition that the question is yet an open one in the scientific world and therefore an open one for the purposes of this hearing. This being so, it was within the power of the Indiana Legislature to prohibit the use of benzoate of soda in the preparation of foods.

In *Laurel Hill Cemetery v. City & County of San Francisco*, 216 U. S. 358-365, 30 Sup. Ct. 301, 302 (54 L. Ed. 515), the court was considering an action brought to restrain the appellees from enforcing an ordinance forbidding the burial of the dead within the city and county limits. The complaint set up that the ordinance violated the fourteenth amendment to the Constitution of the United States. Speaking through Mr. Justice Holmes, the court says:

"To aid its contention and in support of the averment that its cemetery, although now bordered by many dwellings, is in no way harmful, the plaintiff refers to opinions of scientific men who have maintained that the popular belief is a superstition. Of these we are asked, by implication, to take judicial notice, to adopt them, and on the strength of our acceptance to declare the foundation of the ordinance a mistake and the ordinance void. It may be, in a matter of this kind, where the finding of fact is merely a premise to laying down a rule of law, that this court has power to form its own judgment without the aid of a jury. *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 227 [29 Sup. Ct. 67, 53 L. Ed. 150]. But whatever the tribunal, in questions of this kind, great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. *Dobbins v. Los Angeles*, 195 U.

S. 223 [25 Sup. Ct. 18, 49 L. Ed. 169]; *Lochner v. New York*, 198 U. S. 45, 58 [25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133] et seq. But it has expressed through the mouth of the same judge who delivered the judgment in the case last cited the great reluctance that it feels to interfere with the deliberate decisions of the highest court of the state whose people are directly concerned. *Welch v. Swasey*, 214 U. S. 91, 106 [29 Sup. Ct. 567, 53 L. Ed. 923]. The reluctance must be redoubled when, as here, the opinion of that court confirms a specific determination concerning the same spot previously reached by the body that made the law. See *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 341 [21 Sup. Ct. 625, 45 L. Ed. 879]; *Smith v. Worcester*, 182 Mass. 232, 234, 235 [65 N. E. 40, 59 L. R. A. 728].

"But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided; and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded. *Jacobson v. Massachusetts*, 197 U. S. 11 [25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765]; s. c., 183 Mass. 242 [66 N. E. 719, 67 L. R. A. 935]. See *Otis v. Parker*, 187 U. S. 606, 608, 609 [23 Sup. Ct. 168, 47 L. Ed. 323]."

In *Red "C" Oil Co. v. North Carolina*, 222 U. S. 392, 32 Sup. Ct. 154, 56 L. Ed. 240, the court had before it a state statute requiring the inspection of kerosene and other illuminating oils, and fixing a fee of one-half cent per gallon to be paid to the Commissioner of Agriculture for the purpose of defraying expenses connected with the inspecting, testing, and analyzing of the oil. The oil company filed its bill against the State Board of Agriculture to restrain enforcement of the statute, charging an abuse of the police power. The court quoted approvingly the language of the trial judge, where he says:

"While there is much diversity of opinion in respect to the danger of explosion from the use of kerosene oil and of the power to ascertain its illuminating capacity, it is evident that the question has not so far passed beyond the domain of debate, that the Legislature may not subject it to reasonable inspection before permitting the sale in the state. The court cannot say that such a law has no reasonable relation to the public safety or welfare."

In *State v. Layton*, 160 Mo. 474, 61 S. W. 171, 62 L. R. A. 163, 83 Am. St. Rep. 487, wherein was involved the right of the state to prohibit the use of alum in baking powder, the court says:

"What, then, is the test when the constitutionality of an act of the Legislature is assailed as invading the right of the citizen to use his faculties in the production of an article for sale for food or drink? We answer that if it be an article so universally conceded to be wholesome and innocuous that the court may take judicial notice of it, the Legislature under the Constitution has no right to absolutely prohibit it; but if there is a dispute as to the fact of its wholesomeness for food or drink, then the Legislature can either regulate or prohibit it."

This case was approved in *City of St. Louis v. Joseph H. Schuler*, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928.

Manifestly, if the Legislature of Indiana in the reasonable exercise of its police power, and for the welfare of its citizens, condemns as an adulteration the use of benzoate of soda in the preparation of ar-

ticles of food, then, in the absence of a general acceptance of the proposition by the scientific world that such is not the case, there can, as to that matter, arise no question of the violation of the Constitution of the United States, or, as here charged, of the state of Indiana. When deemed necessary by the Legislature for the public health, property rights such as here involved must give way. *Buttfield v. Stranahan*, 192 U. S. 470-493, 24 Sup. Ct. 349, 48 L. Ed. 525.

[3] There remains yet to be considered appellant's contention that paragraph 7 of section 2 and section 7 of said chapter 104 vest legislative power in the Indiana State Board of Health, because they confer upon said board the power to authorize the use of other harmless preservatives and to adopt rules regulating minimum standards for food and drugs. So far as material here, the language of the statute is as follows, viz.:

"That for the purpose of this act an article shall be deemed as adulterated. * * * If it contains any added antiseptic or preservative substance except common table salt, saltpeter, cane sugar, vinegar, spices, * * * or other harmless preservatives whose use is authorized by the State Board of Health * * * The State Board of Health shall adopt such rules as may be necessary to enforce this act, and shall adopt rules regulating minimum standards for food and drugs, defining specific adulteration and declaring proper methods of collecting and examining drugs and articles of food, and the violation of said rules shall be punished, on conviction, as set forth in section 10 of this act."

[4] It is the contention of appellant that the language of said paragraph 7 of section 2 authorizes the State Board of Health to distinguish as between harmless preservatives, permitting the use of some and prohibiting the use of others arbitrarily. Such, however, is not our construction of that paragraph. Applying the familiar rule of construction which requires that when a statute may have two meanings that one will be adopted which will relieve it from constitutional objection, we are of opinion that the statute confers upon the board power to ascertain and declare what is a harmless preservative, and that it is not authorized thereby to exclude the use of any preservative which it finds to be harmless. Nor may it arbitrarily denounce that as harmful which is harmless. Appellant's contention that the language of said paragraph 7 of section 2 of said act excludes the use of beet sugar and rock salt is not justified by a fair construction of the language used, since the terms "common table salt" and "cane sugar" are used generically and apply to and include beet sugar and rock salt.

[5, 6] Can it be said that, construed as above, the statute is violative of the Constitution because it attempts to confer authority upon the State Board of Health? The question is by no means a new one. In *Union Bridge Co. v. United States*, 204 U. S. 364-388, 27 Sup. Ct. 367, 375 (51 L. Ed. 523), it was sought to have the court declare unconstitutional section 18 of the rivers and harbor act of 1899, which authorized the Secretary of War to require bridges over navigable waters to be altered or removed whenever he had reason to believe the same to be an unreasonable obstruction to the free navigation of such waters. The court, through Mr. Justice Harlan, said:

"We are of opinion that the act in question is not unconstitutional as conferring upon the Secretary of War powers of such nature that they could not be delegated to him by Congress."

In *Buttfield v. Stranahan*, 192 U. S. 470-496, 24 Sup. Ct. 349, 355 (48 L. Ed. 525), the court held that the tea inspection act approved March 2, 1897 (29 Stat. 604, c. 358 [U. S. Comp. St. 1901, p. 3194]), which authorized the Secretary of the Treasury to appoint a tea inspection board upon whose recommendation he should fix uniform standards for teas imported into the United States, and required that the importation of all teas found to be inferior to such standard should be prohibited, was not repugnant to the Constitution. "To deny the power of Congress to delegate such a duty," says the court, "would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

By an act passed March 8, 1909 (Laws 1909, c. 554), the Legislature of North Carolina provided for the inspection, under the control of the State Board of Agriculture, of all kerosene or other illuminating oils sold or offered for sale in that state. This act was called in question in *Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina*, *supra*, as attempting to delegate to the Board of Agriculture the exercise of legislative powers. The court, speaking through Mr. Chief Justice White, held that the claim that legislative powers were delegated was untenable (citing *Buttfield v. Stranahan*, *supra*; *Union Bridge Co. v. United States*, *supra*; *St. Louis, Iron Mountain & S. Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563).

The Indiana court has, in *Blue v. Beach*, 155 Ind. 121-123, 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195, held that the statute of 1894, which authorized the State Board of Health to adopt rules and by-laws to prevent the spread of contagious and infectious diseases, was constitutional and not an improper delegation of authority (citing a number of cases).

The case of *Isenhour v. State of Indiana*, 157 Ind. 517-525, 62 N. E. 40 (87 Am. St. Rep. 228), passed upon the food law of 1899 (Laws 1899, c. 121), which, so far as the question now under consideration is concerned, is substantially similar to the act herein involved. "The classification of these subjects and the prescribing of rules by which they may be determined is not legislation," says the court, "but merely the exercise of administrative power."

It is therefore apparent that the position taken by appellant with reference to the constitutionality of the act in question is without merit, as are also the other matters covered by the assignment of errors.

The decree of the District Court is affirmed.

In re HAMILTON AUTOMOBILE CO.

KIMBALL & CO. v. JOHNSON.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1,989.

1. BANKRUPTCY (§ 311*)—PREFERENCES—SURRENDER—PROOF OF CLAIM.

Bankrupt's trustee having objected to petitioner's claim, alleging that petitioner had received a preference on its original account consisting of an automobile valued at \$1,500 and an open account in favor of the bankrupt against M. for \$1,300, and petitioner having refused to surrender the preference, its claim was disallowed. After confirmation the trustee sued to recover the preference of \$1,500 which amount the petitioner paid with costs. No action was ever brought by the trustee to recover the claim against M., but petitioner thereafter tendered the M. claim, alleging that it was uncollectible, and prayed leave to amend its claim already filed by adding thereto the sum of \$1,500 paid on the judgment. *Held*, that petitioner occupied the position of a creditor who had received and surrendered a preference and was not barred from such relief by reason of its failure to account for the preferences at an earlier date, neither the trustee nor the creditor having been prejudiced by the delay.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.*]

2. BANKRUPTCY (§ 311*)—CLAIMS—DISALLOWANCE—VACATION OF ORDER.

Where after a claim against a bankrupt's estate had been disallowed because of an alleged preference received by the creditor, the trustee recovered the preference, whereupon the referee permitted an amendment and proof of the creditor's claim, such action constituted a vacation of the former order disallowing the claim as it had been presented, which the referee was authorized to do by Bankr. Act July 1, 1898, c. 541, § 2, cl. 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), conferring jurisdiction on bankruptcy courts with reference to claims, and section 57g, 30 Stat. 559 (U. S. Comp. St. 1901, p. 3443), as amended by Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1504), and General Order 96, cl. 6, giving to a referee the power to reopen a ruling on claims; the court, so long as the bankrupt's estate is pending and unsettled, having jurisdiction to modify its rulings and conform to the rights of the parties.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.*]

3. BANKRUPTCY (§ 328*)—CLAIMS—FILING—TIME—AMENDMENT.

Where a claim against a bankrupt's estate was filed within a year after adjudication and disallowed because of an alleged preference which the creditor thereafter surrendered, so that it appeared that justice required that the claim be amended and allowed for a larger amount than the claim when first presented, but for the same claim and subject-matter, an amendment increasing the amount of the claim and refiling the same was not barred by the one-year limitation for proving claims specified by Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 559 (U. S. Comp. St. 1901, p. 3443), as amended by Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1504).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. § 328.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

In the matter of bankruptcy proceedings of the Hamilton Automobile Company. From an order dismissing an amended petition of C.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

P. Kimball & Co. to amend and prove its claim against the bankrupt's estate, to which E. H. Johnson, trustee, objected, the claimant appeals. Reversed, with directions to confirm the referee's report and allow the claim.

See, also, 198 Fed. 856, 117 C. C. A. 135.

On March 12, 1908, appellant filed its claim before the referee in *Re Hamilton Automobile Company*, a bankrupt, for \$1,782.58. Thereafter the trustee filed his objections to the allowance thereof, and such further action was had that the referee found that appellant had received a preference upon its original account, consisting of a Lozier automobile valued at \$1,500 and an open account in favor of bankrupt against Levy Mayer in the sum of \$1,300. Upon the refusal of appellant to surrender its said alleged preference, the referee disallowed its said claim, on December 16, 1908. Appellant then filed a petition to review. Upon the hearing thereof, the District Court confirmed the referee's action in the premises. Thereupon the trustee brought suit and recovered judgment against appellant for said preference of \$1,500, which amount, with costs, was duly paid by the trustee. No action was brought by the trustee to recover for said alleged claim against Levy Mayer.

On June 28, 1912, appellant filed with the referee its petition setting out the previous disallowance of its claim by the referee because of said preferences; that, on judgment rendered against it therefor, it had paid to the trustee said sum of \$1,500 and costs, which had appeared as a credit upon its original claim; and that no action had been taken as to said Mayer claim because it was worthless, said Mayer having a good defense thereto. Appellant in said petition tenders to the trustee said Mayer claim, alleging that it has collected nothing thereon and prays leave to amend its claim already filed and disallowed, by adding thereto the said sum of \$1,500 so paid by it on said judgment—making a total amount claimed of \$3,282.58. Said petition then prays that it may stand as such amendment and that said amended claim be allowed and that it be paid its dividend thereon. To this petition the trustee interposed a demurrer, which the referee overruled. Thereupon the referee allowed said claim for said sum of \$3,282.58, which action the trustee took to the District Court on petition to review. That court set aside the order of the referee and sustained the demurrer and dismissed said amended petition of appellant for want of equity, from which order this appeal is taken, appellant having elected to stand by its demurrer. The errors assigned are the order of the court vacating the order of the referee, sustaining said demurrer, and dismissing said amended petition for want of equity.

Edward B. Esher and Elmer H. Adams, of Chicago, Ill. (James Rosenthal and Francis J. Houlihan, both of Chicago, Ill., of counsel), for appellant.

Frederick D. Silber, Martin J. Isaacs, Clarence J. Silber, and James D. Woley, all of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLAAT, Circuit Judge (after stating the facts as above). Appellee raises the following objections to the relief herein prayed by appellant, viz.:

1. The insufficiency of the amended petition;
2. The inclusion by the referee of the claim against Mayer as among those constituting the preference, thereby showing it to be of value and not surrendered as provided by statute.
3. The bar of the first order disallowing appellant's claim.
4. The bar of the one-year limitation of section 57n.

[1] Unless weight be given to said objections 2, 3, and 4, no reason is perceived why the petition is insufficient. Under the decisions

of the Supreme Court in *Keppel, Trustee, etc., v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790, and *Page v. Rogers, Trustee*, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, appellant stands in the position of a creditor who has received and surrendered a preference.

We are not impressed with the argument that, by reason of its failure to account for the claim against Levy Mayer at an earlier date, it has failed to surrender completely the preference charged. The appellant charges in its verified amended petition that said claim is valueless because said Mayer had a perfect defense thereto, and that, if such were not the case, said claim was as good and collectible at the time it was tendered to the trustee as when assigned to appellant. The bankruptcy act deals with matter of substance and the mere preferential transfer of a worthless claim does not come within the meaning of the act. The trustee was not, nor were the creditors, in any way prejudiced by the action of appellant with reference to said claim. Nor do we find, in the recital of the referee enumerating said claim as a part of the preference obtained by appellant, any authority for holding that it was of any value. It was not followed up by the trustee, and was evidently not worth the trouble. Moreover, there was ample time in which he could have brought suit to recover the amount it called for, after it was tendered back to him. It is plain from the record that appellant surrendered all the advantage it had received from the preference.

[2] The action of the referee in allowing appellant's claim after the surrender of the preference had the effect of undoing his former order disallowing said claim as it was then presented, but came clearly within the powers conferred by the act. Clause 2 of section 2 of chapter 2 of the bankruptcy act authorizes District Courts of the United States to "allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates." Subject to revision by the District Court, the referee is authorized to perform these acts. Section 57g reads:

"The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances." Act July 1, 1898, c. 541, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443) as amended by Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1504).

Subdivision k of said section 57 provides that:

"Claims which have been allowed may be reconsidered for cause and re-allowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

General Order 96, cl. 6, gives the referee, on petition filed by any creditor or the trustee, power to reopen, and, "if the claim ought to be expunged or diminished," to order it expunged or diminished. Thus the spirit of the act, as well as the express declaration of section 2 of chapter 2 thereof, seems to be that the court retains control of all of the proceedings whenever necessary to effect the purpose

thereof. We are of the opinion that, so long as the bankrupt's estate is pending in the court and unsettled, the court has, under the bankruptcy act, and especially under section 2 of chapter 2 thereof, power over its orders and records as to the disposition of claims, to modify the same to conform to the rights of parties, and that therefore the referee was not, in the present case, estopped from permitting said amendment and the allowance of the claim in accordance with the prayer of the amended petition, by his former order disallowing the claim as then presented.

[3] It is urged that the one-year limitation for proving claims against a bankrupt's estate barred the right of appellant to have the amended claim proved up. We are of the opinion that section 57n does not apply in the present case. The claim had been filed within the year. By reason of further proceedings it became apparent that justice required it should be amended and allowed for a larger amount than that claimed when it was first presented, but for the same claim or subject-matter. This situation seems to have been clearly covered by the act, which has been construed in this respect by the Supreme and other federal courts. In *Hutchinson v. Otis*, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, the court had before it a case in which a creditor had obtained attachments against one who was within four months thereafter declared a bankrupt, and had attached debts, which, upon entry of judgments, were paid over to the attaching creditor, who then satisfied the judgments, guaranteeing the garnishees against loss. The trustee in bankruptcy demanded payment of the debts from the garnishees, whereupon the creditor, who had collected them and guaranteed the garnishees against loss, paid the amounts over to the trustee. The court held that the action of the trustee undid the satisfaction of record of the creditor's judgments and that the same were not a bar which would prevent the creditor from proving its claim against the estate in the hands of the trustee. The court says:

"The proof of debt originally filed is admitted to have been defective. A substituted proof was filed by consent of the trustee more than a year after the adjudication, the facts having been agreed in the meantime and an appeal taken. It is argued that the allowance of the amendment is within section 57n, forbidding proofs subsequent to one year after the adjudication, etc. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The clause relied upon cannot be taken to exclude amendments."

To the same effect are *In re Kessler*, 184 Fed. 51, 107 C. C. A. 13, *Powell v. Leavitt*, 150 Fed. 91, 80 C. C. A. 43, and *Bennett v. American Indemnity Credit Co.*, 159 Fed. 624, 86 C. C. A. 614.

We are therefore of the opinion that the referee was right in allowing appellant to amend its said claim after the expiration of the year from the date of adjudication, and in allowing the same as amended. The judgment of the District Court disallowing said amended claim is reversed, with direction to that court to confirm the referee's report and allow said claim.

ST. LOUIS MERCHANTS' BRIDGE TERMINAL RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1,893.

1. CARRIERS (§ 37*)—CARRIAGE OF LIVE STOCK—28-HOUR LAW.

A terminal railroad company whose tracks connected with the eastern terminus of a through line in St. Louis, and formed the only connection between such terminus and the nearest available stockyards where live stock could be unloaded for rest, feed, and water, which was across the river in Illinois, by accepting from such connecting carrier cars of cattle which had already been confined for a longer time than permitted by the 28-Hour Law (Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 [U. S. Comp. St. Supp. 1911, p. 1341]) and moving them with all reasonable dispatch to such yards, where they were unloaded, cannot be said to have violated the statute.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*

Liability of carrier for failure to feed, water, and rest live stock and for violation of the 28-Hour Law, see note to *St. Joseph Stockyards Co. v. United States*, 110 C. C. A. 435.]

2. CARRIERS (§ 37*)—CARRIAGE OF LIVE STOCK—STATUTORY REGULATION—"WILLFULLY."

"Willfully," as used in the 28-Hour Law (Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 [U. S. Comp. St. Supp. 1911, p. 1341]), providing for a penalty or forfeiture by a carrier who knowingly and willfully fails to comply with the provisions of the act, means purposely or obstinately, and describes the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7468-7481, 7835, 7836.]

In Error to the District Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Action at law by the United States against the St. Louis Merchants' Bridge Terminal Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

This suit was brought by the United States, defendant in error, against plaintiff in error to recover several penalties for several alleged violations of the so-called 28-Hour Law, being "An act to prevent cruelty to animals while in transit by railroad or other means of transportation." The declaration originally contained five counts, of which the fifth was dismissed on the trial. Plaintiff in error filed its plea of not guilty and several special pleas, but seems to have relied only on its plea of not guilty. The cause was submitted to the court upon stipulations of facts without a jury. From these it appears that the Wabash Railroad Company and the Chicago & Rock Island Railway Company, respectively, had located the termini of their several tracks entering St. Louis, Mo., from a westerly direction, together with their several yards, at points upon the track of plaintiff in error in said city of St. Louis; that plaintiff in error was, at the time of the said alleged violations, a Missouri corporation whose duty it was to receive cars from said several railroads and others and move them across the Mississippi river to their several railroad connections, as might be desired, for forwarding or otherwise; that said roads had no other means of making connection between the termini west of the river and those east of the river than by transportation over the lines of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff in error; that the gap thus filled by plaintiff in error covered a distance of about five miles; that the tracks of plaintiff in error also connected with the yard tracks of the National Stockyards, located at National City, Ill.; that none of the roads involved had or were so located that they could have unloading, resting, feeding, and watering pens within the city of St. Louis or at any point nearer or more convenient and available than were the National Stockyards; and that, as a matter of fact, all of the roads centering at St. Louis and at and adjacent to East St. Louis, Ill., were accustomed to have their stock freight unloaded, rested, fed, and watered at said National Stockyards. It further appears from said stipulations that plaintiff in error, on certain dates in said counts mentioned, received on its tracks in St. Louis, Mo., to be forwarded, certain cars loaded respectively with stock which had been confined en route for periods of considerably over 36 hours, which cars, without unreasonable delay, plaintiff in error transported across the river to the tracks of the National Stockyards to be unloaded, rested, fed, and watered as required by law, and that the same were by said National Stockyards promptly so cared for; that the stock named in said fourth count was consigned to parties at said stockyards; that after being so cared for by said stockyards, plaintiff in error received the stock mentioned in said counts 1, 2, and 3 and delivered it to the several roads by which it was routed forward, and that for its said service it charged and received a flat sum of \$4 per car, which sum was not made a part of the joint rate. Upon this evidence the court found plaintiff in error guilty upon all four counts and entered judgment thereon and on each of them. Plaintiff in error thereupon sued out its writ of error to this court, and assigns as error the said judgment of the trial court.

T. M. Pierce and J. L. Howell, both of St. Louis, Mo., and Edward C. Kramer, Rudolph J. Kramer, and Bruce A. Campbell, all of East St. Louis, Ill., for plaintiff in error.

Wm. E. Trautmann, of East St. Louis, Ill., S. M. Clark, of Danville, Ill., and John E. Hamlin, of East St. Louis, Ill., for the United States.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The statute under which this suit was instituted (Supplement of 1911 to Compiled Statutes of 1901, passed June 29, 1906) prohibits the confinement of stock for a period of more than 28 hours, without unloading, resting, feeding, and watering for at least 5 hours, provided that upon the written request of the owner or person in charge—separate and apart from the bill of lading—the period of confinement may be enlarged to 36 hours, and provides that any carrier “who knowingly and willfully fails to comply” with the provisions of the act “shall for every such failure be liable for and forfeit and pay a penalty,” etc., except in certain cases enumerated which are not here in question.

[1, 2] The declaration charges, as the statute requires, that plaintiff in error “knowingly and willfully confined” said stock in said cars for a longer period than that permitted by the statute. As was said by the United States Circuit Court of Appeals for the Eighth Circuit in *C. & Q. Ry. Co. v. United States*, 194 Fed. 342, 114 C. C. A. 334:

“‘Willfully’ means purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.”

Thus, where the succeeding carrier did not know that the stock had been confined contrary to law, it was held that the carrier had not violated the statute. *St. Joseph Stockyards Co. v. United States*, 187

Fed. 104, 110 C. C. A. 432; *United States v. Stockyards Terminal Ry. Co.*, 178 Fed. 19, 101 C. C. A. 147.

It is inferable from the record that in taking the cars in question from St. Louis, Mo., to the tracks of the National Stockyards, plaintiff in error was obliged to traverse a considerable portion of its tracks used in hauling cars from the Wabash and the Chicago & Rock Island railroad termini in St. Louis, Mo., to the forwarding connections across the river in Illinois. Were it not for this fact, it would be difficult to conceive of even colorable support for the government's contention that the statute had been violated by the above-enumerated acts. If, for instance, plaintiff in error had been compelled, in delivering the stock to an unloading place, to go in an opposite direction from the places where the western roads connected with those across the river, would there have been any pretense for the construction now sought to be placed upon the acts of plaintiff in error in taking the stock with all reasonable dispatch to the nearest, most convenient, and most suitable unloading place? Most assuredly not. How is the situation disclosed in this record different? Plaintiff in error hauled the stock in question with all due diligence, on its tracks, being the only available and quickest route to the stockyards for unloading; that being, so far as shown, the only available place for that purpose. In so doing it was placing the most humane and most reasonable construction upon the statute. As was said by Judge Adams in *United States v. Union Pacific Ry. Co.*, 169 Fed. 68, 94 C. C. A. 433, and adopted by the court in *United States v. Stockyards Terminal Ry. Co.*, *supra*, the real purpose of the legislation "was to alleviate the condition of dumb animals in transit." In the case just cited the stock was hauled 11 miles to the St. Paul stockyards at St. Paul, Minn.; that being the nearest and most suitable place for unloading. This act was regarded as a recognition of the statute rather than as a violation.

In *Northern Pacific Terminal Co. v. United States* (C. C. A. 9th Cir.) 184 Fed. 603, 106 C. C. A. 583, where a car load of horses had been confined for more than the period allowed by the statute, prior to its delivery to the plaintiff in error in that case, and the latter at once removed it to the Union Stockyards Company of Portland, Or., a distance of 1,300 feet, the court says:

"This action of the plaintiff in error, so far from being in contravention of the provisions of the act of Congress in question, was, in our opinion, but aiding in giving effect to its object and purpose. * * * No law should be so construed as to do violence to its clear meaning and intent, and bring about unjust or absurd results."

We have searched this record in vain for any facts tending to show that plaintiff in error knowingly and willfully violated the statute. In our opinion the acceptance, under the circumstances, of the cars of stock by the plaintiff in error, was in effect an act in the process of delivering the same to the stockyards for the purpose of unloading the stock. Had it done otherwise than it did, plaintiff in error would have been guilty of inflicting further suffering upon dumb animals, and would have sacrificed the spirit of the act for the letter.

The judgment of the District Court is reversed, with direction to grant a new trial.

BAKER ICE MACH. CO. v. BAILEY.

In re GRANT BROS.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1913.)

No. 3,991.

BANKRUPTCY (§ 178*)—TRANSFER—CONDITIONAL SALE.

Gen. St. Kan. 1909, § 5237, provides that a written instrument evidencing a conditional sale of personal property, and retaining title in the vendor until the purchase price is paid, shall be void as against innocent purchasers or creditors of the vendee, unless the original instrument or a copy is deposited in the office of the register of deeds in the county wherein the property shall be kept, and shall be entered on the records the same as a chattel mortgage, and when so deposited shall remain in full force and effect until the amount of the same is wholly paid without renewal. *Held*, that where claimant sold certain ice machinery to the bankrupts under a conditional contract of sale, completed the installation February 5, 1912, filed the contract May 15, 1912, following, and the vendees were adjudged bankrupts on July 11, 1912, such conditional sale contract did not constitute a "transfer" by the bankrupts to claimant, but was rather a retention of title in claimant, and was therefore enforceable as against the bankrupts' trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.*]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

In the matter of bankruptcy proceedings of Grant Bros. Petition by the Baker Ice Machine Company to recover possession of certain ice machinery sold to the bankrupt under a conditional sale contract. From an order of the District Court, affirming an order of the referee in bankruptcy denying the petition, claimant appeals. Reversed, with directions.

See, also, 209 Fed. 844.

H. C. Brome, of Omaha, Neb. (Clinton Brome, of Omaha, Neb., on the brief), for appellant.

W. S. McClintock, of Topeka, Kan. (A. L. Quant, of Topeka, Kan., on the brief), for appellee.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

CARLAND, Circuit Judge. This is an appeal from an order made by the District Court affirming an order of the referee in bankruptcy which denied the petition of the Baker Ice Company to have certain property delivered to it by the trustee in bankruptcy. The facts which control the decision of the case are as follows:

October 14, 1911, the Baker Ice Company, of Omaha, Neb., entered into a written agreement with one Grant for the manufacture and delivery at Horton, Kan., of certain ice-making and refrigerating machinery; it being expressly agreed in the contract of sale that the legal title to and the legal possession of the machinery sold should be and remain in the Baker Ice Company until the purchase price was paid. The installation and delivery of the machinery was completed February 5, 1912. The conditional sale contract was filed for record

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the office of the register of deeds of Brown county, Kan., the county in which such machinery was delivered and installed, on May 15, 1912. On July 11, 1912, Grant, and the other members of the firm of Grant Bros., to which firm the machinery had been delivered by direction of the Grant who executed the contract of sale, filed a voluntary petition in bankruptcy and were thereafter adjudged bankrupts. Appellee, Bailey, as trustee, took possession of the bankrupt estate, including the machinery in controversy. Thereupon the Baker Ice Company, by intervening petition, prayed the delivery of the machinery to it, there having been a default in the payment of the purchase price in the sum of \$2,800. The referee in bankruptcy denied the petition, and the District Court affirmed the order.

The District Court treated the conditional sale contract as a transfer effective May 15, 1912, the date of its filing, to secure an existing indebtedness, and that, this date being within four months of the time of the filing of the voluntary petition in bankruptcy, July 11, 1912, the transfer was void as a preference. We think this was error, and that the error arose from holding that the conditional sale contract operated as a transfer. Section 5237, General Statutes of Kansas, reads as follows:

"That any and all instruments in writing or promissory notes now in existence or hereafter executed evidencing the conditional sale of personal property, and that retains the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds of the county wherein the property shall be kept, and shall be entered upon the records the same as a chattel mortgage, and when so deposited shall remain in full force and effect until the amount of the same is fully paid, without the renewal of the same by the vendor; and any conditional verbal sale of any personal property reserving to the vendor any title in the property sold shall be void as to creditors and innocent purchasers for value."

It was not intended to decide in *Bank of Commerce v. Carbondale Machine Co.*, 195 Fed. 180, 115 C. C. A. 132, that a conditional sale contract was in fact a chattel mortgage under the above statute. The question for decision in that case was as to the priority of liens, and the above statute was cited and certain language used in the opinion for the purpose of showing that the laws of Kansas required the conditional sale contract to be recorded as a chattel mortgage, or in the same manner as a chattel mortgage. The contract in this case is a conditional sale contract. *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435 (8th Cir.); *In re Pierce*, 157 Fed. 755, 87 C. C. A. 537 (8th Cir.); *Monitor Drill Co. v. Mercer*, 163 Fed. 943, 90 C. C. A. 303, 20 L. R. A. (N. S.) 1065, 16 Ann. Cas. 214 (8th Cir.); *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; *Bryant v. Swofford Bros.*, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997; *Big Four Implement Co. et al. v. Wright* (C. C. A.) 207 Fed. 535 (8th Cir.).

We had occasion in *Big Four Implement Co. et al. v. Wright*, supra, to consider *Christie v. Scott*, 77 Kan. 257, 94 Pac. 214, and concluded that there was nothing in that case which decided that a conditional sale contract was a chattel mortgage. We said in that case:

"The only question that the court decided in that case was that a vendee in a conditional sale contract was liable on his promissory notes, although the creditor had retaken the property. * * * Conditional sale contracts have long been recognized in the law of Kansas. They were valid as to third persons, when there was no statute requiring them to be filed, while there was a statute requiring the filing of chattel mortgages. *Sumner v. McFarlan*, 15 Kan. 600; *Hall v. Draper*, 20 Kan. 137; *Standard Implement Co. v. Parlin & Orendorff Co.*, 51 Kan. 544 [33 Pac. 360]; *Moline Plow Co. v. Witham*, 52 Kan. 185 [34 Pac. 751]. The statutes of Kansas recognize the difference between a chattel mortgage and a conditional sale contract, by providing separate and different provisions for filing."

We further said in the same case:

"These being contracts of conditional sale, there is no foundation for the claim that the filing of them within four months of the bankruptcy constituted a preference. There could be no preference without a transfer by the bankrupt of his property. If there were any transfer in this case, it is evidenced by these instruments, dated December 8, 1910, and January 23, 1911. But they transferred no property of Bell. They expressly refrained from transferring any to him."

So, in the case at bar, Grant Bros. never transferred the machinery to the Baker Ice Company, because it had never been transferred to them. The whole transaction was entirely opposed to a transfer from the debtor to the creditor, and this case must be ruled by our decision in the case of *Big Four Implement Co. et al. v. Wright*, *supra*, in which we approved of *In re Farmers' Co-operative Co.* (D. C.) 202 Fed. 1005.

Judgment reversed, with direction to the trial court to cause the machinery in controversy to be delivered to the Baker Ice Company, unless the trustee in bankruptcy shall, within a time to be named, pay the balance due from Grant Bros. to the Baker Ice Company for the purchase price of the machinery.

MOBILE & O. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1,988.

CARRIERS (§ 37*)—TRANSPORTATION OF LIVE STOCK—28-HOUR LAW—CONSTRUCTION.

Act Cong. June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1911, p. 1341), provides that interstate carriers shall unload stock within 28 hours, except that on written request of the owner or person in custody of the particular shipment, which request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to 36 hours. *Held*, that while a request for extended confinement as such must be separate from any printed bill of lading, or other railroad form, it is not necessary that such request be written on a virgin sheet; it being effective if in writing at the bottom of a waybill and signed by the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

Liability of carrier for failure to feed, water, and rest live stock and for violation of the 28-hour law, see note to *St. Joseph Stockyards Co. v. United States*, 110 C. C. A. 435.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Action by the United States against the Mobile & Ohio Railroad Company for alleged violation of the 28-hour law. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

Lansden & Lansden, of Cairo, Ill., for plaintiff in error.

William E. Trautmann, of East St. Louis, Ill., and S. M. Clark, of Danville, Ill., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. This writ of error is addressed to a judgment against the railroad company for an alleged violation of the 28-Hour Act of June 29, 1906, 34 Stat. L. 607.

A jury was duly waived, and the only question is one of law upon the stipulated facts.

Kimbrough shipped interstate a car of cattle, which was continuously on the way for more than 28 and less than 36 hours. Failure to unload within 28 hours was not accidental or unavoidable, but was due solely to the right supposed to be given the defendant by the written request of Kimbrough, the shipper, which request was and is in writing and not in print and is at the end or bottom part of the waybill for said shipment and is in these words and figures, namely:

"I hereby grant privilege of running shipment 36 hours for feed, water and rest.
W. M. Kimbrough, shipper."

Section 1 of the act commands the unloading within 28 hours, "provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to 36 hours."

One construction is that the shipper's written request, as a request, shall be separate and apart from any printed bill of lading or other railroad form, as a contract or stipulation between shipper and carrier. Under this construction the legislative intent would be that the request should not be mixed in with the terms of any printed bill of lading or other railroad form, and the shipper thus led unwittingly to sign a stipulation for the longer time, but that the 28-hour limit should be strictly observed unless the shipper freely and deliberately has signed a written request for the extension separately and apart from signing or accepting any other writing between himself and the railroad company. The other construction (and there is no middle ground that we perceive) is that the written request is no protection unless it be upon a piece of paper, or other material, separate and apart from the paper or material upon which appears "any printed bill of lading, or other railroad form." It is a matter of common knowledge that general offices of railroad companies supply the local offices with stationery and blanks all of which are marked as form number so and so. If a shipper's written request should be made upon the margin or back of a paper containing a form of a daily report to the auditor, or form of a letter head, we fail to see how the humanitarian purposes

of the act would be less subserved than by having the request written upon a virgin sheet. A construction that leads to futility or absurdity should be avoided if possible; and here it easily can, for the wording of the act very clearly, in our opinion, requires the separateness of the request as a request, and not the separateness of the paper or material on which the request is written.

Judgment reversed, with the direction to enter judgment for defendant.

UNITED STATES ex rel. BROWN v. COOKE.

(Circuit Court of Appeals, Third Circuit. December 11, 1913.)

No 1,754.

HABEAS CORPUS (§ 103*)—EVIDENCE—EXTRADITION PROCEEDINGS.

In determining the judicial question whether a fugitive from justice has been lawfully demanded from the asylum state, in a proceeding for his discharge on habeas corpus, the court cannot take into consideration the question whether or not he will be accorded a fair trial in the demanding state.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 90, 91; Dec. Dig. § 103.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Habeas corpus proceeding by the United States, on the relation of Frederick Brown, against Frederick A. Cooke, Superintendent of the Philadelphia County Prison. Judgment for respondent, and relator brings error. Affirmed.

G. Edward Dickerson, of Philadelphia, Pa., for plaintiff in error.

Geo. Bell Timmerman, of Lexington, S. C., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The relator, a colored man residing in Philadelphia, is charged with the commission of a homicide in South Carolina several years ago, and was arrested under a warrant issued by the Governor of Pennsylvania in response to a requisition from the Governor of South Carolina. The District Court granted a writ of habeas corpus, but after a hearing declined to interfere; the correctness of this refusal being now before us.

Our decision has awaited the disposition by the Pennsylvania superior court of a similar proceeding brought by the same relator, which was begun in the common pleas of Philadelphia county, and was removed to the superior court after the relator had been remanded. As these proceedings antedated the application to the District Court, it seemed advisable to defer action on the writ of error now under consideration until the superior court should dispose of the appeal before that tribunal. The court's judgment has just been announced, and in a clear and satisfactory opinion (*Penna. v. Cooke*) Judge Head

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

has shown that the relator's rights have been carefully protected, but that he is not entitled to be discharged from custody. We agree with this conclusion. No question is properly raised before us that has not been discussed and decided frequently both by the federal courts and by the courts of the states; and we content ourselves with citing some of the many cases that bear upon the points now in controversy: *Hyatt v. New York*, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657; *Illinois v. Pease*, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121; *Strassheim v. Daily*, 221 U. S. 280, 31 Sup. Ct. 558, 55 L. Ed. 735; *Pennsylvania ex rel. Flower v. Superintendent of Prison*, 220 Pa. 401, 69 Atl. 916, 21 L. R. A. (N. S.) 939; *Pennsylvania v. Hare*, 36 Pa. Super. Ct. 125; *Pennsylvania v. Cooke*, supra.

It was earnestly urged upon us by the relator's counsel that we should take judicial notice of certain matters that are not upon the record, but were said to be established by common fame. These, it was argued, show that the relator is not likely to have a fair trial—and probably will not have a trial at all—in the courts of the demanding state. We intimate no opinion concerning the weight this argument should receive, but certainly it cannot properly be considered by this court. Occasionally such arguments have been taken into account by the executive of a state—whether legally or arbitrarily is not a matter of present concern—but they cannot be allowed to influence a court's decision upon the judicial question whether a fugitive from justice has been lawfully demanded from the asylum state. In the present case this particular argument was answered on behalf of the demanding state by the most explicit assurance that the apprehensions expressed for the relator's safety and his right to a fair trial were wholly without foundation; and, so far as this court is concerned, we must leave the subject in that situation.

The judgment of the District Court is affirmed.

NOTE.—This case has been removed to the Supreme Court.

LOEB v. WEIL et al.

(Circuit Court of Appeals, Third Circuit. November 25, 1913.)

No. 1,751.

1. **BILLS AND NOTES (§ 443*)—HOLDER AS AGENT OR TRUSTEE—RIGHT TO SUE.**
A holder of indorsed negotiable paper may maintain a suit thereon against the maker, though he is acting as agent or trustee for others.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1377-1380, 1383-1392, 1394-1423; Dec. Dig. § 443.*]

2. **BILLS AND NOTES (§ 473*)—DEFENSES—ESTOPPEL.**

In a suit on a note, defendant filed an affidavit of defense, alleging that F., one of plaintiffs' firm, served as a member of a committee and as a director of a corporation formed to adjust defendant's debts with his creditors; that a settlement at 40 per cent. was effected with defendant's other creditors, but not with plaintiffs; that the amount required to make such payment was paid to the adjusting corporation; and that F., as a member thereof, accepted the settlement in satisfaction of all claims,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

leaving open and unsettled the claim based on the note sued on. *Held*, that such affidavit did not charge that F. did or omitted to do any act whereby any other creditor of defendant, or defendant himself, was misled or wronged, but only that he refused to compound his firm's claim, and did not create an estoppel.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1503–1507, 1555; Dec. Dig. § 473.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Action by Charles Weil and others, trading as Weil, Farrell & Co., against Leopold Loeb, trading as Leopold Loeb & Co. Judgment for plaintiffs, and defendant brings error. Affirmed.

Julius C. Levi, of Philadelphia, Pa., for plaintiff in error.

Duane, Morris & Heckscher, of Philadelphia, Pa., for defendants in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, the plaintiffs, J. Walter Farrell and others, trading as Weil-Farrell & Co., citizens of Massachusetts, sued Leopold Loeb, a citizen of Pennsylvania, trading as Leopold Loeb & Co., to recover on a six-month negotiable note made by defendant to the order of the Loeb-Nunez Havana Company, and by the latter indorsed in blank. The defendant filed an affidavit of defense, which the court held insufficient and granted the plaintiffs' motion for judgment. On entry there of judgment defendant sued out this writ.

[1] The case falls within a narrow compass. The question involved is: In a suit by holders against the maker of a negotiable note, indorsed by the payee in blank and delivered to plaintiffs before maturity, is an affidavit of defense which denies plaintiffs have title to the note, alleges real ownership by another, and which, while alleging a defense, sets forth no facts which constitute a defense against plaintiffs, or the alleged real owner, sufficient to prevent judgment? The right of a holder of indorsed negotiable paper to bring suit thereon against the maker, and this even though he is agent or trustee for others, is clear. *Ward v. Tyler*, 52 Pa. 393; *Lingg v. Blummer*, 88 Pa. 518; *Brown v. Clark*, 14 Pa. 469, and cases cited; 8 Cyc. 61.

[2] As to the defense set up against the plaintiffs, the summary of the several affidavits is that one of the plaintiffs' firm served as a member of a committee and as a director of a corporation formed to adjust defendant's debts with his creditors; that thereby a settlement at 40 per cent. was effected with defendant's other creditors, but not with the plaintiffs; that said sum of 40 per cent. for the payment of all defendant's debts was paid to said adjusting corporation; and that—

“said J. Walter Farrell, as a member of the protective committee and board of directors of the H. N. Gill Company, accepted the settlement of 40 per cent. * * * in satisfaction of all such claims, leaving open and unsettled the claim based upon the note in suit.”

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
209 F.—39

We see no elements of estoppel in these allegations. It is not alleged that Farrell did or omitted to do any act whereby any other creditor of the defendant, or the defendant himself, was either misled or wronged. He simply refused to compound his firm's claim, and stood on their rights. He has in no way estopped his firm from enforcing their claim, and the judgment below is therefore affirmed.

BISON STATE BANK v. BILLINGTON et al.

(Circuit Court of Appeals, Fifth Circuit. December 1, 1913.)

No. 2,518.

COURTS (§ 312*)—JURISDICTION OF FEDERAL COURTS—SUIT BY ASSIGNEE.

In an action in a federal court by an assignee on a promissory note, the record must affirmatively show that the assignor might have prosecuted an action thereon in the same court, to give the court jurisdiction under Judicial Code (Act March 3, 1911, c. 231) § 24, par. 1, 36 Stat. 1091 (U. S. Comp. St. Supp. 1911, p. 135).

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865-875; Dec. Dig. § 312.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

In Error to the District Court of the United States for the Northern District of Texas; E. R. Meek, Judge.

Action at law by the Bison State Bank against B. J. Billington and others. Judgment for defendants, and plaintiff brings error. Reversed.

A. H. Kirby and Theodore Mack, of Ft. Worth, Tex., for plaintiff in error.

John M. Wagstaff, of Abilene, Tex., for defendants in error.

Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. This is a suit by an assignee to recover on two promissory notes payable to the order of one W. F. Thero. The record shows that the plaintiff is a citizen of the state of Kansas and the defendants are citizens of the Northern district of Texas; but we find neither allegation nor proof as to the citizenship of the assignor, W. F. Thero.

As the record fails to show that the assignor, the payee of the notes, could himself prosecute a suit in the District Court of the Northern district of Texas to recover on said notes, if no assignment had been made, that court was without jurisdiction to render judgment. See Judicial Code, § 24, par. 1.

The judgment of the court below must be reversed, and the cause remanded, with instruction to dismiss the action, unless, by proper amendment made in due season, the jurisdiction of the court is properly made to appear; and it is so ordered, the costs of this court to be paid by the plaintiff below.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

FIRST NAT. BANK OF ATLANTA, TEX., v. CAMERON.
(Circuit Court of Appeals, Fifth Circuit. December 1, 1913.)

No. 2,478.

BANKRUPTCY (§ 328*)—TIME FOR ALLOWING CLAIMS—CLAIMS LIQUIDATED BY LITIGATION.

An agreement between a trustee in bankruptcy and a secured creditor as to the value of the latter's security, made pending a suit in a state court to which both were parties and in which that question was involved, is a liquidation by litigation of the amount of the claim unsecured, within the meaning of Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), which entitles the creditor to prove such claim within 60 days, although the year for proving claims has expired.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. § 328.*]

Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

From an order disallowing its claim in bankruptcy proceedings, the First National Bank of Atlanta, Tex., appeals. Reversed.

Will Steel, of Texarkana, Ark., for appellant.

Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. It appears that the appellant, a secured creditor, and the appellee, trustee in bankruptcy, pending a litigation in the state courts in which both were parties and in which the value of the creditor's security was involved, agreed together as to the value of the creditor's security, and thereafter the bankruptcy court approved such agreement and directed the carrying out of the same.

It seems to us that this was a liquidation by litigation, within the purview of section 57n of the Bankruptcy Law, and that, although more than one year had elapsed from the adjudication in bankruptcy, the appellant had the right to prove within 60 days from such litigation the amount of his unsecured claim. See *Powell v. Leavitt*, 150 Fed. 89, 80 C. C. A. 43; *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790; *Page v. Rogers*, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332.

The decree appealed from is reversed, and the cause is remanded, with instructions to allow the appellant to prove as presented his unsecured debt.

KANSAS CITY SOUTHERN RY. CO. v. MAYNOR et al.

(Circuit Court of Appeals, Fifth Circuit. December 8, 1913.)

No. 2,528.

LIMITATION OF ACTIONS (§ 2*)—WHAT LAW GOVERNS—ACTIONS FOR TORT.

Rev. Civ. Code La. art. 3536, providing that actions for offenses or quasi offenses shall be prescribed by one year, affects the remedy primarily; and while it may extinguish the right of action in Louisiana at the expiration of one year, it is not applicable in the courts of another state,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to which the injured party has lawfully removed while the right of action in Louisiana subsisted.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4-8; Dec. Dig. § 2.*]

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action at law by G. C. Maynor and another against the Kansas City Southern Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

W. L. Estes and John J. King, both of Texarkana, Tex., for plaintiff in error.

Cone Johnson and Jas. M. Edwards, both of Tyler, Tex., and J. H. Beavers, of Winnsboro, Tex., for defendants in error.

Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. Under the undisputed facts in this case, Mrs. Maynor, at the time she received her injuries, was more than a mere licensee on board the train of the railway company. She was a quasi employé of the railway company by consent and in its interest, and was entitled to protection from injury through negligence of the railway company.

The statute of Louisiana, providing that actions for offenses and quasi offenses shall be prescribed by one year (R. C. C. La. art. 3536), affects the remedy primarily; and while it may extinguish the right in Louisiana at the expiration of one year, it is not applicable in the courts of another state, to which the injured party has lawfully removed while the right of action in Louisiana subsisted. For authorities, see 25 Cyc. 1020, 1021.

Judgment affirmed.

UNITED STATES v. SINCLAIR.

(Circuit Court of Appeals, Fifth Circuit. December 10, 1913.)

No. 2,504.

EXECUTION (§ 275*)—VALIDITY—NOTICE.

Under Rev. Civ. St. Tex. 1911, art. 3757, which requires a sale of land under execution order of sale or other process to be advertised for 20 days in a newspaper published in the county where the land is situated, the failure to so advertise the land renders the sale void.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 16, 148, 345, 791-796; Dec. Dig. § 275.*]

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action at law by the United States against J. T. Sinclair. Judgment for defendant, and the United States brings error. Affirmed.

J. B. Dailey, Asst. U. S. Atty., of Paris, Tex.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. In this case a jury was waived. The cause was tried by the court, which made a special finding of facts. The question raised in this writ is whether the facts as found warrant the judgment rendered.

We do not decide whether or not the homestead of Sinclair was exempt from distraint, the decision of that question being unnecessary, because we conclude that the fact that the sale was not advertised in a weekly newspaper published in the county for 20 days made the sale void.

The judgment of the District Court is affirmed.

FARMERS' & MERCHANTS' STATE BANK OF WACO, TEX., v. PARK.
(Circuit Court of Appeals, Fifth Circuit. December 9, 1913. Rehearing Denied January 27, 1914.)

No. 2,521.

BANKRUPTCY (§ 154*)—RIGHT OF SET-OFF—SPECIAL DEPOSIT IN BANK.

A bank will not be allowed to set off a deposit made by a bankrupt shortly prior to the bankruptcy against a previous indebtedness of the bankrupt contrary to the agreement under which the deposit was made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 451-455; Dec. Dig. § 154.*]

Appeal from the District Court of the United States for the Western District of Texas.

Suit in equity by M. C. H. Park, trustee in bankruptcy of the Slayden-Kirksey Woolen Mill, against the Farmers' & Merchants' Bank of Waco, Tex. Decree for complainant, and defendant appeals. Affirmed.

Frank T. West and E. C. Street, both of Waco, Tex., for appellant. J. D. Williamson, of Waco, Tex., John Neethe, of Galveston, Tex., and Rhodes S. Baker, of Dallas, Tex., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. Under the evidence in the case the deposit made by the Slayden-Kirksey Woolen Mill with the appellant bank shortly prior to the bankruptcy was a special deposit agreed not to be subject to general set-off. To allow a set-off of the same against the indebtedness previously due the bank would be to give the bank an advantage not enjoyed by other creditors.

Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LOUISVILLE & N. R. CO. v. IRWIN.

(Circuit Court of Appeals, Fifth Circuit. December 9, 1913.)

No. 2,500.

RAILROADS (§ 345*)—ACTION FOR INJURY AT CROSSING—EVIDENCE—RATE OF SPEED.

Under an allegation, in the complaint in an action against a railroad company to recover for the death of a person killed at a crossing, that the train was being run wantonly and recklessly at a high rate of speed, a municipal ordinance regulating the speed of trains is admissible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1113-1116; Dec. Dig. § 345.*]

In Error to the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge.

Action at law by Ella R. Irwin, administratrix of J. S. Irwin, deceased, against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Gregory L. Smith, of Mobile, Ala., for plaintiff in error.

R. T. Ervin, of Mobile, Ala., for defendant in error.

Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. The speed ordinance of the town of Bay Minette was admissible in evidence under the counts in the complaint which charged that the engineer at the time of the accident was wantonly and recklessly running his engine over a crossing at a high rate of speed.

In other rulings of the court we find no reversible error.
Affirmed.

WAYNE MFG. CO. et al. v. COFFIELD MOTOR WASHER CO.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1913.)

No. 3,939.

1. PATENTS (§ 297*)—SUITS FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

When a patent has been sustained as the result of a final hearing, the right thus secured to have its validity accepted on a motion for a preliminary injunction in another suit, except in rare cases, cannot be destroyed by new citations of patents from the patent office.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. § 297.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WATER MOTOR.

An order granting a preliminary injunction against infringement of the Coffield reissue patent, No. 12,719 (original No. 807,779), for a water motor, affirmed.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by the Coffield Motor Washer Company against the Wayne Manufacturing Company and the American Washer Company. From an order granting a preliminary injunction, defendants appeal. Affirmed.

L. C. Kingsland, of St. Louis, Mo. (J. D. Rippey, of St. Louis, Mo., on the brief), for appellants.

Richard J. McCarty, of Dayton, Ohio (Homer Hall, of St. Louis, Mo., on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. [1] This is an appeal from an order granting a preliminary injunction to restrain defendants, appellants here, from infringing plaintiff's patent, No. 12,719, for a water motor. The patent has been sustained, after protracted litigation, in the Fourth circuit. *P. T. Coffield & Son v. Spears & Riddle et al.* (C. C.) 169 Fed. 641; *Coffield Motor Washer Co. v. A. D. Howe Co.* (C. C.) 172 Fed. 668; *A. D. Howe Mach. Co. v. Coffield Motor Washer Co.*, 197 Fed. 541, 117 C. C. A. 37. The drawings and specifications are there set out in full, and need not be repeated here. The answer sets up three defenses: (1) Lack of novelty in the plaintiff's patent. (2) Denial of infringement. (3) Intervening rights acquired between plaintiff's original patent and its present patent which is a reissue. All of these defenses were interposed in the litigation in the fourth circuit. With a single exception the same patents are cited in the present suit as were cited in the cases referred to. One additional citation is made, patent No. 220,625, issued to A. Knecht; but, when a patent has been sustained as the result of a final hearing, the right thus secured, except in rare cases, cannot be destroyed by a new citation from the inexhaustible storehouse of the Patent Office. If that could be done, the holder of a patent would never obtain peace. It is impossible to judge of the merits of the patent which is alleged to anticipate, except as the result of a final hearing where its place, not only on paper, but in the industrial world, can be ascertained.

As to the second defense, the denial of infringement, that, so far as this record discloses, is devoid of merit. The stem and spring in defendant's structure is an obvious mechanical equivalent of the same parts of the patent in suit.

There is also abundant evidence to support the contention that defendant acquired no intervening rights between the time of plaintiff's original patent and its present reissue.

[2] We can discover no abuse of discretion in the action of the trial court in awarding the preliminary injunction. The present case is clearly ruled by the principles which were declared and explained by this court in *Fireball Gas Tank Illuminating Co. v. Commercial Acetylene Co.*, 198 Fed. 650, 117 C. C. A. 354, and *American Grain Separator Co. v. Twin City Separator Co.*, 202 Fed. 202, 120 C. C. A. 644. It is quite unnecessary to formally apply the rules there declared to the particular facts of this case. The application is obvious.

The decree of the trial court is therefore affirmed.

MILWAUKEE BRONZE CASTING CO. v. AVERY et al.
(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)
No. 1986.

1. PATENTS (§ 21*)—INVENTION—SUBSTITUTION OF MATERIALS.

In the absence of some, not only better, but new, result, patentability cannot be predicated upon the material used.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 23; Dec. Dig. § 21.*]

2. PATENTS (§ 23*)—INVENTION—UNITING OF PARTS.

The substitution of a one-piece device for a two-piece device does not constitute invention, unless some new result, and not a mere difference in degree, is thereby obtained.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 25; Dec. Dig. § 23.*]

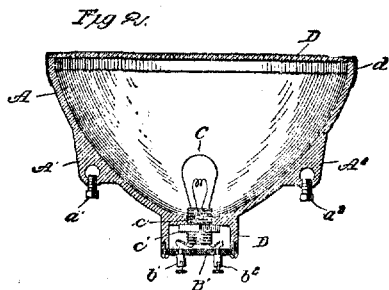
3. PATENTS (§ 32S*)—INVENTION—REFLECTOR FOR AUTOMOBILE LAMPS.

The Avery patent No. 986,668, for a reflector for automobile lamps of cast metal, *held* void for lack of patentable invention, in view of the prior art.

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Arthur L. Sanborn, Judge.

Suit in equity by Percy C. Avery and the American Brass Foundry Company against the Milwaukee Bronze Casting Company. Decree for complainants, and defendant appeals. Reversed.

This cause is here on appeal from the order of the District Court adjudging Avery patent No. 986,668, dated March 14, 1911, for a reflector for automobile lamps to be valid and infringed. The patent calls for a cast metal, as, for instance, aluminum, reflector, so made as to provide a parabolic curve to the reflecting surface, having a flange concentrically with its axis cast upon its outer rear surface, together with attaching lugs cast integrally upon its outer surface, as shown in the following reproduction of figure 2 of the patent:



The patentee claims for his device a reflector which is so rigid as to resist ordinary blows and other indenting means, the production of a true parabolic reflecting surface, a flange housing for his electrical attachments, and one which can also be used as a handle in holding the reflector for purposes of brushing and polishing the inner surface. As originally presented the application covered the process of polishing the reflector. This part of the application was abandoned in the patent office. Original claims 1, 2, and 3 called for a cast metal reflector having an integral

polished surface. Claims 2 and 3 were limited to the use of aluminum. Claim 4 added the integral lugs. These claims were rejected by the patent office, which rejection was acquiesced in by the patentee. In this connection the examiner says:

"McMullin shows a cast metal reflector for lamps. Owen shows a reflector for lanterns, which may be of metal or glass. If made from the latter material it must be cast, if made from the former material it would naturally, because of its form, be cast, though it would not necessarily be made in this manner. Reflectors having a parabolic reflecting surface are well known. Richards describes the casting of aluminum and the making of reflectors from aluminum by polishing the metal. It is common in the art to have lugs upon

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the exterior surface of a reflector for the purpose of supporting the reflector. The article defined by claims 1 to 4, inclusive, does not comprise any new element nor any old element acting in a new way. Metal reflectors having integral, polished, reflecting surfaces are the oldest artificial reflectors known. Applicant has merely selected from what was previously well known, the particular elements which he desired to use and brought them together in an article, but without accomplishing any new result."

Original claim 5 became present claim 1. The present claim 2 was added to include the integral lugs. The two read as follows:

"1. A cast metal reflector for lamps having a circular flange concentrically cast on the outer surface thereof, and having an integral polished reflecting surface.

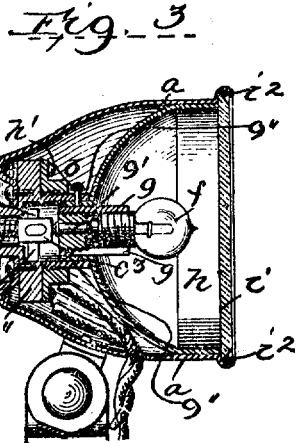
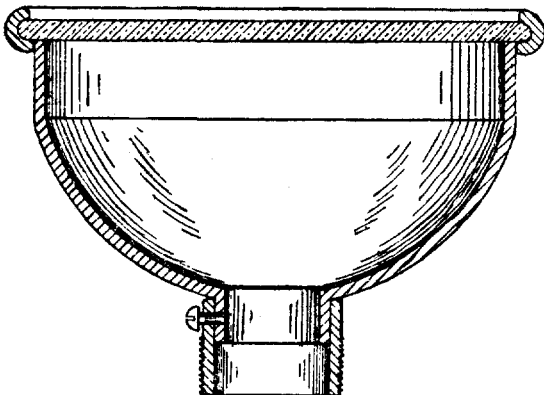
"2. A cast metal reflector for lamps having attaching lugs cast integral therewith, said reflector having a circular flange concentrically cast on the rear outer surface thereof and having an integral polished reflecting surface."

Appellant's device differs from that in suit mainly in the matter of the concentric flange, which, in appellant's device, consists of a mere shoulder or head upon which to screw or otherwise secure an external shell or housing in the form of a cap, which in appearance resembles the flange of the patent, when covered with its cap piece.

There is some evidence to show that appellant agreed to manufacture the patented device for appellee under an agreement not to manufacture for any one else. This was prior to the granting of the patent. Appellant thereupon undertook to manufacture for appellee, but its work was not accepted by appellee. The bill joined with the prayer for relief against infringement a prayer for relief against unfair competition. In support of this latter feature the bill sets out the close resemblance of the one reflector to the other. Appellant, by way of defense, while setting up a number of patents of the prior art, relies mainly on Perry patent, No. 650,418, dated May 29, 1900, for a casing and lamp socket for portable lamps, figure 3 of which is as follows, viz.:

This patent was not cited by the examiner.

For the purposes of this comparison, appellant treats the Perry reflector as separated from the shell or protection, as shown by the following cut, viz.:



This Perry reflector is not made of cast metal. It is so arranged as to permit the lamp to be accurately focused within its reflector casing. Patent No. 38,498, for attachment to lanterns and reflectors, granted to W. C. Owen May 12, 1863, shows a reflector made of metal or glass. The Fielding patent, No. 576,013, dated February 2, 1897, and the Tilmann patents, Nos. 524,075 and 524,076, for reflectors for lamps, dated August 7, 1894, call for parabolic reflecting surfaces. The prior use of

aluminum and certain alloys as reflecting surfaces for reflectors is shown by Richards' publication in 1896 and by Brandt in 1908.

Appellant contends that, having acquiesced in the rejection by the examiner of claims 1 to 4, appellee is now limited to the combination of the metal reflector having a polished reflecting surface and a concentrically cast flange and integral lugs on its outer surface, and that such a device was old in the art, and involved no patentable novelty, and that the patent was invalid. It also denies infringement.

Leverett C. Wheeler, of Milwaukee, Wis., for appellant.

George L. Wilkinson, of Chicago, Ill. (J. H. Marshutz, of Milwaukee, Wis., of counsel), for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLAAT, Circuit Judge (after stating the facts as above). Whatever invention there may have been in original claims 1, 2, 3, and 4 was distinctly waived by the proceedings in the patent office. *Hubbell v. United States*, 179 U. S. 77, 21 Sup. Ct. 24, 45 L. Ed. 95. We are of the opinion, however, that said claims involved no invention, and were properly disallowed. The only question now presented is whether the combination including the concentrically cast flange and the integral lugs added patentable novelty to the device independently of the subject-matter of the rejected claims.

[1] The use of aluminum or other metal, whether cast or forged, even had that use been new, was not determinative of the question of invention. In the absence of some, not only better, but new, result, patentability cannot be predicated upon the material used. See *Walker on Patents* (4th Ed.) § 28, and cases there cited.

[2] The patent in suit has only to do with reflectors as such, and does not cover the electrical attachments. Perry's sheet metal reflector is practically the same as Avery's, differing only in the material from which it is made and the two-piece flange, concentric with its axis. Ordinarily it is not invention to substitute a one-piece device for a two-piece device. It is only when some new result, not a mere difference in degree, is thereby obtained. Where the prior art already suggests the idea of a device as to form and character of operation and result, mere improvements as to the material used and as to durability and effectiveness do not attain to the dignity of invention. *Gardner v. Herz*, 118 U. S. 180, 6 Sup. Ct. 1027, 30 L. Ed. 158; *Florsheim v. Schilling*, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574; *Brinkerhoff v. Aloe*, 146 U. S. 515, 13 Sup. Ct. 221, 36 L. Ed. 1068; *Gates Iron Works v. Fraser*, 153 U. S. 332, 14 Sup. Ct. 883, 38 L. Ed. 734.

[3] Appellant has adopted the device of the Perry patent as to form and idea, and carried it out in cast metal. If the appellee's cast metal concentric flange is the equivalent of a two-piece flange, then it would seem that Avery is anticipated by Perry.

We are of the opinion that there was not invention involved in the conception of the cast metal reflector of Avery, in view of the state of the art. His improvements were only such as would occur to one skilled in the art in attempting to meet the demands of the automobile trade. It was not invention to make in one part the housing cap, which had theretofore been made in two. Nor was there required

any inventive skill in casting lugs upon the outer surface of the reflector. The metallic reflector with its polished reflecting surface itself suggested the use of this common expedient. It constituted no new use.

With regard to the matter of unfair competition, it does not appear that appellee had any trade built up on his form of reflector. Nor does it appear that his reflector had any features which were distinctive, or that appellant could have given its reflectors any other or distinctive features without departing from the ordinary form of a reflector. No attempt is disclosed on appellant's part to imitate appellee's device for the purpose of securing trade. The form used may well have been incident to the use of the cast metal reflector. We are unable to see what bearing appellant's undertaking to manufacture reflectors for appellee has upon the question of unfair competition.

For these reasons, the decree of the District Court is reversed with direction to dismiss the bill for want of equity.

GLEN ROCK CO. v. AMERICAN CARAMEL CO.

(Circuit Court of Appeals, Third Circuit. November 25, 1913.)

No. 1741.

PATENTS (§ 328*)—INVENTION—CARAMEL HOLDER.

The Lafean patent, No. 945,788, *held* invalid; it being merely such an economic mechanical step as naturally followed the growth of an industry, and not such an innovating disclosure as makes an inventive act differ from a mechanical improvement.

Appeal from the District Court of the United States for the Middle District of Pennsylvania.

Suit in equity by the American Caramel Company against the Glen Rock Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 201 Fed. 363.

C. T. Belt, of Washington, D. C., for appellant.

John M. Coit, of Washington, D. C., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, the American Caramel Company, owner of patent No. 945,788, granted January 11, 1910, to S. B. Lafean, for a caramel holder, brought suit against the Glen Rock Stamping Company charging infringement thereof. That court, in an opinion reported at 201 Fed. Rep. 363, held the patent valid and infringed. From a decree so holding and ordering an accounting, defendant appealed.

The patent concerns tin plates for holding caramels, a field of narrow compass, as will be seen by its own statement that "the object of the invention is to simplify the manufacture of the plates," of the design of the patentee, which were "of general type disclosed in the patent to Wiest, No. 428,765, of May 27, 1890." Wiest's patent shows the use,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the candy art, of a sheet having rows of rectangular, caramel-holding spaces, each space having central at its sides and ends vertical flanges cut from the sheet, without or exterior to the caramel space, and bent up at right angles. This left the caramel-holding space imperforate. The prior art, however, showed in the patent of Hershey, No. 412,090, of October 1, 1889, a holder with a perforate bottom, whose vertical sides were formed by bending upward at right angle triangular flanges from the holding space. Indeed this particular construction was an inventive feature of Hershey's patent, viz.:

"The objects of my invention are, first, to use portions of the material *from the bottom of the holder to form the sides.*"

It is also embodied in his claim which is—

"for a candy holder made from a single plate having portions of the material in the center cut out, said cut-out portions projecting upwards and forming the sides of the holder, and other portions located between said sides extending inward and forming the bottom."

From the foregoing it will be seen that Hershey showed a holder of individual caramels with a perforate bottom, and Wiest showed a sheet assemblage of individual holders with imperforate bottoms. At this point of the art Lafean conceived the idea of placing in Wiest's multiple holding sheet—"this invention relates," says Lafean's specification, "to caramel holders of the general type disclosed in the patent to Wiest"—a series of holders with perforate bottoms, for which no better description can be given than in a claim of Hershey's then expired patent, viz.:

"Having portions of the material in the center cut out, said cut-out portions projecting upward and forming the sides of the holder."

Such being the facts, the question before us is, Did this substitution, on Wiest's assembling sheet, of Hershey's perforate for Wiest's imperforate bottom, constitute invention? On this question the patent office at first held it did not; later it reversed that holding. After a careful study of the case we have reached the conclusion that no invention was here involved. The art was well developed. The patent of Hershey was so old that it had expired, and its disclosure of a perforate bottom space had become common property. So also had the assembling of holders in Wiest's sheets become a use of common right. To us it is clear that the coupling of these two features in a sheet was a mere structural or mechanical advance. It is contended Lafean both strengthened and cheapened the old product; but, even if this contested fact be, for present purposes, conceded, that does not stamp the device with patentable novelty. To so hold would be to make mechanical originality a test of invention. Giving due regard to all that may be said of Lafean's device, it is clear to us that it is such an economic and mechanical step as naturally followed in the evolution of an industry, and not such an original, innovating disclosure as makes an inventive act differ from mere mechanical advance.

The decree below is therefore reversed, and the case remanded, with instructions to dismiss the bill.

GRINNELL WASHING MACH. CO. v. WOODROW et al.

(District Court, S. D. Iowa, C. D. September 15, 1913.)

No. 107—M.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WASHING MACHINE.

The Phillips patent, No. 950,402, for gearing devices for washing machines, while the elements are old, is for a new combination of utility, and discloses invention. Claims 5 to 8, inclusive, also held infringed.

In Equity. Suit by the Grinnell Washing Machine Company against O. B. Woodrow, John Nelson, Harry L. Ogg, and others, partners doing business under the name of the Automatic Electric Washer Company. On final hearing. Decree for complainant.

Orwig & Bair and George H. Cart, all of Des Moines, Iowa, for complainant.

Wallace R. Lane and Arba B. Marvin, both of Chicago, Ill., and Wilfred C. Lane, of Des Moines, Iowa, for defendants.

SMITH McPHERSON, District Judge. Counsel not being present when the decree is ordered herein, for their information I briefly state my views:

Letters patent No. 950,402, to William F. Phillips, of Newton, Iowa, of date February 22, 1910, for gearing devices for washing machine, owned by complainant, is the basis of this action against the defendants for an alleged infringement. There are eight claims, the first four of which can be put to one side. The contention is that claims 5 to 8, both inclusive, support the patent, as well as the contention that the defendants are guilty of infringement. In fact, claim 5 is practically all that there is for consideration.

The washing machine is of what is generally known as the "Dolly" type. This washing machine is old, and of itself cannot be the basis of a patent. There is a "reversing gear" device which allows the machine to be instantaneously reversed or stopped, and that is old and cannot be the basis of a patent. Connected with the machine is a clothes wringer, with the ordinary two rollers through which the clothes pass, and that is old and cannot be the subject of a patent. The motive power is either by an electric motor or a gasoline engine, which are old and cannot be the subject of a patent. There is no one element of this washing machine, or of the clothes wringer, but that is old and cannot be the subject of a patent.

At the argument, as well as for some time later, I was inclined to be of the opinion that these different elements and mechanisms, when united, were an aggregation only, and therefore not the basis for a valid patent; but upon a re-reading of the record, and by giving additional attention thereto and to the whole case, I have reached the conclusion that all these elements and mechanisms formed a combination both useful and the subject of an invention, and therefore sustain the patent, and claims 5, 6, 7, and 8 thereof.

By careful consideration of the testimony, I have reached the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

conclusion that defendants' machine, which they are making and selling, is in contravention of the claims of the patent referred to, owned by complainant herein, and that defendants are infringers. A great many patents—nearly 100 in number, British and American—of prior date have been pleaded by the defendants; but I am impressed with the fact that, as is too often the case, when alleged infringers are driven to the point of defense, these numerous patents are makeshifts, and that by pleading the same it is a mere grasping at straws in seeking assistance by way of making defense.

The case is within a very narrow compass as to point of time and the last defense. Reliance is based upon what is called the "Paragon" machine. It is urged that one or more of these machines, much like complainant's, was in use at a date a short time prior to bringing in to being the Phillips patent. But the conduct of the Paragon people in presenting their testimony, and the suppression of the truth, destroys that defense. If the facts have not been suppressed, the testimony is so evasive, so uncertain, and so unreliable as to drive me to the conclusion that it is not entitled to credence.

The Woodrow patent, No. 921,195, has been considered, and I reach the conclusion that that is not defensive, and does not support the defendants in the machine they are manufacturing and putting on the market.

The conclusion of the court is that the Phillips patent is a combination of novelty, and that it is a utility, and sufficiently desired and in use by the public as to require the court to sustain the Phillips patent. And the further conclusion is reached that the claims 5, 6, 7, and 8 of the Phillips patent correspond with the defendants' machine.

The order is that there will be a decree for the complainant, upholding the claims mentioned, and decreeing the defendants to be guilty of infringement, and to call for an accounting.

RAJAH AUTO SUPPLY CO. v. REX IGNITION MFG. CO.

(District Court, S. D. New York. November 19, 1913.)

No. 77.

PATENTS (§§ 216, 259*) — CONTRIBUTORY INFRINGEMENT — VIOLATIONS OF RESTRICTIONS ON USE OF ARTICLE.

A notice placed on the packages in which a patented article is sold imposing as a condition of the sale a requirement that no parts not made by the seller shall be substituted for those sold, under penalty of infringement of the patent, is lawful and enforceable, and one who, with knowledge of such restriction sells parts to be resold and used in violation of it is chargeable with contributory infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 329, 400-402; Dec. Dig. §§ 216, 259.*]

In Equity. Suit by the Rajah Auto Supply Company against the Rex Ignition Manufacturing Company. On motion for preliminary injunction. Motion granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Newell & Neal, of New York City, for complainant.
Munn & Munn, of New York City, for defendant.

WARD, Circuit Judge. The complainant manufactures under letters patent of the United States a spark plug known as the "Rajah Spark Plug." The defendant manufactures a spark plug known as the "Rex." Each of these plugs contains a porcelain shank. The defendant's shank can be used in the Rajah, as well as in a large variety of other plugs. The complainant does not contend that the defendant's plug infringes its patent, nor that the defendant may not sell porcelain shanks, even if they can be used in the Rajah plug. The complainant seeks to hold the defendant as a contributory infringer on the ground that it sells the Rex porcelains knowing that they are intended to be used in the Rajah plug, in violation of the license under which that plug is sold.

The defendant denies that this is done, but I am satisfied that in several instances its agents have done this deliberately. It is no defense to the defendant to say that it has told its agents not to do so. Such reasoning would soon make an end of the principle of respondeat superior. The defendant further offers in evidence a number of letters signed by its superior officers to show their good faith. These make exactly the contrary impression upon me. The officers reply to persons ordering Rex porcelains for the express purpose of substituting them for Rajah porcelains substantially:

"We do not claim that our porcelains fit the Rajah plugs but we send you a sample to see if it meets your requirements and if so will be glad to fill your order."

This strikes me as a palpable indirection.

Finally, the defendant contends that the license accompanying the sale of the Rajah plugs is void, and therefore that it has an absolute right to sell Rex porcelains even with knowledge that the purchaser intends to use that in Rajah plugs. The complainant sells its plugs inclosed in cartons, on the outside of which is printed the following:

"Notice.—In order to insure the proper operation of the 'Rajah' spark plug, each plug is sold only under the express condition that no porcelain, bushing or shell, except that sold by the Rajah Auto Supply Company of New York, shall be substituted, or sold for substitution in the same. Further, that any violation of this condition shall constitute an infringement of United States patent No. 825,856, and that failure to immediately return said plug shall constitute an acquiescence by the purchaser in the above conditions."

The motion is to be decided in favor of the complainant or in favor of the defendant according as the situation is found to be within the case of *Henry v. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, or within the case of *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041.

I think the sale in question is not an absolute sale, but a sale accompanied by restriction of the right to use, exactly like the license sustained in the *Henry Case*. In it, it is true that the court commented upon the fact that the Dick Company sold its mimeograph at cost, looking for its profit to the sale of the paper and ink which the pur-

chaser was obliged by the license agreement to buy of it. The court pointed out that the condition was a reasonable one. The Rajah plugs, on the other hand, are sold at a price which includes the complainant's full profit. The Henry Case, however, was not made to depend on any such distinction, but upon the right of a patentee to restrict the use of his product, even in the case of a sale.

In the subsequent Bauer Case the court held that a restriction as to the price at which a patented article shall be sold is not a limitation as to the use of it and that in such a case the sale is absolute and the restriction invalid. In this way the case was distinguished from the prior decision.

In view of the marked diversity of opinion among the judges of the highest court in these two cases, an inferior court cannot be confident. The defendant very truly suggests in its brief that on the evidence before the court, if an injunction is granted, it may as well be a final one. If the parties agree on this point, a final injunction will be issued. In the meantime the motion for a preliminary injunction is granted.

SIROCCO ENGINEERING CO. v. B. F. STURTEVANT CO.

(District Court, S. D. New York. December 23, 1913.)

PATENTS (§ 323*)—SUITS FOR INFRINGEMENT—DECREE.

Where a bill alleges infringement of claims of a patent as to which little or no evidence was taken, and which were not relied on, discussed by either party, or considered on the final hearing, the court is not required to pronounce any decree whatever as to such claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 596-599; Dec. Dig. § 323.*]

In Equity. Suit by the Sirocco Engineering Company against the B. F. Sturtevant Company. On settlement of decree.

See, also, 208 Fed. 147.

Motion by defendant on settlement of decree in favor of complainant that the court enter a decree dismissing the bill as to the claims of the two patents in suit not considered and adjudicated on at the final hearing, and that the decree apportion the costs.

Fraser, Turk & Myers, of New York City, for complainant.

Omri F. Hibbard, of New York City, for defendant.

RAY, District Judge. It appears, on an examination of the pleadings and record, that the complainant alleged in the bill infringement by defendant of several claims regarding which little, if any, evidence was taken, and infringement of other claims concerning which quite a little evidence was taken. During the taking of testimony the complainant gave notice as to what claims it would rely on, but at least once changed its attitude in this regard. At the final hearing the complainant relied upon and argued the validity of certain claims only, and defendant made no objection then that other of the claims were in issue, or should

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be considered or passed upon by the court. The court did not consider or pass upon any of the claims not presented for consideration on the final hearing. The court upheld all of such claims so argued as valid, and held them infringed by the defendant.

Under such circumstances I do not understand that the rules or the practice requires the court to pronounce any decree whatever as to the claims not presented, considered, or passed upon. It seems to me that as the court has not considered such claims, and was not called upon by either party to do so, it would be improper to make any decree regarding them. And I cannot assent to the proposition that when a suit in equity on a patent for an injunction and an accounting is brought, the bill sets out as many causes of action as the patent has claims alleged to be infringed, and that the court should pronounce a decree in favor of complainant on the claims sustained as valid and infringed, and a decree for the defendant dismissing the bill as to the claims alleged to have been infringed when no substantial evidence was produced regarding them and the parties by mutual assent, or silence, failed to present such claims to the court for consideration on the final hearing. I find no authority for such a decree under such circumstances.

As to costs, which are in the discretion of the court, I think the defendant here entitled to some consideration. It only briefed and argued the claims submitted on the final hearing, and which the court found valid and infringed, but the record shows that the defendant did spend some time in taking evidence or examining witnesses as to other claims, and as to which no claim of infringement was, in the end, made. Sufficient does not appear to enable the court to make an exact deduction, or one which will do exact justice between the parties, but I think that if the complainant recovers three-fourths costs and disbursements, substantial justice will be done. Hence the decree will direct that complainant recover three-fourths costs and disbursements.

MACALLEN CO. v. CHARLES WIRT & CO. et al.

(District Court, E. D. Pennsylvania. May 15, 1912.)

No. 373.

PATENTS (§ 328*)—INFRINGEMENT—INSULATING JOINTS.

The Gennert patent No. 514,822, for improvements in insulating joints and couplings for sections generally, *held* not infringed.

In Equity. Suit by the Macallen Company against Charles Wirt & Co. and others. On final hearing. Decree for defendants.

William A. Macleod, of Boston, Mass. (George P. Dike, of Boston, Mass., of counsel), for complainant.

Dyer, Dyer & Taylor, of New York City, and C. Bradford Fraley, of Philadelphia, Pa. (Richard N. Dyer and John Robert Taylor, both of New York City, of counsel), for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
209 F.—40

J. B. McPHERSON, Circuit Judge. The plaintiff is suing upon claims 1, 2, 4, and 5 of what seems to be a mere paper patent. It is No. 514,822, for "improvements in insulating joints and couplings for sections generally," and was granted February 13, 1894, to Emil F. Gennert upon an application filed August 10, 1893. It is unnecessary to quote the claims, for I cannot find the time to give my views in detail upon the several controverted questions raised by the record. The patent expired shortly after the suit was brought, so that no injunction could now issue; and—since it is conceded that neither form of notice required by section 4900, R. S.,[†] was given—the plaintiff could at the best obtain no more than an accounting for the few months between the filing of the bill and the date of expiry. But even this cannot be decreed, for after a full consideration of the evidence and the briefs, I find as a fact that defendants do not infringe.

For this reason the bill may be dismissed, with costs.

LOLAND v. NORTHWEST STEVEDORE CO.

(District Court, D. Oregon. December 22, 1913.)

No. 6213.

REMOVAL OF CAUSES (§ 103*)—NOTICE—NECESSITY.

Where a written notice of a petition and bond for removal of an action from a state court is not given to the adverse party prior to filing such instruments, as required by Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]) § 29, the case will be remanded to the state court, though a copy of the petition and bond has been served.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 221; Dec. Dig. § 103.*]

Action by Marcus Loland against the Northwest Stevedore Company, a corporation. Motion to remand allowed.

John F. Logan and Littlefield & Smith, all of Portland, Or., for plaintiff.

John H. Hall, of Portland, Or., for defendant.

BEAN, District Judge. Section 29 of the Judicial Code provides that written notice of a petition and bond for removal of an action from a state court shall be given the adverse party prior to the filing of the same. This requirement is one of substance, and if not complied with, the federal court cannot ignore it and retain jurisdiction if seasonable objection is made. *Wanner v. Bissinger & Co.*, decided by this court on September 29, 1913; *Goins v. Southern Pac. Co.* (D. C.) 198 Fed. 432; *United States v. Sessions*, 205 Fed. 502, 123 C. C. A. 570.

The statute does not prescribe the length of time the notice shall be given prior to the filing of the petition and bond, but only that it shall be prior thereto. Before the adoption of the Judicial Code no notice of a removal application was necessary, but upon the filing of proper

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† U. S. Comp. St. 1901, p. 3333.

petition and bond in the state court it was made the duty of that court to accept the same and proceed no further in the suit. The adoption of the Judicial Code has made an important change in this regard by requiring prior written notice of the petition and bond. This notice is a matter of substance; and, since the right of removal is statutory, all the requirements of the statute must be followed in order to effect the transfer. A prior written notice is therefore an essential step in the proceedings. The purpose of the statute is that the adverse party shall be advised of the intention to file such petition and bond in order that he may have an opportunity to appear in the state court and resist the removal if he so desires. Since no time is fixed in the federal statute, the practice of the state court in the matter of notice will, no doubt, govern, and prior written notice in accordance therewith will be sufficient. *Chase v. Erhardt* (D. C.) 198 Fed. 305. But there must be such a notice, and the mere serving of a copy of the petition and bond without more is not enough, and especially in a case where, as here, the state court has made no finding on the question of notice.

The record is that on the 12th day of November, 1913, the attorney for the plaintiff accepted in writing service of the petition for removal, reserving, however, the right to remand, and on the same day the petition and bond were filed in the state court and the order of removal made. No prior written notice of intention to file such petition and bond, or of the time when they would be filed or the application for an order of removal would be made, was given the plaintiff. If such a proceeding is a compliance with the requirements of the removal act, then Congress accomplished nothing of substance by inserting the provision requiring prior written notice. As said by the Court of Appeals of the Sixth Circuit, in *United States v. Sessions*, *supra*:

"The provision is either mandatory or inoperative. There is no middle course. The mandate must be carried into effect or be practically destroyed."

It follows that the motion to remand must be allowed, and it is so ordered.

In re KRAMER et al.

(District Court, E. D. Pennsylvania. December 22, 1913.)

No. 4,344.

BANKRUPTCY (§ 225*)—ADMINISTRATION OF ESTATE—PROCEEDINGS AGAINST BANKRUPTS—ORDER REQUIRING DELIVERY OF MONEY AND MERCHANDISE—DEFINITENESS.

A referee's order directing the bankrupts to pay to the trustee a definite sum and to deliver merchandise was sufficient in so far as it provided for the payment of money, but was fatally defective as to the merchandise for indefiniteness in failing to describe the goods.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 352; Dec. Dig. § 225.*]

In Bankruptcy. In the matter of bankruptcy proceedings against Harry Kramer and another, individually and trading as Kramer & Muchnick. On certificate of a referee to review an order requiring the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankrupts to pay money or deliver merchandise to the trustee. Modified and affirmed.

Carr, Beggs & Steinmetz, of Philadelphia, Pa., for trustee.
Furth, Singer & Bortin, of Philadelphia, Pa., for bankrupts.

J. B. McPHERSON, Circuit Judge. The presumption is that the referee performed his duty, and that his report is based upon such testimony only as is competent upon the hearing of a trustee's petition for an order upon a bankrupt to pay money or deliver goods. The report does make some incidental reference to testimony that was not offered upon the particular hearing now under review, but it is not clear that any important finding is based upon it; and in any event I agree that abundant evidence exists that was unquestionably competent, and is amply sufficient to support the referee's conclusions concerning the money. I shall only affirm that part of his order, for in my opinion the part directing the delivery of "merchandise" cannot be upheld. It makes no attempt to point out or describe the articles, even by kind or class, and I do not see how the bankrupts could obey it. *In re Jackier* (D. C. Pa.) 179 Fed. 720. I do not decide that an order to deliver merchandise must describe the goods minutely, but I merely hold that an order directing the delivery of "merchandise," without more, is not sufficient. The degree of particularity that such an order should exhibit need not be dwelt upon; probably no precise rule can be laid down that would fairly and reasonably meet every situation; all that is now decided is that an order to deliver "merchandise" is too indefinite. But an order that directs the payment of "money" in a definite sum is sufficient, and to that extent the order under consideration will be sustained. *In re Epstein* (D. C. Pa.) 206 Fed. 568.

The trustee agrees that a further allowance should be made from the sum to be paid by the firm; after this is done, and a time is set for payment, the order will read as follows:

And now, December 22, 1913, Harry Kramer and Michael Muchnick, trading as Kramer & Muchnick, are directed to deliver to Alfred T. Steinmetz, trustee of their estate in bankruptcy, the sum of \$4,092.21; and Michael Muchnick individually, one of said bankrupts, is directed to pay over to the trustee the further sum of \$16,732.94. Both payments to be made on or before January 2, 1914.

With these modifications, the order of the referee is affirmed.

In re COTTON MANUFACTURERS' SALES CO.

(District Court, E. D. Pennsylvania. October 21, 1913.)

No. 3,965.

1. BANKS AND BANKING (§ 116*)—NOTICE TO AGENT—IMPUTATION TO PRINCIPAL.

A bank which made loans to a mercantile company, taking assignments of its accounts receivable as they were created as security, and which appointed the president of the company, who acted for the company in the transaction its own agent, under bond, to collect the accounts and deposit the proceeds, is bound by the knowledge of such agent that the company was insolvent.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 282-287; Dec. Dig. § 116.*]

2. BANKRUPTCY (§ 165*)—PREFERENTIAL TRANSFERS—EQUITABLE ASSIGNMENTS.

By an agreement between a bankrupt, which was a mercantile company, and a bank with which it had not previously done business, made more than four months prior to the bankruptcy, the bankrupt agreed to assign to the bank all of its accounts receivable thereafter created, and the bank agreed to advance to the bankrupt 80 per cent. of the face value of such accounts as it approved. The agreement further provided that it might be terminated by the bank at any time without notice, and by the bankrupt by paying the amount of the advances made, on which the accounts should be reassigned. No advance was made at the time nor until, some weeks later, accounts were actually assigned, when the bank took a collateral note for a large sum and credited the bankrupt in its checking account with 80 per cent. of the amount of the accounts, and the business was continued in the same manner; each assignment being treated as a separate and independent transaction. *Held*, that the agreement did not operate as an equitable assignment of the accounts, but merely provided for a future course of dealing in case specific assignments of accounts were thereafter made, nor did the collateral note, which embodied a similar agreement, operate as such assignment, and neither could avail the bank to validate subsequent transfers of accounts within the four months' period, which would otherwise be preferential.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

3. BANKRUPTCY (§ 303*)—PROPERTY TRANSFERRED WITH INTENT TO DEFRAUD CREDITORS.

That a mercantile company, with assets of some \$40,000, which within the four months preceding its bankruptcy assigned its current accounts receivable to a bank and obtained advances thereon, which were used in its business, and continued to purchase goods on credit, was insolvent, and that during the time of such transactions the excess of its liabilities over assets increased from about \$5,000 to about \$15,000, does not show such a discrepancy between assets and liabilities as to warrant a presumption of bad faith, and, in the absence of evidence of actual intent to defraud, the assignments of the accounts to the bank cannot be set aside under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), which makes invalid transfers of property within four months with intent to hinder, delay, or defraud creditors except as to purchasers in good faith, and for a present fair consideration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

4. BANKRUPTCY (§ 165*)—TRANSFERS OF PROPERTY—VOIDABLE PREFERENCE.

The bank being without actual knowledge of the bankrupt's insolvency, although chargeable with constructive notice of the fact, was, in so far

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as it advanced money on the several accounts when they were assigned, and to the extent of such advances, a pledgee in good faith and for a present fair consideration; but, in so far as they were to be held as security for other indebtedness, the assignments were preferential and voidable by the trustee under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799, and Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

5. SALES (§ 13*)—ASSIGNMENT OF ACCOUNT—CONSTRUCTION AND EFFECT.

An assignment of an account for merchandise sold, even if it attempts to do so, cannot operate as a conveyance of the merchandise, since by the sale which produced the account the assignor divested himself of the title thereto.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 23; Dec. Dig. § 13.*]

In the matter of the Cotton Manufacturers' Sales Company, bankrupt. On certificate for review of order of Referee. Modified.

The following are the opinion and order of D. W. Amram, Referee:

This matter comes before me upon the petition of the First Mortgage Guarantee & Trust Company, hereinafter called the "Bank," filed March 6, 1911, the answer of the trustee of the Cotton Manufacturers' Sales Company, hereinafter called the "Bankrupt," filed March 15, 1911, the cross-petition of the trustee filed March 15, 1911, the answer of the bank to said cross-petition filed April 21, 1911, and the agreements made between the said parties filed March 16, 1911, and May 17, 1911.

From the pleadings and testimony taken before me I find the following facts:

The bankrupt corporation was engaged in the business of buying and selling cotton yarns and hosiery on commission. In order to raise money it was accustomed to pledge its book accounts as collateral security, and, at the time when its business relation with the bank began, all of its accounts had been assigned for loans made by the Bank of Commerce. By reason of the fact that the Bank of Commerce had invariably notified debtors of the bankrupt as soon as assignments of book accounts were made to it, the bankrupt deemed it expedient to discontinue its business with the Bank of Commerce and to transfer the same to the bank which had established the practice of never notifying debtors of its assignors. Before entering into business with the bankrupt, the bank obtained what its vice president called "excellent bank references" as to the financial standing of the bankrupt, the exact nature of which does not appear, and also obtained a statement in writing from the bankrupt showing its financial standing as of May 1, 1910, which statement was in the following form:

"Assets.	
Merchandise, cost value in warehouse.....	\$ 9,513 33
" in transit to warehouse.....	2,137 79
Notes or amounts due by partners.....	None
Outstanding accounts, not due.....	37,007 08
" " past due.....	7,898 70
Cash in bank and on hand.....	2,256 40
Special deposit—certificate deposit.....	2,400 00
Office fixtures & furniture.....	807 55
Commission due on orders not completed.....	1,625 90
	<hr/>
	\$63,666 75

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Liabilities.

Notes payable for merchandise.....	\$ 2,678 57
Owe for merchandise.....	22,663 37
Owe to banks assignment accounts advanced.....	23,753 09
Loans advanced by warehouse.....	4,428 03
Capital paid in.....	10,100 00
Surplus	43 69
	<hr/>
	\$63,666 75

"Annual sales \$250,000 to \$300,000 approximately.

"Banking reference—Commercial National Bank, Statesville, N. C.

First National Bank, Do
 Merchants' & Farmers' Bank, Do
 Girard National Bank, Philadelphia, Pa.
 Fourth Street National Bank, Do
 First National Bank, Do
 Merchants' National Bank, Do
 Corn Exchange National Bank, Do

"The above statement is a true statement of our conditions this first day of May, 1910.

"[Signed] Cotton Manufacturers' Sales Co.,

"John E. Nattress, President.
 W. E. Nattress, Secty-Treas."

"[Seal.]

This statement was given in August shortly before the agreement made between the bank and the bankrupt on August 26th. The bank made no further investigation into the affairs of the bankrupt either at this time or at any time thereafter during the entire period of its dealings with the bankrupt; nor did the bank examine the books, accounts, papers, or correspondence of the bankrupt. The agreement between the bank and the bankrupt is in the following form:

"This agreement, made and entered into this 26th day of August, 1910, between Cotton Manufacturers' Sales Company, party of the first part, and the First Mortgage Guarantee & Trust Company, a corporation organized under the laws of the state of Pennsylvania, party of the second part:

"Whereas, said party of the first part desires to obtain accommodations and advances in money, from time to time, from said party of the second part, and said party of the second part has agreed upon the terms and conditions hereinafter stated, to make certain accommodations and advances,

"Now witnesseth: That for and in consideration of said premises, and for the sum of one dollar (\$1.00) paid by said party of the first part to said party of the second part, receipt whereof is hereby acknowledged, as well as for other good and valuable considerations to it moving, said Cotton Manufacturers' Sales Company hereby assigns and agrees to deliver to the First Mortgage Guarantee & Trust Company all accounts receivable by it (the said party of the first part) obtained for goods and merchandise sold and delivered after this date (except sales for cash in hand and sales of consigned merchandise), and it agrees to make special and specific assignment of each and all of said accounts receivable, and deliver the same to the party of the second part within three (3) days after the shipment of the merchandise represented therein and thereby, said assignment to be made in such form and accompanied by such representations, guaranties and agreements as the party of the second part shall prescribe.

"Furthermore, the first party also agrees to deliver with said invoices bills of lading, railway receipts or other satisfactory evidence of actual shipment of the goods and merchandise represented in the invoices, and when required so to do, furnish satisfactory evidence of the actual receipt of the merchandise by the purchaser, and on demand it agrees to bring and deliver to the party of the second part, all correspondence with the purchaser relative to the sale, delivery of and payment for the merchandise represented in said invoices and accounts receivable.

"It is mutually and expressly agreed that the title and right of possession

of said accounts receivable is to be and remain in said second party, and it shall have the right to collect the same direct from the debtor, and whatever the first party does in connection with the collection of said accounts it agrees to do as the agent and representative of the second party and in trust for said second party, and it expressly agrees to indorse and deliver to said second party immediately upon the receipt thereof, all checks, drafts, notes, moneys, securities and collateral of any and every kind which shall come to said first party in payment or settlement of any account receivable for goods and merchandise sold from and after this date.

"It is mutually agreed that the party of the second part shall have access at all times to the books, papers and correspondence of the party of the first part with every opportunity to keep advised concerning the business of said first party, the character of its sales, the standing of the parties to whom it sells, and said first party agrees promptly to furnish the second party any information which it may receive concerning the financial standing of any purchaser and suits pending or begun against the same, and notify immediately the party of the second part of any material rejection or return of goods, set-off or counterclaim made by any purchaser or deduction or discount claimed by him against any of said accounts receivable or the merchandise referred to therein.

"The second party reserves the right to place the proceeds of any collection to the account of the first party without allowing credit upon any note or advancement made by it to the said second party, the intention being that as the accounts receivable are paid the second party shall have the right to accept new and substituted accounts receivable and release the proceeds of such accounts, thus enabling the First Mortgage Guarantee & Trust Company to grant a continuous line of credit without being called upon to account by indorsements or otherwise for each and every credit (so long as the uncollected accounts receivable afford approved security for the amount advanced).

"The first party agrees to pay to the second party for its services in investigating the credit and financial standing of the customers of the said second party in keeping the accounts and collecting the accounts receivable whether done directly or through the agency of the first party, an amount equal to one per cent. of the face value of all accounts assigned under this agreement.

"In consideration of the foregoing assignment and other covenants, the First Mortgage Guarantee & Trust Company agrees to extend to the first party a credit, with interest at the rate of six per cent. (6) per annum, equal to eighty per cent. of the face value of all accounts receivable approved by it, the First Mortgage Guarantee & Trust Company, against debtors of the party of the first part, not to exceed the aggregate sum of

"It is mutually agreed that in making up the estimates of said aggregate sum of \$25,000, neither past-due accounts nor any accounts deemed by said party of the second part as undesirable, shall be considered, although the assignment of all such accounts, whether past-due or otherwise, shall continue in full force and effect until actually paid by the debtor.

"It is mutually agreed that this contract may be canceled by the second party at any time without notice, and by the first party at any time by payment of the amount of all advances, with interest, according to the terms of the notes given in evidence thereof, and thereupon the second party agrees to re-assign all unpaid accounts.

"Signed the day and date first above written.

"Cotton Manufacturers' Sales Co.,

"By John E. Nattress, President,

"W. E. Nattress, Secy. & Treas."

For the purpose of further security, an arrangement was made between the bank and the bankrupt whereby John E. Nattress, president of the bankrupt and its general manager, was appointed by the bank to act as its agent to receive moneys, checks, notes, and drafts from the debtors of the bankrupt and pay the moneys over and indorse the checks, notes, and drafts to the bank; and to secure faithful performance on the part of Mr. Nattress he was required to give a bond to the bank in the sum of \$10,000.

In accordance with the terms of the above agreement, a collateral note of

\$15,000 was given by the bankrupt to the bank, and assignments of book accounts began to be made on September 7, 1910. When the book accounts were presented to the bank and approved by it, 80 per cent. of the face value of the said accounts was delivered by the bank to the bankrupt by being credited to its checking account, and whenever such assigned accounts were paid in full an additional 20 per cent. thereof was credited to the checking account of the bankrupt and 80 per cent. transferred as a credit to its loan account. Some time after August 26th, a second collateral note of \$10,000 was delivered by the bankrupt to the bank, and subsequently on October 21st this note and the prior one of \$15,000 were merged in a new note of \$25,000; the latter being in the following form:

"\$25,000.00.

Philadelphia, October 21, 1910.

"On demand after date we promise to pay to the order of the First Mortgage Guarantee & Trust Company, with interest, at 6 per cent. per annum, twenty-five thousand dollars, without defalcation, for value received; and have delivered as collateral security, assigned accounts, and do agree, on demand, to deposit with the holders such additional security as they may from time to time require—and, in default thereof, this note shall instantly become due and payable, as though it had actually matured; and upon default of payment at maturity, whether such maturity occurs by expiration of time or default in depositing additional security as above agreed, do hereby authorize and empower the holders hereof, for the purpose of liquidation of this note, and of all interest and costs thereon, to sell, transfer and deliver the whole or any part of such security or any additions thereto, or substitute therefor, without any previous demand, advertisement or notice either at broker's board or public or private sale, at any time or times thereafter; with the right on the part of such holders to become the purchaser and absolute owner thereof, free of all trusts and claims. And it is further agreed, that the securities hereby pledged, together with any that may be pledged hereafter, shall be applicable in like manner to secure the payment of any past or of any future obligations of the undersigned held by the holders of this obligation; and all such securities in their hands shall stand as one general continuing collateral security for the whole of said obligations, so that the deficiency on any one shall be made good from the collaterals for the rest; hereby remaining responsible for any deficiency in payment, and waiving any benefit, exemption or privilege under any law now or hereafter to be in force.

"Payable at _____

"Due _____

"[Signed] Cotton Manufacturers' Sales Co.,

"John E. Nattress, President."

The assignment of the book accounts in accordance with the above agreement and practice was made as follows: The bankrupt delivered to the bank two copies of the invoice of the book account to be assigned, one stamped with a form of assignment to the bank, the other without any mark of assignment on it. The former was retained by the bank; the latter was mailed by the bank to the debtor. The form of the assignment of the invoices was as follows:

"Know all men by these presents, that Cotton Manufacturers' Sales Company, in consideration of one dollar in hand paid, the receipt of which is hereby acknowledged, and other (good and valuable) consideration has sold, assigned, transferred and set over, and by these presents does bargain, sell, assign and set over unto the First Mortgage Guarantee & Trust Company, and its assigns, the claim, account and demand set forth and described in the within invoice and statement of right, title and interest of every nature and kind, including the right of stoppage in transit, of the goods and merchandise covered by and described therein, and all moneys due or to grow due upon the sale or sales therein set forth, together with the sole right to collect the same, and hereby constitutes and appoints said the First Mortgage Guarantee & Trust Company its true and lawful attorney irrevocably for it and in its name and stead, but to its own use and benefit, to sell, assign, transfer, set

over, pledge, compromise or discharge the whole or any part of the aforesaid claim, account and demand, together with all checks and drafts, if any, which may be drawn to the order of Cotton Manufacturers' Sales Company in payment of said account or any part thereof and for that purpose to do all acts and things necessary or proper in the premises and one or more persons to substitute with like power, hereby ratifying and confirming all that its said attorney or its substitute or substitutes shall lawfully do by virtue hereof.

"And the undersigned, and each of them, agree that if any check, draft or money intended as credit upon or payment of the account set forth on the reverse side hereof, shall come to the undersigned or either of them at any time, such checks, drafts and money shall be received by the undersigned as the property of and in trust for the above named assignee and be immediately indorsed and delivered to it, and each of the undersigned jointly and severally hereby guarantees the acceptance of the within stated merchandise by the consignee and the payment in full of the within named stated account.

"This and the previous assignment hereof is made for the purpose of obtaining money by loan from the First Mortgage Guarantee & Trust Company, and for said purpose Cotton Manufacturers' Sales Company each for himself, represents and avers that the following statements are true:

"1. That the within invoice and account represents a bona fide sale, and that all of the merchandise represented therein as sold, was packed and shipped to the customer as shown on said invoice.

"2. That the amount set forth in said invoice and account is wholly unpaid, and that nothing but time is wanted to fix an actual demand against the within named debtor, and that there exists no offset or counterclaim thereto, and that no agreement has been made with said customer under which any reduction or discount may be claimed except as stated therein.

"3. That said account has not been sold, given, transferred or assigned, or in any way or manner pledged to any person, persons or institution whatsoever, except the First Mortgage Guarantee & Trust Company.

"In witness whereof, Cotton Manufacturers' Sales Company has caused this assignment to be executed by its duly authorized officer this 15th day of November, 1910.

"[Signed] Cotton Manufacturers' Sales Company,
"John E. Nattress, President."

The copies of the invoices were accompanied by a printed form containing a list of the accounts assigned from time to time in the following form:

"To the First Mortgage Guarantee & Trust Co., Philadelphia, Pa.

"Referring to our contract with you dated August 26, 1910, we hereby tender for your acceptance additional accounts as per schedule inclosed. Upon your acceptance these accounts will become subject to all the provisions of said contract as if originally scheduled therein:

Invoice No.	Date Due	Name	Address	Amount	Credit

"We do hereby certify and declare that the above amount is a true and correct inventory of the accounts assigned by us this day to the First Mortgage Guarantee & Trust Co., for goods shipped to the above named firms.

"Dated Philadelphia, Pa. this _____ day of _____, 19____.

"Cotton Manufacturers' Sales Company,
"_____, President."

Neither party to this agreement gave notice of any assignment of accounts to the debtors, and it is an admitted fact that the debtors whose accounts with the bankrupt were unpaid at the time of the bankruptcy received no notice of the assignment of their accounts to the bank until after the bankruptcy.

On December 28, 1910, the claim of the bank against the bankrupt had reached its maximum, to wit, \$24,941.58, and between that date and the date

of the bankruptcy, to wit, January 24, 1911, the bank received from collections the sum of \$12,106.34, thus reducing the amount due on advances to \$12,835.24 at the date of the bankruptcy.

On January 6, 1911, the Kingston Cotton Mills, having a claim of \$2,500 against the bankrupt which the latter was unable to pay, issued a foreign attachment and served the bank as garnishee. On January 5 and 9, 1911, the following accounts were delivered by the bankrupt to the bank, to wit:

No. 439—Industrial Mills.....	\$ 330 00
440—Delaware Hosiery Mfg. Co.....	310 56
441—Gem Hammock & Fly Net Co.....	1,378 41
442—Star & Crescent Co.....	300 00
443—Zebulon Hosiery Mills.....	117 60
444—Delaware Hosiery Mills.....	419 29
445—Star & Crescent Mills.....	300 00
446—H. B. Newton.....	423 19
447— " ".....	263 85
448—Gem Hammock & Fly Net Co.....	1,889 83
449—Waldensian Hos. Mills.....	153 67
Total	\$5,886 40

These accounts were delivered for the purpose of obtaining the usual advance of 80 per cent., but the bank retained the accounts and refused to make any loan on them on account of the pending attachment. The attachment was never dissolved. On January 17, 1911, the executive committee of the bank instructed the assistant secretary to appropriate to the loan account 100 per cent. of the amount collected thereafter and not to credit any part of the same to the bankrupt's checking account. Pursuant to said direction, the amount collected on the following accounts was so appropriated:

1/17/11 Wright Health Underwear Company Bill #419.....	\$ 154 05
1/18/11 Warde Mehan.....	238 35
John Moore & Sons.....	116 62
1/12/11 Robert Thoburn.....	440 90
1/12/11 Robert Thoburn.....	93 60
1/23/11 Gem Hammock & Fly Net Co.....	1,359 04
1/24/11 John Barrows.....	2,941 97
Bee Knitting Co.....	53 94
Leolastic Co.....	302 48
2/1/11 Industrial Mills.....	418 24
Lyon Hosiery Mills.....	153 81
Boger & Crawford.....	170 50
Delaware Hosiery Co.....	655 04
2/11/11 Industrial Mills.....	358 50
2/23/11 Dickey & McMaster.....	233 53
Sundry Account.....	916 00

The petition in bankruptcy was filed January 24, 1911, and on the said date the value of the assigned, unpaid bills held by the bank was \$21,194.03, and the advances thereon amounted to \$12,835.24. Subsequent to the bankruptcy, this balance was changed by certain charges and credits reducing the amount of advances to \$11,720.87.

There is no evidence whatever to show that the bank at any time received any accounts from the bankrupt in substitution of accounts overdue or undesirable or paid; nor is there any evidence of a release of any of the accounts or the proceeds of the same to the bankrupt; and I find that there was no substitution of accounts or release of accounts or proceeds as aforesaid.

In February, 1911, goods sold to the Leolastic Company of Bayonne, valued at \$273.52, were returned to the bank and resold by it on February 23d for \$233.53, and the proceeds of said sale were retained by the bank. During the same month, goods sold to the Lyon Hosiery Mills, valued at \$228.25, were returned to the bank and resold by it to the Franklin Hosiery Mills on March

1, 1911, for \$215.38, and the proceeds of the said sale were retained by the bank.

The foregoing finding of acts is based on the testimony taken up to the meeting of December 13, 1911. After the testimony was closed, arguments heard, and briefs submitted, the attorney for the trustee requested me to grant him a further hearing to enable him to present additional testimony. I granted this request and fixed a meeting for April 18, 1912, for this purpose. All of the testimony taken at this and subsequent meetings was taken subject to the general objection of counsel for the bank on the ground "that both sides had closed, argued the case, and submitted their paper books, and for that reason he did not think it proper to reopen it for the taking of additional testimony," and "that this is an attempt to offer testimony which could have been produced before the parties closed their testimony and argued the case." Notwithstanding these objections, I heard the testimony, being of the opinion that under the circumstances of this case there was no good reason why the request should have been refused. The assigned accounts were and are in process of collection by the trustee in bankruptcy under an agreement made between him and the bank, and the delay in taking the additional testimony could not be prejudicial to either party. I therefore deemed it discretionary with me to allow the matter to be reopened. The admission of testimony after the case is closed is discretionary with the trial court. *Lauer v. Yetzer*, 3 Pa. Super. Ct. 461. The court may withdraw a juror because plaintiff does not have proper evidence at hand to prove his case. *Richelberger v. Nicholson*, 1 Serg. & R. (Pa.) 430. If the court has the right to continue the case for such reason, it would follow that it has the right to admit the evidence out of the regular order of the presentation of the same. As practice before referees is not controlled by the same rigorous rules that prevail in practice before juries, it is a fortiori in the discretion of the referee to admit or reject testimony offered after the hearings before him have closed. The general principles which govern the order of proof and admission or rejection of testimony in trials before juries ought to be, and in fact are, greatly modified where a case is heard before a chancellor or before a master or a referee in bankruptcy. Advantage of the flexible nature of the proceedings is, by common consent of the bar, constantly taken by counsel in the trial of cases before a referee to present the case on its merits without any very nice regard to the rules of evidence, and I am unable to find any force in the argument of counsel for the bank whereby he seeks to exclude from my consideration important, relevant testimony for the technical reasons assigned by him. I should say that the discretion of the referee should be exercised in favor of the admission of all relevant testimony even after a matter is closed and argued, provided that he is satisfied that the offer is made in good faith and not for delay or for the purpose of unlawfully or unconscionably harassing the opposite party. See, also, *Barnhart v. Pettit*, 22 Pa. 135; *McCoy v. Niblick*, 221 Pa. 123, 70 Atl. 577, 30 L. R. A. (N. S.) 355; *Hastings v. Thompson*, 47 Pa. Super. Ct. 424.

From the testimony taken on and after April 18, 1912, being principally that of the expert accountant and his reports filed, I find the following facts:

On August 26, 1910, the bankrupt was insolvent and its liabilities exceeded its assets by about \$3,608.81. From August 27th to September 30th it is impossible to determine from the books of the bankrupt exactly what its condition was, except that during September the bankrupt lost at least \$1,069.44, increasing the excess of its liabilities over assets to at least \$4,678.25. On October 21st the excess of its liabilities had increased to at least \$7,370.38. During the period following October 22d, the bankrupt contracted the greater part of the liabilities which are now proven against its estate in bankruptcy, to wit, the sum of \$20,788.48, which created the greater part of the accounts which were assigned to the bank, to wit, \$16,221.84.

The excess of liabilities over assets continued to increase. On November 30, 1910, it was \$10,990.59; on December 31, 1910, it was \$16,749.50; on January 5, 1911, it was \$17,555.48; on January 9, 1911, it was \$17,988.28; on January 24, 1911, it was \$21,027.49.

I find that this condition of insolvency of the bankrupt on August 26, 1910,

and at all times thereafter up to the date of the bankruptcy, appears by its books of account, which were in the possession and under the control of its president and general manager, John E. Nattress.

I find that John E. Nattress, president and general manager of the bankrupt, as well as agent of the bank, is legally chargeable with knowledge of the insolvency of the bankrupt from and after August 26, 1910.

He is presumed to know, as he ought to have known, the insolvent condition of his own company, since he was virtually the whole company himself and officially its president and general manager. In *re Houghton Web Co.* (D. C.) 26 Am. Bankr. Rep. 202, 185 Fed. 213. Although there is no testimony to the effect that he did in fact know that his company was insolvent, he cannot be presumed to be ignorant of that which it was not merely his duty to know, but of that of which from the very nature of things he could not have been ignorant. Even if he had positively testified that he believed his company to be solvent, I should have found against him from the evidence of his own records.

I find that the bank is legally chargeable with knowledge of the insolvency of the bankrupt from and after August 26, 1910, for three reasons:

First, because the information obtained by it at the time of the execution of the agreement was such as to put it on notice and require it to make diligent inquiry. Had it done so, it would have ascertained what was then a fact, namely, that the bankrupt was insolvent. The facts which raise the duty of inquiry are clear enough. The bankrupt was taking away its business from the Bank of Commerce because this bank notified the debtors whose accounts had been assigned, and transferred its business to the bank because it did not give such notice. This fact alone is suspicious and suggests an unhealthy condition of the affairs of the bankrupt indicated by its desire to work under cover. Furthermore, the statement in writing and the contemporaneous oral statements of Nattress show that all accounts then owned by the bankrupt had been assigned for loans to the Bank of Commerce. The statement also showed that the bankrupt had merchandise in warehouses amounting to \$9,513.33 subject to warehouse claims of \$4,428.03, leaving an equity of only \$5,085.30, which together with the merchandise in transit, amounting to \$2,157.79, made a total of unincumbered merchandise of \$7,243.09, against which the bankrupt owed for merchandise \$25,341.94. The statement further shows that of the outstanding accounts which had been assigned to the Bank of Commerce nearly 20 per cent. were past due. Surely such a statement cannot be taken to denote anything but a state of financial ill health bordering on paralysis, and a bank, with its facilities for inquiring and expert knowledge at its command, cannot be heard to say that it considered this statement satisfactory, and, to use the words of its vice president, "the most satisfactory, the most orderly account we ever had in every respect." The vice president said that he had made inquiry concerning the financial condition of the bankrupt and had received excellent bank references concerning it. In view of the statement in writing which was furnished to the bank, all hearsay "references" are, in my opinion, valueless, no matter by whom given, and it was sheer folly for the bank to accept them and act upon them. The statement which was furnished to it pointed toward insolvency, and, indeed, as I have found, insolvency actually existed at the time when the statement was given. It was the fault of the bank that it did not discover this fact, for the evidence was at hand and, indeed, in its very possession. The inquiry made by the bank from the president of the bankrupt corporation was not sufficient.

In the language of the court in the case of *McGirr v. Humphreys Grocery Co.* (D. C.) 26 Am. Bankr. Rep. 518, 192 Fed. 55, we may use judicial notice of business customs and methods as criteria for valuing facts as imposing the duty of inquiry. When once the duty of inquiry occurred, it was not met, under the circumstances of this case, by merely asking the president of the bankrupt corporation for information, nor by relying upon the so-called bank references in the face of the information disclosed by the statement in writing which was furnished to the bank. The fact that the bankrupt transferred its account from the one bank to the other on account of its fear about its credit should have put the bank on inquiry as to the real financial condition

of the bankrupt. The bank apparently neglected to investigate because it was intent merely on its security and satisfied to take the same for the purpose of doing business with the bankrupt. I cannot reach any other conclusion than that the bank remained purposely ignorant and blind of the circumstances of the bankrupt, and that therefore it must be held to have had reason to believe that the legal effect of taking the assignments was not to give it security but a preference, except in so far as the assignments were made in good faith and for a present consideration. In *re Coffey*, 19 Am. Bankr. Rep. 148. In *Tilt v. Citizens' Trust Co.* (D. C.) 27 Am. Bankr. Rep. 320, 191 Fed. 441, the court said: "When a person accepts from its debtor, as the president of this trust company accepted, an assignment of a book account for but a single dollar, as collateral security to the debtor's promissory note, and this after a multitude of like accounts, but of large amounts, had already been transferred as security for the payment of several other notes of the same debtor, who was known to be hard pressed, it must inevitably occur to him that the debtor's assets are practically exhausted. The inquiry, if such it can be called, made in behalf of the trust company, was not, under the circumstances, reasonably careful or sufficient."

The second reason for finding that the bank had knowledge of the bankrupt's insolvency is that the books and records of the bankrupt were, by the agreement of August 26, 1910, placed absolutely under the control of the bank, and a proper examination of them by the bank or by any person duly qualified and acting in its behalf would have disclosed the fact of insolvency. The books of the bankrupt were, of course, evidence on the question of insolvency within four months of the date of the filing of the petition. "They are not conclusive upon this subject, for they may be incomplete, incorrect, or fraudulent, but ordinarily they are important evidence and entitled to much weight." In *re Docker-Foster Co.* (D. C.) 10 Am. Bankr. Rep. 584, 123 Fed. 190. This is the law as to the value of books in evidence when the insolvency of the bankrupt is to be proven; a fortiori when such insolvency is to be established not in a legal forum but only in the judgment of the person making the inquiry, a prudent bank should require less persuasive evidence of the insolvency of a prospective debtor than would be necessary to convict the debtor in a court of law. If the bank could not have had the books or an expert to examine them, it would not have been chargeable with knowledge of their condition because the intimate, inaccessible information contained in the books cannot bind the creditor; but where the books are in its possession or under its control and open to its inspection, and where they will yield the information to a reasonable inquiry, the bank must be held to have the knowledge which it could thus have acquired. In *re Wolf Co.* (D. C.) 21 Am. Bankr. Rep. 73, 164 Fed. 449, affirmed in *Sharpe v. Allender*, 22 Am. Bankr. Rep. 431, 170 Fed. 589, 96 C. C. A. 104. The bank had absolute control of the books, but never opened them or had any one look into them in its behalf.

The third reason for imputing knowledge of the bankrupt's insolvency to the bank is that the president and general manager of the bankrupt was specially appointed as the lawful agent of the bank for certain duties, in the regular performance of which he obtained a knowledge by presumption of law of the insolvency of his corporation by which knowledge his principal, the bank, was bound. See Bankruptcy Act, § 60b; *Babbitt v. Kelley*, 96 Mo. App. 529, 70 S. W. 384, 9 Am. Bankr. Rep. 335. In *re Nassau* (D. C.) 15 Am. Bankr. Rep. 793, 140 Fed. 912, is a case interesting both on the point of the liability of the principal for knowledge of its agent and of the duty of inquiry imposed. In this case the agent of the creditor, immediately upon taking certain mortgages as security for past indebtedness and before the mortgages were recorded, was warned by the debtor's counsel that in case of bankruptcy the mortgages would give the creditor no priority. "He asks the debtor whether he intends or expects to go into bankruptcy and is answered, 'No, not so far as I am concerned.' He makes no further inquiries, records the mortgages in such order of priority as will effectuate his client's intention to make one of them an ultimate gift to the debtor, makes no examination of the property, and, when the searches show an assessment of less than one-half the value of the real estate stated to him by the debtor, contents himself by

an inquiry of the debtor as to its correctness. The inference is irresistible that he judged it better to make no further inquiry. Had he made this inquiry, he would, as an experienced man of business, have ascertained the facts rehearsed in this opinion, and must have come to the conclusion that Nassau was insolvent, and that these mortgages constituted a preference over other creditors."

The next question to be determined is the effect of the agreement of August 26, 1910. The purpose of this agreement, according to its terms, was to provide for future loans from the bank to the bankrupt upon assignment by the bankrupt to the bank of future accounts receivable. The security for the loans to be made was not transferred by the agreement of August 26th, but the bankrupt thereby did agree that thereafter it would make a special and specific assignment of each and all accounts receivable and deliver them to the bank. It is true that the words in the agreement are that the bankrupt "hereby assigns and agrees to deliver" to the bank all accounts receivable by it, but, in fact, no accounts receivable were assigned and delivered at the time of the execution of this agreement and not until about two weeks thereafter. No consideration whatever passed from the bank to the bankrupt for the execution of the agreement of August 26th; the bank made no loans, gave no credit, or assumed no liability upon the faith of this agreement. The bank sought by this agreement to obtain absolute control of all of the book accounts of the bankrupt, and it reserved the right to make loans on only such of these accounts as it approved, but sought to hold all accounts assigned, whether approved or not, as security for any advances made by it to the credit of the bankrupt. Upon accounts approved by it the bank agreed to give a credit of a sum equal to 80 per cent. of such accounts.

It is doubtful, even where there is no insolvency at the time of the execution of the agreement (as stated in the case of *First National Bank of Pittsburgh v. Guarantee Title & Trust Co.*, 24 Am. Bankr. Rep. 330, 178 Fed. 187, 101 C. C. A. 507), whether "under the law of the state of Pennsylvania an assignment of all of the assignor's future book accounts, without limit as to time, as security for present and future indebtedness to the assignee, without limit as to amount, may be enforced in equity against the creditors of the assignor, or against the assignor's trustee in bankruptcy." The effect of such an agreement would be to enable the assignee to be the secret owner of all of the intangible assets of his assignor with the right to appropriate them at his pleasure and with concealment from other creditors of the assignor of the real status with reference to their ownership. The rule of law laid down in the case of *Clow v. Woods*, 5 Serg. & R. (Pa.) 275, 9 Am. Dec. 346, and cases following it, inhibiting the attempt to separate title and possession of tangible property, has not been recognized in cases of intangible property because of the difference in the evidence of possession between these two classes of property. But if the opinion of the mercantile world be considered a fair test of the propriety of such secret assignments of all book accounts and the analogy of Bulk Sales Laws be invoked, it would seem that such agreements should be declared to be illegal, and if, as is argued on behalf of the bank, loans on such agreements are a general custom among financial institutions, I unhesitatingly say this is a bad custom, one contrary to good policy and business ethics, and one that should be suppressed. If a merchant asking for credit should advise his prospective creditor that he had assigned all of his book accounts, it would require some unusual condition or some peculiarly intimate relation between the parties to induce the prospective creditor to grant the credit. In the case at bar one creditor of the bankrupt testified that it was the policy of his firm not to sell merchandise to persons who are engaged in the business of assigning their accounts for advances of money, and that if he had had such knowledge of the practice of the bankrupt he would not have sold it any goods. I believe that this expression of opinion fairly represents the attitude of the business world toward such contracts, and a practice that is thus condemned should be declared unlawful. If this is a sound argument against actual transfers of all book accounts of a business concern, then it applies with equal force to an agreement to transfer all such book accounts. The strong language of the court in the matter of *Great Western Manufacturing Co.*, 18 Am. Bankr. Rep. 259, 152 Fed. 123, 81 C. C. A. 341, points out the

dangers to honest business enterprise of preferential transfers such as were considered in that case and may be applied with equal force to the case at bar.

But, apart from this consideration of the matter, I am of the opinion that the agreement of August 26, 1910, does not have the force and effect which the bank claims for it. It purports to be an assignment in presenti of accounts to come into existence and be delivered to the assignee in futuro and can only be enforced upon the doctrine of equitable assignment or equitable lien created under it. As to this I shall have more to say hereafter.

The agreement was made at a time when the bankrupt was insolvent and known to be so by the bank. There was no consideration whatever for the agreement of August 26, 1910. Not a dollar of money or credit was given by the bank to the bankrupt under this agreement until the book accounts referred to in it were actually assigned, and the value of the book accounts always largely exceeded the amount of the credit or loan made upon them. The parties, by their practice under this agreement, interpreted it to be merely an agreement defining the terms under which they were to do business thereafter. It set forth in substance the conditions under which the bank would in the future make its advances or give credits to the bankrupt. Had these conditions not been fulfilled, that is to say, had accounts properly approved by the bank never been assigned and delivered to it, and had the other conditions set forth in the agreement not been complied with by the bankrupt, no loans would ever have been made by the bank, and the agreement of August 26th would have been mere waste paper. The argument, therefore, that this agreement of August 26th is to be sustained upon equitable doctrine, falls. An equitable lien is created when the creditor actually gives a credit, pays money, or indorses a note; in other words, gives value and is sought to be secured by accounts to come into existence in the future. The equitable right is based on the fact that the creditor has actually parted with property upon the faith of a promise to secure him.

This was the case in *Union Trust Co. v. Bulkeley*, 18 Am. Bankr. Rep. 35, 150 Fed. 510, 80 C. C. A. 328, where the creditor became indorser for the bankrupt and was secured by an appropriation of accounts receivable as they accrued by way of pledge or security until the time for the bankruptcy. In that case the court said: "The interest conveyed by an assignment to secure the assignee against liability as an indorser was commensurate in degree and duration with the liability it secured." *Hamlin v. European Co.*, 72 Me. 83. The transaction had all the elements of an equitable assignment of that kind of property as effectually as if it were created by mortgage, although not evidenced by writing (*Merchants' Nat. Bank v. Gregg*, 107 Mich. 148, 64 N. W. 1052; *McDonald v. Daskam*, 8 Am. Bankr. Rep. 543, 116 Fed. 276, 53 C. C. A. 554), and meets all the requirements to its validity as an assignment declared in *Wright v. Ellison*, 1 Wall. 16-22, 17 L. Ed. 555, where it is said "it is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it." It is not material that some of the accounts had not yet accrued. A court of equity would enforce the assignment according to its intent.

"The intention of the parties will be enforced in equity. *Fourth St. Bank v. Yardley*, 165 U. S. 635, 17 Sup. Ct. 439, 41 L. Ed. 855. It is no objection in a court of equity to the validity of the assignment that manual possession of the accounts was not given. There is no way by which an open account can be physically delivered. *Preston Nat. Bank v. Geo. T. Smith Co.*, 84 Mich. 385-387, 47 N. W. 502; *Spring v. So. Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614; *McDonald v. Daskam*, 8 Am. Bankr. Rep. 543, 116 Fed. 280 [53 C. C. A. 554]. The agreement of the parties transferred to petitioner the equitable title thereto. That effect inheres in the term 'equitable assignment'—an assignment of that much of the debt which a court of equity will recognize and a court of law will not." *First Nat. Bank v. Coates* (C. C.) 8 Fed. 540-542; *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233; 2 Am. & Eng. Ency. Law (2d Ed.) 1010, title "Assignments."

"The contention that the agreement of January 3, 1903, was purely executory—an agreement to assign the accounts in futuro—not a present executed

transfer thereof even by parol, is negatived by the testimony of both petitioner and the bankrupt. The latter states in terms: 'He (petitioner) asked me what I would give him for security. I told him I would assign those accounts, and before we finished the conversation he asked me if I had assigned those accounts to him, and I said, "Yes."' The petitioner's testimony is equally explicit to the same effect, as has been shown. The facts epitomized are that the bankrupt assured petitioner that, if he would indorse bankrupt's negotiable paper to the amount of \$15,000, he would assign his book accounts to secure the indorser's liability, and then and there assigned them to petitioner by parol for that purpose. The petitioner on the faith of that assurance and the contemporaneous assignment of that security indorsed Macaulay's paper to the amount of \$15,000. The proceeds of these indorsements went into the bankrupt's business, and his creditors have had the benefit of them. It is conceded that the value of the assigned accounts is less than petitioner's liability as indorser.

"It is contended by the appellant that the contract of assignment was a contract to assign, and so was an unperformed agreement when the bankruptcy proceedings were taken, which was converted into a claim for damages for breach of contract merely, by the operation of the Bankruptcy Act. But there is no ground for this contention. If any contract was made, it was one which became of its own force operative as a lien. It is true that the subject to be affected by it was to be thereafter acquired; but when acquired it would become subject to the lien without any new or further agreement. This is something quite different from an executory contract. The same doctrine has been applied to assignments of book accounts to be thereafter earned by the assignor. *Tailby v. Official Receiver*, L. R. 13 App. Cas. 523."

In the case at bar there is, as has been pointed out, no equity in favor of the bank, for it gave nothing in consideration of the agreement of August 26th, and its status differs herein and in the fact that the agreement was merely executory from the status of the assignee in the *Bulkeley* Case.

In the case of *Godwin v. Bank*, 22 Am. Bankr. Rep. 703, 145 N. C. 320, 59 S. E. 154, 47 L. R. A. (N. S.) 935, the bankrupt before the beginning of the four months' period verbally agreed with the bank to transfer certain bonds amounting to \$4,500, if the bank would lend the bankrupt \$20,000. The bank actually made the loan as agreed upon, and thereafter, within the four months' period, the bankrupt, in performance of his verbal agreement, executed a written assignment of the bonds. The jury found by special verdict that the bankrupt "verbally agreed to transfer" the bonds, and the court said that while this language might be construed as constituting an executory agreement, under the facts of the case, a present equitable assignment more than four months prior to the bankruptcy was thereby created, and the words "agreed to transfer" clearly referred to an agreement to "deliver" the bonds whenever the same came to hand. The court cites with approval from *Walker v. Brown*, 165 U. S. 655, 17 Sup. Ct. 453, 41 L. Ed. 865, as follows: "Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers, or incumbrancers with notice. By the contract of December, 1903, when these bonds came into his possession and control, E. F. Young had no right to deal with them, except to deliver them to the defendant bank as required by its terms. On the equitable principle which considers that done which the parties are under a binding agreement to do, said Young had no right to make any other disposition of this specific property. This is the principal test by which an equitable assignment may be distinguished from an executory agreement to assign, and a case is presented where the claimant has a right to the specific property against the bankrupt himself, and where, in the absence of some interfering state regulation or of some adverse

provision of the bankruptcy law itself, the defendant's right is enforceable against the trustee. It is this creation of a present interest in the bonds themselves, amounting to an equitable assignment thereof, which differentiates the present case from many of those cited, and relied upon by the plaintiffs' trustees. Some of these were cases where from the very general terms of the agreement no right in any specific property was acquired at all. In others, from the nature of the interest or by reason of some interfering principle of positive law or public policy no right in any specific property was created, except within the period when it was avoided by express provisions of the bankruptcy law itself. Thus in *Sheridan's Case* (D. C.) 3 Am. Bankr. Rep. 554, 98 Fed. 406, there was an executory agreement to pledge property made prior to the four months, and the property was actually delivered within such period. By the very nature of a pledge no interest passes until delivery, and this was on that ground avoided as a prohibited preference."

In the case at bar the bank gave no consideration for the agreement of August 26th; there was no debt or obligation in existence for which security could or should be given, and there was no security in existence which could then have been transferred for a loan to be made thereafter. Applying the test suggested in the last-cited case, when the bankrupt created the book accounts it had a perfect right to dispose of them except in so far as they were needed to be substituted for accounts already assigned which were found to be insufficient. The bank could not have compelled the bankrupt by decree of specific performance either to create accounts for its benefit or to assign to it accounts coming into existence upon which it had made no advances. The agreement of August 26th therefore was not one creating an equitable assignment, but was merely an executory agreement to assign accounts.

Nor does the agreement fall under the rule laid down in the case of *Furth v. Stahl*, 205 Pa. 439, 55 Atl. 29, that "a pledge or payment for a consideration given in the present or to be given in the future, whether in money or goods or services, is not a preference." There was no pledge given to the bank for a present consideration or for a consideration to be given in the future; in fact, there was no pledge given at all by the agreement of August 26th; there was merely a promise to give a pledge in the future for a consideration to be given in the future.

I call attention to the case of *In re Sayed* (D. C.) 26 Am. Bankr. Rep. 444, 185 Fed. 962. In this case money was actually loaned at the time of the assignment of the security, and there was an indefinite agreement to make further loans on the same security, and such further loans were in fact from time to time made; the assignor being solvent during all this time. The court in that case held that all advances made by the bank were made on the strength of the security which it had already received in contemplation of such advances, and that each of these advances was in substantial effect a loan in exchange for present security. Each time by virtue of the transaction the bank contemporaneously received an additional interest in the security. The mere statement of the substance of this case sufficiently distinguishes it from the case at bar without requiring further comment.

I am of the opinion that the agreement of August 26th, for the reasons above stated, was invalid as against the trustee in bankruptcy except in so far as the bank in its subsequent dealings with the bankrupt within the period of four months before the bankruptcy was a purchaser in good faith and for a present, fair consideration. The assignments of accounts which were actually made before the beginning of the four months' period, to wit, the four assignments made between September 7 and September 24, 1910, are not affected by the subsequent bankruptcy, and the right of the assignee to hold the accounts thus assigned must be sustained, not, however, by virtue of the agreement of August 26th, but by reason of the fact that, at the time when these four assignments were respectively made, the period of four months before the bankruptcy had not yet commenced, and, although the bankrupt was insolvent at that time, the clauses of the bankruptcy law relating to preferential transfers can have no application.

Counsel for the bank argues, however, that the agreement of August 26th ought to be sustained; that it and the collateral notes subsequently executed

and the actual assignment of book accounts subsequently made all constituted one transaction; and that they all refer back for their force and effect to the date of this agreement, which having been made more than four months before the bankruptcy, saves all of the subsequent dealings of the parties from the effect of the bankruptcy. Counsel relied especially upon the case of *Young v. Upson* (C. C.) 115 Fed. 192, 8 Am. Bankr. Rep. 377, and *In re Schwab-Kepner Co.*, decided by Referee Adams of Newark and approved by Judge Cross in the District Court of New Jersey. In *Young v. Upson* the part of the opinion of the court relied on is as follows: "Since the argument of this case, counsel request that I pass upon the question of a method of application of the collateral. I think that the various sums advanced must be taken as a continuous transaction. The proofs justify that conclusion. The president of the company informed complainant, at the time arrangements for the loan were perfected, that the company needed from \$20,000 to \$30,000, 'not all at once, but as the business needs required.' For this reason I am of the opinion that the claims paid must first be applied to the payment of the note for which they stand collateral. Any excess may then be generally applied on the indebtedness, including expenses incurred by complainant for collecting accounts after failure of the company."

The facts in the case of *Young v. Upson*, as they appear in other parts of the opinion of the court, are as follows: "The corporation was adjudicated bankrupt in involuntary proceedings instituted by creditors on January 11, 1900. The undisputed proofs show that in the autumn of 1889 the New York China, Glass & Toy Company (which will hereafter, for convenience, be referred to as the 'company'), being unable to borrow from banks the necessary amount of money to prepare for its fall trade on account of a false report printed in a newspaper as to its financial condition, applied to the complainant, brother of the president of the company, for loans and advances to meet its merchandise account and current expenses during the fall months. The nature of the company's business was such that the principal portion of its sales was made in the fall and early winter, and payments upon such sales were made in most instances after the holiday season. The stringency of its finances produced by the refusal of the banks to accept its collateral resulted in the board of directors of the company authorizing its president to borrow money of the complainant and to secure repayment by assignments of bills receivable as collateral security. The company was then to collect the assigned accounts as agent for the lender, and without expense to him. Subsequently, at different times between September 16 and December 18, 1899, complainant loaned and advanced to the company various sums, to secure which he exacted and received demand notes for each amount loaned, together with assignments in writing of bills receivable as collateral security. Appended to each note was a list of claims or accounts assigned. The amounts varied from \$1,000 to \$3,000 and aggregated \$53,700. The collateral is estimated to have been 25 per cent. in excess of the loan. It further appears from the evidence that as soon as each account was assigned it was transferred on the ledger of the company to an account designated 'Security Account.' That was done to distinguish such accounts on the company's books from accounts not assigned. As soon as an assigned account was collected, the proceeds were paid to complainant to apply on the loan. Extensions of time of payment and renewals were referred to complainant for his approval or disapproval. The transaction is admitted to be free from actual fraud or deceit. It was not seriously contended on the hearing that a preference was created by the act of transfer. A preference, within the scope of the Bankruptcy Act, is created when it shall be given within four months of filing petition, and when the person receiving it has reasonable cause to believe it was intended to give a preference. We have no such claim here. The security was given for a present consideration, and therefore no fraud on creditors, under the Bankruptcy Act. * * * It does not appear that either the company or the complainant at the time the loans were made had any knowledge of the company's insolvency."

It does not appear from this opinion that the complainant had either possession or control of the books of the bankrupt as in the case at bar, and

therefore was not chargeable with knowledge of what an examination of the books would have disclosed.

It would appear from the facts set forth in the opinion of the court that there was a present consideration actually given for the securities which were subsequently transferred, and that neither the bankrupt nor the creditor had any knowledge of the bankrupt's insolvency. To hold that the decision in *Young v. Upson*, under the facts as they appear in that case, governs the case at bar, would be to extend the principle of immunity from the charge of preferential transfer far beyond the intent of the bankruptcy law and of the decisions under it. See *Tilt v. the Trust Co.*, *supra*. In the case of the *Schwab-Kepner Co.* to which I am referred, there are at least two important differences of fact from the case at bar. The referee in the *Schwab-Kepner Case* found that at the time of the making of the agreement the bankrupt was not insolvent; that the assignee of the accounts had no reason to believe that the bankrupt was insolvent; and that the loans made to the bankrupt were continually increasing, while the security was decreasing, the result of which was that the dealings between the bankrupt and its assignee resulted in increasing the estate of the bankrupt, hence were for the benefit of the creditors. In the case at bar I have found that the bankrupt was insolvent at the time of the execution of the agreement of August 26th and at all times thereafter; that the bank had legal knowledge of the fact, and that the security was continually increasing by the advance of fresh accounts transferred to the bank, while the loans never equaled the amount of the security, and that the estate was not benefited by the transaction, since its assets were not increased thereby. The referee in the *Schwab-Kepner Case* says: "All of the assignments of accounts made within the four months' period were made under the agreement of May 16, 1910; the advances were continuous transactions (*Young v. Upson* [C. C.] 115 Fed. 192, 8 Am. Bankr. Rep. 377), and the agreement operated as an equitable assignment not only of the accounts then in esse, but of those to grow due, which latter passed to the petitioner as they ripened into being by force of the original agreement and not because of a later assignment (*Field v. Mayer*, 6 N. Y. 179, 57 Am. Dec. 435; *Devlin v. Mayor*, 63 N. Y. 8, at page 15; *Union Trust Co. v. Bulkeley*, 150 Fed. 510, 80 C. C. A. 328, 18 Am. Bankr. Rep. 35; *Jaquith v. Alden*, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717, 9 Am. Bankr. Rep. 776." In so far as the case of *Young v. Upson* is cited as authority, I refer to what was said hereinbefore with reference to that case. As to the view of the referee that the agreement operated as an equitable assignment not only of the accounts in esse but of those to grow due by virtue of the force of the original agreement, I am of the opinion that the doctrine of equitable assignment has no application in the case at bar for the reasons above mentioned, and for the further reason that one of the essential features of contracts enforceable in equity, to wit, mutuality, is lacking in the contract under consideration, under the terms of which the bank could apparently insist upon having all of the bankrupt's book accounts and the bankrupt could insist on nothing, for the question as to whether he should have a loan depended, not on the contract, but on the good will and pleasure of the bank. He had no enforceable quid pro quo.

It furthermore appears that the conduct of the parties under the agreement of August 26, 1910, shows that it was merely executory in its nature. No money passed directly under it, no loan was made under it until the accounts were actually transferred, the bankrupt asked for no credit on the faith of it without at the same time delivering accounts for assignment. A copy of this agreement was accepted by the bank, was signed by the bankrupt, but unsigned by the bank. This was explained by the vice president of the bank by the fact that it was an oversight in putting it away in the vault. It may as readily be explained by the fact that the bank, having obtained the bankrupt's signature to this agreement which set forth the terms of their subsequent dealings, really did not have to sign it, because the signature of the bank conveyed no rights to the bankrupt which it would not have had even without any agreement. It was, of course, understood by the officers of the bank that no business could be done with the bankrupt unless accounts were produced for assignment and approved. Nobody

paid any attention to the agreement of August 26th which was locked away in the vaults of the bank and not produced until this issue was raised. During the course of the examination, I asked the assistant secretary of the bank, who had special charge of this transaction, the following question:

"Q. I would like to ask you a question in reference to the printed matter on the back of these slips. There is a clause here, Mr. Oglesby, that begins, 'This and the previous assignment hereof is made,' etc. Was there any previous assignment made of this account? A. No."

Counsel for the bank subsequently recalled Mr. Oglesby for the purpose of having him withdraw this answer, and asked him the following question: "Q. Mr. Oglesby, the referee in this case asked you a question which is set forth on page 66 of the testimony, in which he asked you the following question: 'I would like to ask you a question in reference to the printed matter on the back of these slips. There is a clause here, Mr. Oglesby, that begins, 'This and the previous assignment hereof is made,' etc. Was there any previous assignment made of this account?' And your answer was, 'No.' The paper which the referee referred to, Mr. Oglesby, was the agreement of August 26, 1910. Were you familiar with that paper at all? A. Never saw it."

"Q. So you don't know whether there was another assignment or not? A. No."

"Q. So, therefore, when you made that answer, you testified as to what you knew of? A. As to what I knew and seen."

"Q. But you don't know anything about the other assignment? A. No."

It seems therefore that very little weight was placed on the agreement of August 26th, since the assistant secretary of the bank who had special charge of these loans knew nothing about it.

The purpose of the agreement of August 26th might have been to attempt to do the very thing which the bank is now attempting to do, namely, to protect subsequent transactions from the effect of the bankruptcy law. I do not say that this was the deliberate intention of the bank in this case, but it can readily be seen how such agreements might be used by unscrupulous prospective bankrupts and their no more scrupulous friends to defeat the bankruptcy law, and in this connection a portion of the opinion of the court in *Re Great Western Mfg. Co.*, 18 Am. Bankr. Rep. 259, 152 Fed. 123, 81 C. C. A. 341, is not without importance: "An agreement to mortgage or transfer is not a mortgage or transfer. The title remains in the owner unincumbered by the mortgage until the mortgage or transfer is effected. When the agreement is made before, and the mortgage or transfer within, the four months, the title stands unincumbered by the latter at the commencement of the four months, and the proceeds of that title are pledged under the bankruptcy law for the benefit of all the creditors pro rata. Any subsequent mortgage or transfer withdraws that title or a portion of its value from these creditors, and a just and fair interpretation and execution of the act demands that such a mortgage or transfer should be adjudged voidable if it is otherwise so, and that the mortgagee or transferee should be remitted to his original agreement. In this way the property at the commencement of the four months and its value may be preserved for the general creditors, and the mortgagee or transferee may retain every lawful advantage his earlier contract confers upon him. Any other course of decision opens a new and enticing way to secure preferences, nullifies every provision of the law to prevent them, and invites fraud and perjury. Hold that transfers within four months in performance of agreements to make them before that time do not constitute voidable preferences, and honest debtors would agree with their favored creditors before the four months that they would subsequently secure them by mortgages or transfers of their property, and just before the petitions in bankruptcy were filed they would perform their agreements. Dishonest men who made no such contracts might falsely testify that they had done so, and thus by fraud and perjury sustain preferential transfers and mortgages made within the four months to relatives or friends. The great body of the creditors would be left without share in the property of their debtor and without remedy, and a law conceived and enacted to secure a

fair and equal distribution of the property of debtors among their creditors would fail to accomplish one of its chief objects. This court will hesitate long before it approves a rule so fatal to the most salutary provisions of the bankruptcy law."

Counsel for the bank has referred me to some Pennsylvania cases in support of his contention. An examination shows them to be not in point. Kuhn's Appeal, 163 Pa. 438, 30 Atl. 215, simply decides the question of competency of witnesses to prove that the assignment was made in good faith and for adequate consideration. East Lewisberg Lumber & Mfg. Co. v. Marsh, 91 Pa. 96, decides that the assignment of future collections from sales of reapers to be paid over within three months as collateral security was a valid assignment on the ground that the antecedent indebtedness was sufficient consideration for it and that the assignee for the benefit of creditors had no standing to contest it. In the case at bar, however, the assignment is indefinite both as to amount and as to time; it is not contested by an assignee for the benefit of creditors, but by a trustee in bankruptcy whose rights are different and higher, and the basis of the decision validating the assignment on the ground that the antecedent indebtedness was sufficient consideration is cut away by the clause of the bankruptcy act in relation to preferences. *Ruple v. Bindley*, 91 Pa. 296, was a contest between the original parties to the transaction, the assignor, the assignee, and the debtor, with no intervening creditors whose rights had attached. *Collins' Appeal*, 107 Pa. 590, 52 Am. Rep. 479, was likewise a case in which there were no attaching or execution creditors interested.

The next question to be considered is the effect of the execution of the collateral notes. No loan was made under these notes except for the amount of collateral approved by the bank. The note of October 21, 1910, contains a clause which provides that the assignor shall on demand of the bank deposit such additional security as may be required from time to time, and that the security pledged and thereafter paid shall be applicable to secure the payment of any past or future indebtedness of the bankrupt to the bank. I am of the opinion that the execution and delivery of these collateral notes, of which the note of October 21, 1910, is a specimen, add nothing to the rights of the bank, and the arguments applicable to consideration of the agreement of August 26, 1910, have equal force in consideration of these collateral notes. The notes created a valid obligation as against the creditors in bankruptcy only for such sums as were actually advanced by the bank in good faith and for a present consideration upon the securities which were assigned to the bank. The notes cannot help the bank to apply collateral received by it for any pre-existing indebtedness.

I come now to the effect of the individual assignments of the accounts of the bankrupt to the bank. I am of the opinion from what has been said that the assignments, if valid at all, are valid only for loans actually made on them respectively. Each loan or advance or credit to the checking account of the bankrupt made by the bank is secured only by the account actually transferred to the bank at that time, for, at the time when these loans were made and assignments taken, the bankrupt was insolvent and was known to be insolvent by the bank, and the transactions took place within four months of the bankruptcy.

But the bank contends that, in addition to being security for amounts advanced at the time when they were assigned, the assigned accounts were also security as substituted accounts for accounts collected by the bankrupt and not accounted for, it being the purpose of the parties thereby to keep the security good; but I find no evidence whatever that accounts were collected by the bankrupt and not paid over, nor is there anything in the testimony to indicate that any accounts were ever released by the bank and other new accounts substituted as security in place of those released. To continually take new accounts, keeping both the new and the old, can be said to be a substitution of the new for the old only by a change in the definition of the word "substitution," which has not yet been recognized by lexicographers. In this case there was no substitution of one security for another at any time. What is meant in law by substitution, and when ac-

counts may be properly substituted within four months' period, is set forth in the case of Reese-Hammond Fire Brick Co., 25 Am. Bankr. Rep. 323, 181 Fed. 641, 104 C. C. A. 371. In this case the date of the bankruptcy was July 22, 1907. A note was given more than four months before the bankruptcy proceedings were commenced, accounts were assigned under it, and other accounts assigned later on within the four months' period. I quote from the opinion of the court: "While some of the elements of unlawful preference may be found, yet all are not present, especially knowledge on the part of the bank of the bankrupt's insolvency, of which no evidence was produced (it is not to be inferred from the knowledge of Garland, because a director is not an organ of communication with the bank. *Custer v. Tompkins County Bank*, 9 Pa. 27; *Bank of Whitehead*, 10 Watts [Pa.] 397, 36 Am. Dec. 186)." The court found that the accounts assigned took the places of accounts paid, and that these transactions did not impair the rights of the general creditors, for the reason that the substitutions of new for old securities did not in any wise diminish the debtor's estate available for those creditors. "It is too well settled to require discussion that an exchange of securities within the four months is not a fraudulent preference within the meaning of the bankruptcy law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it."

The assignment of the book accounts of January 5th by the bankrupt to the bank was received by the bank the day before the foreign attachment was served on it as garnishee, and the assignment of accounts of January 9, 1911, was received by the bank after the attachment was served. No loans were made to the bankrupt on these assignments for the alleged reason that the foreign attachment prevented it. These book accounts were not refused by the bank, but were taken and held by it and attempted to be appropriated to its account with the bankrupt. It is neither alleged nor proved that these accounts were tendered or received in substitution for other accounts, and I find that they were tendered and received for the purpose of securing an 80 per cent. loan to the bankrupt. The loan was not made, and I am of the opinion that the bank had no title to the accounts and has no title to the proceeds of their collection. *In re Mandel* (D. C.) 10 Am. Bankr. Rep. 774, 127 Fed. 863.

The greater part of the assignment of the book accounts was made between September 25 and December 30, 1911; that is to say, within four months of the bankruptcy. Before considering these assignments, I shall consider the effect of the return of merchandise by some of the customers of the bankrupt, which merchandise was received by the bank after the bankruptcy, sold by it, and its proceeds appropriated. I have found that in February, 1911; after the bankruptcy, the bank received merchandise from two debtors of the bankrupt, the book accounts for which had been assigned to the bank. This merchandise was received by the bank and sold for a total of \$448.91, which sum was retained by the bank. The question arises: By what title does the bank retain this money against the trustee in bankruptcy?

The only argument offered for the bank's claim of title to these goods is a reference to the phraseology of the form of assignment wherein the bankrupt assigns to the bank "the claim, account and demand set forth and described in the within invoice and statement of right, title and interest of every nature and kind, including the right of stoppage in transit, of the goods and merchandise covered by and described therein," etc. Every other word in the somewhat lengthy form of assignment which is set forth in full on page 633 of this opinion indicates without the least ambiguity the intention of the parties to make an assignment of the book account only, and in no way refers either expressly or by any implication to the merchandise which is the basis of the account assigned. Is the above-quoted phrase sufficiently explicit to make clear the intention of the parties, taking their agreement as a whole, to assign the goods as well as the book account? And if it is clear, is it an agreement valid and enforceable against creditors?

The intention to assign the merchandise, if it existed, is not at all clearly

expressed and by no means necessarily implied. This part of the agreement seems to have been pieced together from different forms, and, reduced to its simplest form, it attempts to assign to the bank the account described in the invoice and the right of "stoppage in transit of the merchandise covered thereby." The assignment is specifically only of the account and the right of stoppage in transit, and the latter does not necessarily mean an assignment of title to the goods, especially when the rest of the agreement, by omission of any reference to the goods where they should be mentioned, negatives the implication. But assuming that it is intended to convey title to the goods, the attempt is futile. I have recently considered this question in *Re Shulman*, in *Bankruptcy*, No. 4,129. In my opinion filed and now pending on review before the District Court, I commented on the clause in the Shulman agreement, which attempted to assign "the claims or accounts set forth * * * and the goods covered by or described therein." The form in the Shulman Case does by express words what the form in the case at bar is alleged by counsel for the bank to do by implication. I quote from my opinion in the Shulman Case: "At the date of the agreement the merchandise had already been sold and delivered by Shulman to Josephson (the debtor whose account had been assigned to the bank) and could not have been transferred by Shulman to the bank. This agreement attempts to convey a chose in action as well as the goods, no longer belonging to the assignor, out of which the chose in action arises. This is obviously impossible. *Guarantee, etc., Co. v. First Nat. Bank*, 26 Am. Bankr. Rep. 85, 185 Fed. 373, 107 C. C. A. 429. Had the agreement conveyed the goods as security to the bank prior to the sale to Josephson with the proviso that the sale and delivery to him were made for the benefit and behoof of the assignee bank (*Caulfield v. Van Brunt*, 173 Pa. 428, 34 Atl. 230), the contradiction in the terms of the agreement would have been avoided and a lien on the goods would have been created. Or, the difficulty might have been avoided by following the suggestion of Judge Gray in *Guarantee Title Co. v. Bank*, 26 Am. Bankr. Rep. 85, 185 Fed. 373, 107 C. C. A. 429, and providing that in case of rejection by Josephson the goods should be delivered to the bank." In the case at bar the goods were actually sold and delivered to two different firms and then rejected and returned by them. The clause last above quoted providing for such rejection might have covered the question now raised, but there is no such clause in the agreement, and the attempt to convey a right to stoppage in transit cannot without more be converted into the larger right here contended for. When the bankruptcy was adjudicated, the goods in question were in the possession of the vendees, and, when rejected and returned by them, they were returned as the goods of the bankrupt and not as the goods of the bank.

Reverting now to the assignments made between September 25 and December 31, 1911, they are good in form and apparently incontestable for the amount of money actually advanced on them at the time when they were made, even though they were intended to secure antecedent and subsequent as well as present loans. In *re Wolf* (D. C.) 3 Am. Bankr. Rep. 555, 98 Fed. 84. As to the inability of the bank to hold them as security for existing debts, enough has already been said. Can they be held as security for subsequent advances? Section 60c of the act provides that "if a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him." In this case the bank made no loans without contemporaneous transfer of security. It never gave "further credit without security" on the faith of some security previously transferred, and therefore cannot be permitted to enjoy the right which this section of the act confers.

The trustee contends that none of the assignments made by the bankrupt to the bank are valid in Pennsylvania by reason of the fact that the debtors of the bankrupt received no notice of the assignment until after the bankruptcy. I am unable to agree with the trustee in this contention, since this

point has been decided adversely thereto by the Supreme Court of Pennsylvania. In *Re Phillip's Estate* No. 3, 205 Pa. 515, 55 Atl. 213, 66 L. R. A. 760, 97 Am. St. Rep. 746, it was held that notice of the assignment was necessary to uphold it against a subsequent assignee, and in *Phillip's Estate* No. 4, 205 Pa. 525, 55 Atl. 216, 97 Am. St. Rep. 750, it was held that no notice of the assignment is necessary to uphold it against a subsequent attaching creditor. Under section 47a (2) of the Bankruptcy Law as amended, the status of the trustee in bankruptcy is not that of a purchaser or a subsequent assignee of the bankrupt for value without notice; his status is that of a lien creditor or an execution creditor and, therefore, as against him notice of the assignment to the debtor is not necessary to perfect the title of the assignee. See, also, *Young v. Upson*, supra.

While I am bound to accept this distinction made by the Supreme Court of Pennsylvania as law, it is too technical to become a permanent principle of jurisprudence. Business transactions are more and more searchingly scrutinized in modern times, and public opinion which favors publicity will ultimately make it impossible for secret liens such as this to be successfully sustained upon mere technical grounds.

We come now to the final argument, namely, that all of the assignments fall by reason of the fact that the bankrupt was guilty of a fraud on creditors, that the bank had knowledge of the fraud, and that in taking the assignments it sought to profit by the fraud, and therefore is not a purchaser in good faith under section 67e. The basis of this contention is fraud practiced by the bankrupt on its creditors. There is no positive direct evidence of fraud, and the trustee's contention rests upon the theory that the bankrupt, by failing to disclose its hopeless insolvency and by continuing to obtain merchandise on credit at a time when it could not have had any intention to pay for the same or any hope in its ability to do so, was guilty of such a fraud. *Gillespie v. Piles Co.*, 178 Fed. 886, 102 C. C. A. 120. It is argued on the other hand, that the facts are consistent with the theory of the innocence of the bankrupt's president; that there is nothing to indicate that, assuming full knowledge on his part of a condition of hopeless insolvency, he did more than is done so often, namely, hope against hope until brought to an absolute standstill; and that he did not in any way, so far as the testimony shows, profit by his transactions with his creditors after the condition of hopeless insolvency had set in.

It is not essential, however, that the bankrupt should have "secured an advantage for himself out of what in law should belong to his creditors and not to him," in order to charge him with such fraud on creditors. Ordinarily it is true that fraud arises out of the attempt of the bankrupt to misappropriate assets belonging to his creditors, but the gravamen of the fraud is not the advantage accruing to the bankrupt, but the loss occasioned to the creditors; the fraud is conclusively presumed to have been perpetrated on them when the bankrupt is hopelessly insolvent and knows at the time when he obtains the new credits that it will be impossible for him to liquidate them. Whether he actually intended to defraud under such circumstances is irrelevant, for the law conclusively presumes such intention. *Gillespie v. Piles Co.*, 178 Fed. 886, 102 C. C. A. 120.

The trustee now argues that, assuming the fraud of the bankrupt, the bank must be presumed to have had knowledge of it, and hence should be prevented from holding the assigned accounts which were intended to secure its advances. Knowledge of the bankrupt's hopeless insolvency at the time of making the loans rebuts the presumption of good faith necessary to support its right to hold the assignments made to it.

But I would go further than the trustee and hold that the bank cannot enjoy the assigned accounts as against other creditors of the bankrupt by reason of the fact that it is directly responsible for the creation of the liabilities due to the other creditors, and therefore in the same position legally as though it had induced these creditors to give the credit upon the faith of statements made by it directly to them.

In the case of *Boyd's Ex'rs v. Browne*, 6 Pa. 310, it appeared from the evidence that Boyd was the owner of a store, and that he induced Miller to pur-

chase the same through promises of long credit and assistance in selling off the old stock and replenishing the same from time to time. At the time of the purchase Miller was not considered a man of any property. Boyd gave Miller ten years to pay for the old stock purchased from him, promised to keep him afloat, and to show him how to pay for it. Among other things that Boyd did in the matter was to take Miller to Philadelphia to business houses of whom Boyd had bought goods and recommend Miller to these merchants as a man worthy of credit and able to pay. There did not seem to be any evidence in the case of Miller's intention to defraud. In the opinion of the Supreme Court, Judge Bell says: "The ground of action is the deceit practiced upon the injured party; and this may be either by the positive statement of a falsehood, or the suppression of material facts, which the inquiring party is entitled to know. The question always is: Did the defendant knowingly falsify, or willfully suppress the truth, with a view of giving a third party a credit to which he was not entitled? It is not necessary there should be collusion between the party falsely recommending and him who is recommended; nor is it essential, in support of the action, that either of them intended to cheat and defraud the trusting party at the time. It is enough, if such has been the effect of the falsehood relied on. Misrepresentations of this character are frequently made from inconsiderate good nature, prompting a desire to benefit a third person, and without a view of advancing the party's own interests. But the motives by which he was actuated do not enter into the inquiry. If he makes representations productive of loss to another, knowing such representations to be false, he is responsible as for a fraudulent deceit. In *Foster v. Charles*, 6 Bing. 369, when it was first in Westminster Hall, Tindal, C. J., said, 'It has been argued that it is not sufficient to show that a representation on which a plaintiff has acted was false within the knowledge of the defendant, and that damage has ensued to the plaintiff; but that the plaintiff must also show the motive which actuated the defendant. I am not aware of any authority for such a position; nor can it be material what the motive was. The law will infer a proper motive, if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff.' All the other judges fully concurred in the soundness of those views, and indeed they recommend themselves by their intrinsic merit. But that part of the instruction chiefly complained of here is the direction to the jury that the suppression of the fact, by Boyd, that he had taken securities for large amounts from Miller in payment of the merchandise sold by Boyd to him, was evidence of fraud and deceit. The soundness of this opinion is fully shown by the authorities. Neither the intention entertained by Miller, when purchasing goods, nor his belief as to the value of his property, was of any consequence. We have seen that an intention eventually to defraud is not necessary to the action; and, as to the value of the property, the inquiry touched Boyd's belief, and not Miller's." See, also, *Huber v. Wilson*, 23 Pa. 178; *Rheem v. Wheel Co.*, 33 Pa. 358.

It seems to me that the principles underlying the decision in the case of *Boyd v. Browne* are applicable to the case at bar. The bank knew that the bankrupt was hopelessly insolvent and unable to pay its debts. It, nevertheless, continued to help the bankrupt create new debts which were to be assigned to it as collateral security for advances to the bankrupt by means of which the bankrupt was to be further enabled to create more new book accounts, which it would be unable to pay, for the purpose of further assigning them to the bank for further advances. It was a continuous chain of fraud on creditors. The bank was the only one who profited by these transactions; it made its loans, receiving 6 per cent. interest thereon together with an additional 1 per cent. of the face value of all accounts for services in investigating the credit and financial standing of the customers of the bankrupt and in keeping and collecting the accounts. The bank virtually seized the book accounts of the bankrupt as security for its debt, giving further credit on the faith of these book accounts as long as assignments of them continued, knowing all the while that it thereby enabled the bankrupt to create new book accounts and either innocently or intentionally deceive oth-

er creditors as to its actual financial condition, and believing that through taking the accounts as security it was fully protecting itself against all possible harm. For the sake of obtaining and enjoying its profits, the bank enabled the bankrupt to draw other creditors into business relations by which they inevitably suffered losses. Had the game not been stopped by the issuance of the foreign attachment by one of the bankrupt's creditors, it might have continued for some time more. The limit that the bank had fixed for its loan to the bankrupt was \$25,000, and this limit had practically been reached at that time. It is impossible to tell whether the bank would have extended additional credits. But if we are to assume with the bank that the agreement of August 26, 1910, was the basis of all its future transactions with the bankrupt, we find nothing in that agreement to indicate that it might not have continued to loan money to the bankrupt ad libitum, for the amount of the aggregate of the loans which were to be made by the bank to the bankrupt was left blank in that agreement. This may have been accidental or intentional; as to this I express no opinion. Even after the foreign attachment was levied the bank advised the bankrupt that it would continue to make advances on assigned accounts as soon as the attachment was dissolved. Applying the principles of the case of *Boyd v. Browne*, if the bank, at the time when the bankrupt became hopelessly insolvent, had, in spite of its knowledge of the fact, advised the bankrupt's creditors that it was able to pay its bills, there can be no doubt that the bank would have been guilty of actionable fraud. It seems to me that by continuing to grant loans to the bankrupt under the circumstances of this case, upon the security of bankrupt's property, it was placing itself in a position similar to that which it would have occupied if it had made deliberate misstatements to the bankrupt's other creditors.

It has been argued by the trustee that whatever may have been the hopefulness of the bankrupt corporation as to its ability to extricate itself from its financial difficulties in the period intervening between August 26, 1910, and November 1, 1910, there can be no doubt that on the latter date it, acting through its president, must have realized its hopeless insolvency. I agree with this conclusion of the trustee and find as a fact that on November 1, 1910, the bankrupt was hopelessly insolvent, and that it is legally presumed to have known this fact, and that the bank was likewise legally presumed to have known it for the reasons hereinbefore stated. If therefore the bank had refused to continue its advances on November 1, 1910, the creditors who did business with the bankrupt from and after that date, and who are the majority of the creditors having claims against the bankrupt estate, would not have done any business with the bankrupt and incurred any losses on that account. Did the bank have any duty toward the other creditors of the bankrupt which it neglected to perform? It must be remembered that the bank is now seeking enjoyment of bankrupt's property to the disadvantage of other creditors, and that therefore the element of good faith in its transactions which enabled it to secure such property must be made manifest. If it fails in any duty toward the other creditors by reason of which they were induced to give the credit which in turn enabled it to secure assigned accounts, the transaction lacks the essential element of good faith. It may be asked: How can the bank, in the absence of proof of any direct relation between it and the other creditors of the bankrupt, have any duty toward them? There is no evidence of the fact that it ever met any of the other creditors, or that any of them ever made any inquiry of it concerning the standing of the bankrupt. Nevertheless it seems to me that its position is analogous to that of *Boyd* in the case above cited. Knowing the bankrupt to be hopelessly insolvent, knowing that the money which it was advancing was being used to induce further credits to be given, it was virtually holding out to the public a general recommendation of the bankrupt's ability to pay its debts and the fact that the bankrupt was in funds and able to pay some of its old creditors on account, and thus enabled to obtain new credits, was directly due to the bank and tantamount to a statement on its part to the bankrupt's creditors that the bankrupt was solvent and able to pay its debts, for it gave a concern that was hopelessly insolvent the means of deceiving its creditors into a be-

lief that it was solvent. There is considerable analogy between the status of the bank and the bankrupt and that of partners. The bank advanced the capital and the bankrupt its alleged business ability. They agreed to share in the profits of the common enterprise; the bank taking a steady and certain income secured, as it hoped, beyond the possibility of loss, and the bankrupt depending on its ability to get a larger or a smaller share of the profits, and both of the parties having equal intimate knowledge of all of the affairs of the business. Of course, the technical relation of partners did not exist, but I see no difference in essence between their business relation and that of partners, and the legal definition of the term "partnership" should not be permitted to obscure the obvious fact that such a relation did exist except in the merest technical sense. The bank has all the book accounts of the bankrupt, it has complete knowledge of the business, complete control of the credits to be given, and complete discretion in passing on the accounts and approving or disapproving them, and it has a certain fixed income out of the profits. It does not technically contribute to the firm as a partner, nor does it technically draw profits as such. While it may not be technically liable as a partner, it should not under these circumstances be permitted to gain an advantage over other creditors who have been dealing with the bankrupt at arm's length. If it cannot be called upon to contribute to the losses of the business, it should, at least, not be permitted to enjoy a preference in the distribution of the assets at hand.

The duty that it owed to the other creditors under the circumstances of this case is, in my opinion, this: That as soon as it knew, to wit, on November 1, 1910, that the bankrupt was hopelessly insolvent, it should have refused to advance it any more money and thus compel it to go into bankruptcy at that time. Its failure to do this vitiates any attempt made by it subsequently to protect itself against loss whether for past, future, or present advances, by taking possession of property of the bankrupt. I am of the opinion therefore that the assignments of accounts made by the bankrupt to the bank after November 1, 1910, and December 30, 1910, are void against the creditors for the reasons above cited.

And now, January 30, 1913, upon consideration of the petition of the First Mortgage Guarantee & Trust Company and the answer of Samuel D. Matlack, trustee in bankruptcy thereto, the cross-petition of the trustee in bankruptcy, and the answer of the said First Mortgage Guarantee & Trust Company thereto, the agreements of counsel and testimony taken, and after hearing argument of counsel, and in accordance with the foregoing findings of fact and conclusions of law, it is ordered:

1. That the assignments of book accounts made by the Cotton Manufacturers' Sales Company to the First Mortgage Guarantee & Trust Company prior to September 25, 1910, are valid assignments and that title to the same is in the said assignee.

2. That the assignments of book accounts made by the Cotton Manufacturers' Sales Company to the First Mortgage Guarantee & Trust Company between September 25, 1910, and November 1, 1910, are valid assignments as security for the amounts advanced by the said First Mortgage Guarantee & Trust Company to the said Cotton Manufacturers' Sales Company at the time of the said assignments respectively.

3. That the assignments of book accounts made by the Cotton Manufacturers' Sales Company to the First Mortgage Guarantee & Trust Company after November 1, 1910, and December 30, 1910, are void, and that title to the said accounts or the proceeds thereof is in the trustee in bankruptcy.

4. That the assignment of book accounts made by the Cotton Manufacturers' Sales Company to the First Mortgage Guarantee & Trust Company on January 6th and January 9, 1911, are void, and that title to the said accounts or proceeds thereof is in the trustee in bankruptcy.

5. That the money, to wit, the sum of \$448.91, received by the First Mortgage Guarantee & Trust Company from the sale of merchandise returned by debtors of the bankrupt during February, 1911, is the property of the trustee in bankruptcy.

And it is further ordered that the said First Mortgage Guarantee & Trust

Company shall on or before February 14, 1913, file with the referee a complete and detailed statement of its account with the Cotton Manufacturers' Sales Company and with the debtors of the said Cotton Manufacturers' Sales Company whose accounts were, or purported to be, assigned to the said First Mortgage Guarantee & Trust Company, setting forth in the said account the dates and amounts of all its transactions with the said Cotton Manufacturers' Sales Company and the said debtors, more particularly the dates and amounts of all accounts assigned or purported to be assigned to it, the dates of all assignments of said accounts, the dates and amounts of all loans, advances or credits made or extended by it to the Cotton Manufacturers' Sales Company on each of the said accounts, the dates and amounts of all payments received by it on each of the said accounts, together with a full and complete transcript of the checking account of the Cotton Manufacturers' Sales Company from and after August 26, 1910.

And it is further ordered that Samuel D. Matlack, trustee in bankruptcy of the Cotton Manufacturers' Sales Company, file with the referee on or before February 14, 1913, an account of the moneys received and distributed by him under the agreement made between him and the First Mortgage Guarantee & Trust Company dated May 17, 1911.

And it is further ordered that a meeting be held before the referee on February 14, 1913, at 2 p. m., for the purpose of auditing the said accounts and entering such further orders as may be found to be just and right.

D. H. Solis-Cohen, Albert L. Moise, and John G. Johnson, all of Philadelphia, Pa., for trustee.

J. Hector McNeal and Alexander Simpson, Jr., both of Philadelphia, Pa., for First Mortgage Guarantee & Trust Co.

THOMPSON, District Judge. In the careful and painstaking report of the learned referee he has so fully stated the history of the case and so thoroughly discussed the evidence upon which his findings of fact and conclusions of law are based that a detailed reference thereto would be superfluous. The evidence sufficiently supports the referee's finding that the bankrupt was insolvent on August 26, 1910, when the original agreement between the parties was made and the statement of the bankrupt's condition as of May 1, 1910, was presented, and that its excess of liabilities over its assets continued to increase from that date to the time of the filing of the petition in bankruptcy, and his finding that the statement of the bankrupt's condition and the circumstances under which the agreement of August 26, 1910, was made were such as to put the petitioner upon inquiry as to the bankrupt's financial condition.

[1] The referee did not err, in my opinion, in finding that Mr. Nattress, the president and general manager of the bankrupt company, the agent of the petitioner in the collection of the assigned accounts, is legally chargeable with knowledge of the condition of the company during the period covered by the transactions, and that the bank is legally chargeable with its agent's knowledge of the insolvency of the company. It is argued on behalf of the petitioner that it is not bound by the knowledge of its agent because the authority of the agent was limited to the collection of the accounts and their payment to the bank. Even so, the authority of Mr. Nattress covered everything which it was necessary should be done in the transaction except the credit of the receipts upon payment of the assigned accounts and the payment of the money to the bankrupt upon its checks, and it appears that he

did transact all of the other business in connection with the assignment and collection of the accounts. To hold that the bank may appoint the principal officer of the bankrupt its agent in the transactions and thereby preclude knowledge of the transactions being obtained by the customers of the bankrupt and not be bound by the knowledge of the agent as to the bankrupt's condition of insolvency would enable parties intending to effect preferences to render nugatory the provisions of the Bankruptcy Act as to the conditions under which a preference may be set aside. The bank's consent that Mr. Nattress should act as agent for both parties prevents its escape from the general rule that notice to the agent is notice to the principal. A principal who knows that his agent is also acting as agent for the party adversely interested in a transaction with him, and yet consents that he may act as his agent, is estopped from denying the notice and knowledge which the agent has during the transaction. *Pine Mountain Iron & Coal Co. v. Bailey*, 94 Fed. 260, 36 C. C. A. 229.

[2] Counsel for the bank contends that the agreement of August 26, 1910, operated as an assignment in *præsenti* of all the accounts to come into existence in *futuro*, and that therefore the assignment of the accounts did not create a preference because all the collateral passed more than four months prior to the filing of the petition in bankruptcy. The referee has found that the agreement of August 26th was without consideration between the parties, that nothing passed thereby to the bank, and that no accounts passed until specific assignments were made as provided in the agreement. The final paragraph of the agreement is as follows:

"It is mutually agreed that this contract may be canceled by the second party (the bank) at any time without notice, and by the first party at any time by payment of the amount of all advances, with interest, according to the terms of the notes given in evidence thereof, and thereupon the second party agrees to reassign all unpaid accounts."

No account was assigned to the bank until September 7, 1910, and no advances were made to the bankrupt until the advance of 80 per cent. was made upon the accounts assigned at that date. Prior to September 7th the agreement could have been terminated by either party with nothing further to be done to put both parties in the same position they held prior to the execution of the agreement. Neither party could have enforced specific performance because no consideration had passed and the other party could have canceled the contract at once. There were no previous dealings between the parties by way of extension of credit and assignment of accounts as collateral, and the referee has found from the conduct of the parties, as shown by the testimony of Mr. Nattress and the officials of the bank, that each assignment was considered by the parties as a separate and independent transaction and treated as such.

It is apparent that the agreement of August 26th did not operate as an equitable assignment of the accounts, and that it is properly construed in accordance with the referee's opinion as merely providing for a future course of dealing in case specific assignments of accounts were thereafter made.

The case is clearly distinguishable from *Young v. Upson* (C. C.) 115 Fed. 182, and *In re Schwab-Kepner Co.*, 203 Fed. 475, 121 C. C. A. 597, as pointed out by the learned referee, and he was clearly right in holding that by the assignments during the four months' period preferences were created except for the amounts advanced at the time of the respective assignments, and that, the bank having reasonable cause to believe that preferences were thereby created, the assignments are valid only as security for the amounts advanced at the time of the respective assignments.

As was held by the referee, the position of the bank is not helped by the collateral note. In so far as the bank attempted to secure collateral for indebtedness other than that created by the individual assignments, the collateral note cannot be said to have created any additional obligations on the part of the bankrupt, and its obligations therefore can be enforced only in so far as it is for a present fair consideration in good faith.

[3] As to the four accounts assigned before the commencement of the four months' period, the referee holds that the assignments are valid, and no exception is taken to that finding. As to the accounts assigned within the four months' period, the referee finds that those assigned between September 25, 1910, and November 1, 1910, are valid assignments as security for the amounts advanced at the time of the said assignments respectively, but that the accounts assigned between November 1, 1910, and December 30, 1910, are void under section 67e because they were made with intent on the part of the bankrupt to hinder, delay, and defraud its creditors, and that the bank cannot retain the security even for the amounts advanced at the time of the respective assignments, because it sought to profit by the fraud, and therefore is not a purchaser in good faith. As to the accounts assigned after November 1st, the referee finds that upon that date the bankrupt was hopelessly insolvent; that it knew of its insolvency; that Mr. Nattress knew of its insolvency, and that it continued to create debts it could not hope to pay; and that the bank, being bound by the knowledge of Mr. Nattress and the information it could have obtained from the books, committed a fraud upon other creditors by continuing to receive assignments of the accounts and to make advances thereon at a time when the bankrupt actually and the bank constructively knew that the bankrupt could not hope to pay its creditors. The referee bases his finding of fraud as to the bank upon the fact that the bank knowing that the bankrupt was hopelessly insolvent and unable to pay its debts nevertheless continued, through its advances and the credit its funds afforded the bankrupt, to help it create new book accounts, which were to be assigned to it as collateral security for advances to the bankrupt by which the bankrupt was to be further enabled to create new debts, which it would be unable to pay, and new book accounts for the purpose of further assigning them to the bank for further advances; and he concludes that, if the bank had refused to continue its advances, the creditors who sold to the bankrupt from and after November 1, 1910, would not have done any business with the bankrupt and incurred any loss, and that therefore the bank was responsible for the creation of the liabilities to these creditors and in the same

position legally as though it had induced them to give credit upon the faith of statements made by it directly to them, or by withholding information it was under a duty to give to other creditors.

The referee in reaching his conclusion applies to the bankrupt the rule as laid down in *Gillespie v. Piles Co.*, 178 Fed. 886, 102 C. C. A. 120, holding that a bankrupt is guilty of a fraud upon creditors if, being in a condition of hopeless insolvency, it fails to disclose that condition and continues to obtain merchandise on credit at a time when it could not have had any intention of paying for the same or any hope of its ability to do so, and applies to the bank the principles underlying the decision in the case of *Boyd v. Browne*, 6 Pa. 310, where, in an action on the case for deceit, the Supreme Court of Pennsylvania held:

"The ground of action is the deceit practiced upon the injured party; and this may be either by the positive statement of a falsehood, or the suppression of material facts, which the inquiring party is entitled to know. The question always is: Did the defendant knowingly falsify, or willfully suppress the truth, with a view of giving a third party a credit to which he was not entitled?"

In the case of *Gillespie v. Piles Co.*, certain creditors of the bankrupt obtained an order upon the trustee to return to them the proceeds of property bought by the bankrupt while insolvent and when he knew that it was impossible for him to pay for it. I quote from the syllabus by the Circuit Court of Appeals in that case:

"An insolvent buyer, who knows at the time of his purchase that his financial condition is such that it is and will be impossible for him to pay, is conclusively presumed to have bought the goods with an intention not to pay for them.

"A presumption to that effect arises from the fact that such a purchaser's affairs were in such a condition at the time of the purchase of the property that he could have had no reasonable expectation of paying for them.

"But insolvency is insufficient to establish such an intent."

It appeared that the bankrupt had entered upon the business of buying and selling hogs in the spring of 1905, with a capital of \$100 and a debt of \$2,000, and continued in this business until on June 26, 1908, he had accumulated property worth \$20,000 and debts exceeding \$100,000. During the spring and summer of 1908 he owed to vendors from \$75,000 to \$100,000 and had no way to pay any of them except by buying more hogs of others and using the money derived from the sales of their hogs for the purpose of paying earlier vendors. He knew this condition of things perfectly, and strove to increase his purchases and his sales in order to get money to use in this way. It appeared that, when his assets to his knowledge were not more than 20 per cent. of his liabilities for his purchases, he continued to purchase from the interveners in the bankruptcy proceeding, and the trustee was ordered to pay back the proceeds of these later sales because, as stated by the Circuit Court of Appeals:

"In this state of the case it is incredible that he intended to pay for these hogs when he bought them. He knew it was impossible for him to pay for them, and the human mind is so constituted that it cannot harbor a serious intent that the being it directs shall do that which it knows it is impossible for it to accomplish."

Upon the facts in that case it was held that the trustee had no right to retain the funds derived from the hogs sold by the interveners to the bankrupt, as the court found from the evidence that the purchases were made with an actual fraudulent intent.

In the present case the referee has found that on October 21, 1910, the excess of the bankrupt's liabilities over its assets was at least \$7,370.38; that on November 30, 1910, it was \$10,990.59, and on December 31, 1910, it was \$16,749.50. There is no finding as to the amount of assets and liabilities on these respective dates, but the expert accountant's statement shows on December 30, 1910, assets of \$39,205.28 and liabilities of \$55,954.86. I am unable to agree with the referee in his inference from these facts that from November 1 to December 30, 1910, the bankrupt was in such a condition of hopeless insolvency that it knew when it made purchases during that period that it would be impossible for it to pay for them and that it did not intend to pay for them. The most that can be said of its condition is that it was insolvent at that time, and that its excess of liabilities was continuing to increase within those two months; but it does not follow that at any time during that period it knew that it could not recoup its losses and continue to carry on its business. To quote from the referee's report:

"The basis of this contention (of the trustee) is fraud practiced by the bankrupt on its creditors. There is no positive direct evidence of fraud, and the trustee's contention rests upon the theory that the bankrupt, by failing to disclose its hopeless insolvency and by continuing to obtain merchandise on credit at a time when it could not have had any intention to pay for the same or any hope in its ability to do so, was guilty of such a fraud."

There is not shown in the present case so great a preponderance of liabilities over assets as, in my opinion, to warrant the presumption of bad faith, which was drawn by the court in the case of Gillespie v. Piles; nor is there any evidence to show that the loans from the bank upon the security of the accounts receivable were obtained for any other purpose than to furnish the bankrupt with funds with which to continue to pay its creditors with the hope of making sufficient profit out of its business to enable it to extricate itself from its insolvent condition. The fact that the bank's money was used to pay some creditors to the exclusion of others and thereby to create preferences is not by any means conclusive evidence of actual fraud upon the part of the bankrupt. My conclusion is that, in the absence of evidence to the contrary, the assignments of accounts to the bank must be presumed to have been made for the purpose of obtaining funds to continue the business of the bankrupt, and that there is no presumption arising from the evidence that they were made with intent to hinder, delay, or defraud creditors. Unless the assignments were fraudulent on the part of the bankrupt, they cannot be set aside under section 67e under the authority of *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008.

[4] The most that can be said of the assignments to the bank is that, in so far as they were not for a present fair consideration, they constituted an attempt to prefer under section 60b. Without citing at large from *Coder v. Arts*, I think the referee has failed to recognize

the distinction therein laid down between an attempt to prefer and an attempt to defraud and the necessity of showing an actual intent on the part of the bankrupt to hinder, delay, and defraud creditors where it is attempted to void a transfer under section 67e as fraudulent. The judgment of the bankrupt's officers upon the question of continuing the business may not have been prudent, and in view of the event it would no doubt have been wiser to have discontinued the transactions with the bank and ceased doing business at a time when more could have been realized for creditors; but the fact that the bankrupt was insolvent and that its business conducted while knowing that it was insolvent proved a failure is not evidence of actual fraud upon its part. As was said in *Re Maher* (D. C.) 144 Fed. 503, cited with approval by the Supreme Court in *Coder v. Arts*:

"In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors, which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual, the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him."

In so far as the bank advanced money at the time of the assignments without actual notice of insolvency, I do not think the trustee has sustained the burden of proof that the transactions were fraudulent and that the bank was not a purchaser in good faith and for a present fair consideration.

In *Boyd v. Browne*, upon which the referee relies to sustain his conclusion as to the want of good faith upon the part of the bank, it appeared that Boyd knowingly and intentionally misrepresented the credit of one Miller, whom he had induced to buy a store and stock from him upon a long term of credit, and that he not only knowingly made false representations, but knowingly suppressed facts within his knowledge when vouching for Miller's credit, and thereby enabled him to obtain from the plaintiffs in the action merchandise for which he was unable to pay.

In the present case the bank had no actual knowledge of the bankrupt's insolvent condition. It neglected to make inquiries which would have put it in possession of that knowledge, and hence, being bound by the knowledge of its agent and by the information it could have obtained from the books of the bankrupt, may properly be held to come within the provisions of section 60b as having received an unlawful preference except for the amounts actually advanced at the time of the assignment of any account within the four months' period. The knowledge of the bank as to the bankrupt's condition is an inference which the law permits to be drawn by reason of its relations with the bankrupt and its opportunities to acquire actual knowledge. Upon that inference the learned referee bases a further inference that by advancing money to the bankrupt, and thereby enabling it to obtain credit to continue business and pay some of its creditors, it was perpetrating a fraud upon other creditors because, if it had discontinued its advances at the time when the inference of knowledge is found against it, they would have learned its true condition and ceased dealing with it and thereby have forced it into bankruptcy; that its fail-

ure in this duty to the other creditors of refusing to make further loans places it in a position of having fraudulently suppressed a fact within its knowledge and therefore, having caused the losses to creditors, it did not receive the collateral for its loans in good faith. With great respect for the opinion of the learned referee, I am unable to agree with a conclusion which would put a bank loaning money to an insolvent upon collateral without notice to other creditors, but without actual knowledge of its insolvency, in the position of being liable for losses to creditors whom it or its representatives did not know, had never seen, or had never communicated with in any manner, because a result of such loans is to enable the insolvent to continue to carry on business.

I must hold that the referee was in error in his finding that the assignments made between November 1st and December 30th were void. I am unable to agree that the inference of fraud based upon an inference of knowledge is sufficient to invalidate these assignments and hold that they are valid to the same extent as those made between September 25th and November 1st.

[5] As to the proceeds of the merchandise returned by purchasers from the bankrupt to the bank after bankruptcy, the referee, for the reasons set out in his report and upon the authorities cited, was clearly right in holding that, under the law of Pennsylvania, the assignment of the accounts did not operate as an assignment of the merchandise upon which the accounts were based. *Guarantee Title & Trust Co. v. First National Bank of Huntingdon*, 185 Fed. 373, 107 C. C. A. 429.

The petitioner's contention is that the merchandise was intended to pass under the language of the assignment wherein the bankrupt gave to the bank "the right to stoppage in transit of the goods and merchandise covered and described therein" (that is to say, in the account). A sufficient answer to the contention is that no right of stoppage in transit was exercised, nor is the claim based upon that right.

I discover no error in the referee's rulings as to the assignment of the book accounts on January 5 and January 9, 1911.

In accordance with the foregoing views, the order of the referee is affirmed, with the exception of the third paragraph thereof, which is reversed, and it is ordered that the assignments of book accounts made by the Cotton Manufacturers' Sales Company to the First Mortgage Guarantee & Trust Company between November 1, 1910, and December 30, 1910, are valid assignments as security for the amounts advanced by the First Mortgage Guarantee & Trust Company to the said Cotton Manufacturers' Sales Company at the time of the said assignments respectively.

BOWERS v. POST.

(District Court, N. D. Illinois, E. D. November 15, 1913.)

No. 30,603 (Term No. 7,286).

1. CORPORATIONS (§ 157*) — STOCKHOLDERS — INCREASE OF CAPITAL AS STOCK DIVIDEND—EFFECT OF SUBSEQUENT SALE OF STOCK.

A corporation, having a capital stock of \$500,000 and large surplus and undivided profits accounts, by action of its stockholders and directors increased its capital stock to \$750,000, the resolutions providing that one-half of the increase should be distributed to the then stockholders as a stock dividend, and the remaining half sold to employes at not less than \$200 per share, and that "all proceeds of such stock so sold shall belong to, and be distributed to, the holders of the present or original capital stock." Details of the plan were provided for, including the appointment of the secretary a trustee, to handle the employes' stock sales, and a part of whose duties should be "to collect and receive all dividends declared upon any stock so sold to employes and to distribute the same pro rata to the holders of said original stock." The par value of the increased stock, \$250,000, was at once credited to the stock account and debited to the undivided profits account, which exceeded that amount, and as the trustee collected for the employes' stock sold he credited each of the original stockholders in a book kept by him for the purpose with his pro rata share of the proceeds. *Held*, that the entire increase of stock was clearly intended as a dividend to present stockholders, one half to be distributed in stock and the other half to be sold to employes for business reasons, but for their benefit, and that the right to such dividend vested at once, and did not pass by a subsequent sale and assignment of stock, although actual distribution had not been made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 584-586; Dec. Dig. § 157.*]

2. CORPORATIONS (§ 157*) — STOCKHOLDERS — TRANSFER OF STOCK — ACCRUED DIVIDENDS.

One who was a stockholder at the time of the adoption of such plan, but subsequently transferred his stock, is entitled to retain dividends received by him from sales of employes' stock, and also to such as may have been collected after the transfer, notwithstanding a further provision of the resolutions adopted that the proceeds of employes' stock, when collected, should "be at once distributed to the holders of the said original stock in proportion to their respective holdings at the time of such distribution"; the same language having been used with respect to the distribution of the stock to be issued as a direct stock dividend.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 584-583; Dec. Dig. § 157.*]

At Law. Action by James F. Bowers, trustee, against Charles N. Post. On pleas of general issue and set-off. Finding for defendant on plea of set-off.

Lyon & Healy is a corporation organized some years ago under the laws of the state of Illinois. Its business has prospered. In January, 1904, it had a capital stock, fully paid, of \$500,000, a large surplus, and a large amount of undivided profits. On January 9, 1904, John P. Byrne, as secretary of the company, sent an official notice to all the stockholders of a meeting to be held on January 30, 1904. The following is the notice:

"Chicago, January 9, 1903 (1904).

"As provided by article 8 of the by-laws of this corporation, you are hereby notified that the annual stockholders meeting will take place on Saturday the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

30th inst. at the office of the corporation, #199 Wabash avenue, in this city, at the hour of ten (10) o'clock a. m.

"At this meeting a new board of directors, five in number, is to be elected, the annual report of the business of the corporation is to be submitted and such other business transacted as may properly come before the meeting.

"The stockholders here have unanimously felt for some time that the capital stock of the company ought to be increased from \$500,000 (5,000) shares to \$750,000 (7,500) shares, and that a stock dividend of one-half of the increase ought to be declared in favor of the present stockholders, and that one-half thereof ought to be sold to the employes of the company. The cash proceeds of such sales are also to be distributed to the holders of the original stock. Therefore the present stockholders will receive a stock dividend of \$125,000 and will also receive the cash proceeds of sales of a like amount. All time sales are to draw 4% interest and be secured by certificates of the stock so sold.

"The law of this state requires a two-thirds vote of all the original stock, but it is desirable to have the vote unanimous if possible inasmuch as it is a friendly proceeding in the interests of the present stockholders.

"We inclose draft of proxy which we would be pleased to have you sign and forward as soon as practicable.

"We inclose draft of resolutions to be presented to the stockholders meeting; they have been carefully prepared and will probably be adopted without any material change.

"It is agreed among the stockholders here that the board of directors shall arrange so that the secretary of the company shall act as trustee (without expense) and receive all notes, securities, and monies on account of such sales and distribute the proceeds to the owners entitled thereto.

"Yours truly,

J. P. Byrne, Secty."

The meeting was held pursuant to that notice, and all the stockholders being present, either in person or by proxy, the following resolutions were passed:

"Whereas, it clearly appears that the property and business of this company, Lyon & Healy, is at a fair cash valuation worth the sum of \$1,500,000.00; and

"Whereas, in the judgment of this meeting there ought to be a stock dividend declared in favor of the present stockholders, and there ought to be stock provided for to be sold to sundry of the employes of the company, so that they may become more deeply interested in the business, therefore:

"Resolved, that the capital stock of this company, Lyon & Healy, ought to be and the same is hereby increased \$250,000.00, so that the entire capital stock of the company shall be \$750,000.00, and so that each share of the stock so increased shall be worth \$200.00 per share. The officers of this company are directed to take steps to have such increase finally accomplished according to law.

"Resolved further, that 1,250 shares of such increase shall be issued and distributed as a stock dividend to the present stockholders in proportion to their respective holdings at the time of such distribution, which distribution shall be made as soon as practicable after the necessary proceedings shall have been had perfecting such increase.

"Resolved further, that the remaining 1,250 shares of such increase shall be retained until sold to employes of the company, at not less than \$200 per share to such persons and in such amounts and on such terms as the board of directors shall direct.

"Resolved further, that all proceeds of such stock so sold shall belong to and be distributed to the holders of the present or original capital stock and our board of directors shall so arrange that when any part of such stock shall be sold and collected for, the proceeds shall be at once distributed to the holders of the said original stock in proportion to their respective holdings at the time of such distribution."

Immediately after the stockholders' meeting, the directors of the company met, and the following preambles and resolutions were adopted:

"Whereas, at the regular annual meeting of the stockholders of this company held at the company's office on the 30th day of January, 1904, at ten o'clock a. m., it was determined and duly voted to increase the capital stock of this

corporation from \$500,000 to \$750,000 and the officers of the corporation were directed to take steps to have such increase finally accomplished according to law, and

"Whereas, this board of directors fully concurs in the propriety of such increase of our stock and in all the proceedings of said stockholders meeting to that end and in the disposition to be made of such increased stock:

"1. Therefore resolved, that the proper officers of this company are hereby directed to issue at once one-half of such increase, to wit, 1,250 shares as and for a stock dividend to the holders of the original 5,000 shares and deliver certificates thereof to such.

"2. Resolved further, that the remaining one-half of such increase, to wit, 1,250 shares to be sold to certain employes of this company as may be indicated and that certificates therefor be issued to such employes as purchasers in such amounts and at such times as this board of the company's officers may direct. Such stock shall be sold only to such persons so indicated at the price of \$200.00 per share. Stock certificates shall be issued to such purchasers but such certificates shall be assigned by such purchasers respectively and held by the company as security for the full payment of such stock.

"3. Resolved further, that any purchaser of any of such stock may pay in cash the purchase price thereof in whole or in part, or at his option the purchase price may be paid wholly or in part by the dividends declared thereon which dividends when declared shall be credited to such purchasers from time to time and until any balance due from him on such purchase account shall be fully paid and when fully paid then such stock shall become his property subject to such rules or by-laws as may exist or be adopted governing or controlling the same, and subject to the provisions of these resolutions.

"4. Resolved further, that in case any such purchaser shall for any reason be discharged from the employ of this company or shall for any reason resign from such employ, then in any such case any of the stock having been purchased by him herein shall be surrendered to the company and the company shall retain the certificate therefor free from any claim on his part, but the company shall refund to him such amount as may be due to him upon any adjustment of the account with him. In adjusting that account he shall be entitled to receive per share for his stock the sum or amount of its board rate value then existing as last established by the board rate committee. From that sum or amount shall be deducted all amounts due or owing from him to the company upon account for such stock or upon any other account. The company shall thereupon have the right to hold and control such certificate so surrendered and to do as it may see fit with the stock therein mentioned free from any claim of any kind whatsoever on the part of such purchaser. In case of death of any of such purchasers a settlement and adjustment on the same lines shall be made with his estate.

"5. Resolved further, that any certificates so surrendered shall be cancelled and new certificates or certificate may be issued for such stock and distributed pro rata to the then holders of said original stock upon their payment to the company in money the then existing board rate valuation. In case any holder of original stock shall fail, neglect or refuse for ninety days after notice of such proposed distribution, to pay the company his proper proportion of such amount then the portion otherwise coming to him may be distributed to such holders of original stock as may pay the proper amount therefor. In case no one shall be willing to make such payment within ninety days after written notice, then the board of directors may sell such stock for the best price obtainable in money and place the proceeds thereof in the company treasury.

"6. Resolved further, that the certificates issued to any such purchaser shall be in such form with such matter printed thereon as this board or its officers may direct and there may be written or printed thereon a provision reading thus: This certificate and the stock herein mentioned are subject to the provisions of resolutions adopted by the board of directors on January 30, 1904.

"7. Resolved further, that nothing contained in these resolutions or involved in the sale or sales of any of such increased stock shall in any manner take away or affect the right of this company to discharge for any reason from its employ any purchaser of any of such stock.

"8. Resolved further, that the secretary of this company shall act as trustee without charge or expense and as such trustee shall hold all agreements, stock certificates or other writings or memoranda pertaining to any sale of any of such increased stock and shall keep or cause to be kept an accurate account of all such transactions to the end that proper proceedings may be taken for the full protection of the holders of said original stock. It shall be the duty of such trustee to collect and receive all dividends declared upon any stock so sold to employes and to distribute the same pro rata to the holders of said original stock."

On May 10, 1904, the directors of the company readopted the January 30, 1904, resolutions with slight modifications, that is to say, the unpaid subscriptions to the "employes' stock" were made to bear interest at the rate of 4 per cent.; and further it was provided:

"That any certificate surrendered by any such purchaser (employe) shall be canceled and the stock shown thereby may be sold by the company to another employe or employes upon the same terms and conditions as originally sold, but at the valuation then last fixed by the board rate committee. The board of directors may take such time as it may deem advisable to determine whether to make further or other sale of the stock so surrendered, and when it shall be determined not to make the same, then new certificate or certificates for such stock may be issued and distributed pro rata to the then holders of original stock."

Immediately after the passage of these resolutions, the capital stock account of the company was increased by \$250,000, and the undivided profit account diminished by the same amount. Contracts for the sale of all of the "employes' stock" were at once made with different employes of Lyon & Healy.

John P. Byrne continued to be secretary of the company until May 18, 1908, and ex officio was trustee of the "employes' stock." On that date James F. Bowers was appointed secretary of the company, and by that fact became trustee and successor to Byrne.

The stock sold to employes was not entirely paid for until the 20th of April, 1911. During the period from 1904 until the stock was paid for a number of employes left the company and one or more died. Those, or their legal representatives, were paid the amount provided for in such event, and their stock was surrendered. The surrendered stock, however, was sold again to other employes, and was paid for in due time.

The proceeds of the "employes' stock" was deposited in the bank to the credit of Lyon & Healy; and on the books of the corporation was kept an account entitled, "John P. Byrne, Trustee," while he was secretary, and afterwards "James F. Bowers, Trustee."

The amount due upon the "employes' stock" which was surrendered to the company owing to the death of the employe, or his leaving the company, was paid by check of the corporation, and the trustee's account was correspondingly debited.

While Byrne was trustee he kept a book in which was stated the account of each employe who purchased "employes' stock," and also with each one of the stockholders of the original stock. This book was opened shortly after January 30, 1904, and following the name or designation of each account with the old stockholders appeared the words, "Surrendered Cap. Stk. a/c," and each of the old stockholders was credited with an amount equal to the proportion of the proceeds to be collected from the "employes' stock."

This book was kept by Byrne personally. Most of the local stockholders of the corporation never saw the book until after June 1, 1908, and it does not appear affirmatively from the record that any of the stockholders other than Byrne knew of the existence of the book, although they knew Byrne was trustee; they never asked whether he kept such a book, or, if he did, for the privilege of examining it.

During the latter part of the year 1907, Lyon & Healy purchased the stock of the defendant, Charles N. Post, amounting to 1,096 shares. The price was agreed upon, and in addition Post was paid his salary as president of the company for the balance of the fiscal year ending February 1, 1908, and an assignment was given to him of any claim the company might have against Charles

N. Post. Charles N. Post then resigned as an officer and director of the company, and retired from business.

John P. Byrne continued to act as trustee for the employes' stock fund until some time after May 22, 1908, although on the 18th of May, 1908, he was succeeded in that office by James F. Bowers. Between December 6, 1907 (the day on which Post sold his stock), and the 1st day of June, 1908, Byrne paid to the defendant \$6,872.09. This payment was made by check of Lyon & Healy, and the trustee's account in the books of Lyon & Healy was debited with those payments and the Post account correspondingly debited. It was not until after the 22d of May, 1908, that the stockholders of Lyon & Healy learned that Byrne, as trustee, had made these payments.

It also appears that the Haynes estate of Boston was the owner of 943 shares of the capital stock of Lyon & Healy; that on August 5, 1909, that stock was sold to the corporation, and after that time Byrne, as trustee, paid to the proper representatives of the Haynes estate \$8,688.05 proceeds from the "employes' stock"; that those payments were made without the specific knowledge of any of the other stockholders of Lyon & Healy. The record does not show that the stockholders, other than Mr. Byrne, knew of or consented to the payment to the Haynes estate or to Post after the purchase of the Haynes and Post stock by the corporation.

There is conflict in the evidence as to whether or not the "employes' stock" and the rights thereto were mentioned when the sale of the Post stock was consummated. In the view which I take of the case it is unnecessary to settle that controversy.

On September 8, 1911, plaintiff herein commenced an action in assumpsit in the superior court of Cook county, the declaration consisting of a special count and the common counts, seeking to recover \$6,872.09, together with interest thereon, paid by mistake to the defendant. The defendant removed the cause to this court, and filed pleas of the general issue and set-off for further distribution of the "employes' stock fund."

Richard W. Clifford and William B. Jarvis, both of Chicago, Ill., for plaintiff.

Moses, Rosenthal & Kennedy, of Chicago, Ill. (Joseph W. Moses and Edward D. Wallace, both of Chicago, Ill., of counsel), for defendant.

CARPENTER, J. (after stating the facts as above). [1] Several points have been argued earnestly and ably by counsel, but the interesting proposition in this case, and the controlling proposition, is the construction of the resolutions of the stockholders and board of directors. There is some ambiguity in the terms used; whether resulting from carelessness or design is immaterial. In endeavoring to reach a conclusion as to what the parties intended by the language used, it is necessary, so far as is possible, to get into the atmosphere surrounding them when the resolutions were passed; to become acquainted with their general plan, and, if you please, with their "habits of language." In other words, having discovered their general situation and purpose, and knowing their peculiarities and eccentricities, you must then determine what they meant by what they did.

As to the general scheme: Lyon & Healy had issued capital stock of 5,000 shares, and in 1904 had accumulated a large surplus and a large amount of undivided profits. The notice sent out to the stockholders, the action of the stockholders, and the action of the board of directors which approved the action of the stockholders, all indicate that it was the purpose of those interested to make a division of some of the accumulated earnings. To this end it was voted to increase the capital

stock of the corporation 2,500 shares. As to one-half of the increase, clearly it was intended to declare a stock dividend. As to the other one-half, it was determined that for the good of the enterprise certain trusted employes should become stockholders. They were to pay for their stock as it was convenient, with interest on the deferred payments. The proceeds accumulating from the sale of "employees' stock" was to be distributed among the stockholders of the company.

The difficulty arises in the wording of the resolutions. The stockholders and directors determined:

"That all proceeds of such stock so sold shall belong to and be distributed to the holders of the present or original capital stock, and our board of directors shall so arrange that when any part of such stock shall be sold and collected for, the proceeds shall be at once distributed to the holders of the said original stock in proportion to their respective holdings at the time of such distribution."

[2] The plaintiff contends that Post, having disposed of his stock, by that very circumstance divested himself of all interest in the "employees' trust fund," and that the words "in proportion to their respective holdings at the time of such distribution" are conclusive on this point. The same language was used with reference to the 1,250 shares of stock dividend. It is conceded that the stock dividend proper would not pass by a sale of the original stock, after the resolution of the directors on January 30, 1904. That language, used in connection with the "employees' stock," ought not to be given a different meaning unless a different intent is manifestly clear.

The resolution was drawn in the light of existing conditions and must be viewed from a practical standpoint. At the time it was passed, Lyon & Healy had a capital stock of \$500,000, a surplus of \$750,000, and undivided profits of \$500,000; the value of each share of stock in the company, therefore, was \$350. The owners of the 5,000 shares were the owners in common of the assets of the company, and had the company then been liquidated each one would have been entitled to his ratable proportion of the capital, surplus, and undivided profits.

Immediately after the passing of the stockholders' and directors' resolutions, the capital stock account of the corporation was credited upon its books with \$250,000, and the undivided profits account was charged with the same amount of money. Thus the new stock issue of 2,500 shares was immediately paid for, and out of the interest of the then stockholders. Instead of having an interest in \$250,000 of undivided profits, the stockholders became entitled to receive their proportionate share of the increased capital stock.

The corporation, through its stockholders and directors, immediately segregated \$250,000 of its undivided profits and credited the amount to its capital stock account. That asset, when segregated, belonged to the stockholders, and took the form of new shares of stock fully paid, belonging to the shareholders in proportion to their respective holdings. The corporation, as such, ceased to have any interest in the increase; it had received full payment. If, as contended by plaintiff, the "employees' stock" had been held by the company to be sold at \$200 a share,

the purchase price would have belonged to the company and would have passed to its treasury. If the parties interested had contemplated such action, the book entries in evidence never would have been made. The books of the company showed no debit entries against the purchasing employés, nor in any of its financial statements made during the years succeeding 1904 did it credit itself with the indebtedness of the employés on account of stock purchases. Moreover, it is stated unequivocally that the purpose of the shareholders and directors was to make each share of stock of the company worth \$200. If the stock to be sold to the employés belonged to the company, then each share would have been worth, book value, \$233, and the employés, immediately after their purchase, would have had a profit of one-third on their transaction. On the other hand, if the "employés' stock" passed as an incident to the ownership of the original shares, then all the original shares would have been worth \$250 each, and the employés' shares would have been worth \$200 each.

It is clear that the corporation neither had nor asserted a right to the new stock. If the corporation surrendered its rights, who succeeded to them? Who had the right of succession? The increase of stock was intended to be paid out of the undivided profits. That was done. The normal instincts of mankind cannot be overlooked by the courts in administering the law. We have in this case the joint owners of a large amount of property deciding to divide up some of it. Is it likely they made the division with the purpose in view that others than themselves should get the benefit of it? A melon ordinarily is cut for the benefit of the owners of the melon patch.

It is argued for plaintiff that the resolution of the directors making the "employés' stock" fully paid, and providing that in certain events the stock sold to employés should be taken over by the corporation at what was paid for it, and sold to the original stockholders according to their holdings, the proceeds to go into the treasury of the company, is inconsistent with the idea of an absolute segregation of that stock. Quite the contrary is true. The original holders of stock, having received a cash return for the "employés' stock," naturally would not receive the surrendered stock, or its value, because it was not intended there should be a double profit on the transaction. It was proper therefore to provide that the subsequent purchase of the "employés' stock" should come from the company, and that the proceeds of the resale should go to the company; it being apparent that the purpose of selling the "employés' stock" was to increase the interest of the employés in the company and to stimulate them in the common interest.

Moreover, paragraph 8 of the directors' resolutions provided certain methods for issuing the "employés' stock" and the appointment of a trustee to receive the proceeds thereof, and made it "the duty of such trustee to collect and receive all dividends declared upon any stock so sold to employés, and to distribute the same pro rata to the holders of said original stock." Here again the right of the holders of the original stock was emphasized. The language used amounted to a declaration of the directors of an immediate dividend of the proceeds of the "employés' stock." The right of the shareholders was deter-

mined upon the adoption of the stockholders' and directors' resolutions; the enjoyment only was postponed at 4 per cent. interest. It was an immediate vested estate, the enjoyment of which was postponed merely for the convenience of the estate and for the purpose of arranging the necessary details of disposing of the stock to the employés.

If it had been intended that the proceeds of the sale of stock to the employés should be paid to whomsoever was the holder of the stock at the time such proceeds were ready for distribution, it would have been easy to have so provided. It was not so provided, nor was it so intended. It cannot be supposed that the holders of shares in the Lyon & Healy company were so altruistic as to take their own money to provide dividends for persons not known to them. And it may very well be doubted if the directors of a corporation have the legal right to declare a dividend out of present earnings, and provide for its payment, not to the present shareholders, but to some subsequent transferees.

In the view I take of the transaction, every stockholder surrendered a pro rata of his interest in the surplus of the corporation, to be transformed into stock and sold to employés; that such surrendered interest was intended to be and was treated as belonging to each individual stockholder at the time the action was taken. Otherwise the stock would have been issued by the corporation to the employés and the proceeds received by the corporation. The rights of the stockholders were fixed, the realization only being postponed; and each stockholder so surrendering his interest is entitled to payment therefor regardless of whether or not he disposed of his holdings of original shares. It was a stock dividend, and when the defendant Post sold his stock he sold it, in commercial parlance, ex-dividend.

There will be a general finding against the plaintiff, and a finding in favor of the defendant on his plea of set-off for the sum of \$3,614.71.

VAUGHAN v. MASSACHUSETTS HIDE CORPORATION.

SMITH v. BROWN BROS. & CO.

(District Court, D. Massachusetts. December 8, 1913.)

No. 214.

BANKS AND BANKING (§ 191*)—ADVANCES TO CUSTOMER FOR IMPORTATION OF MERCHANDISE—TRUST RECEIPTS.

A bank issued letters of credit for the use of a hide importing company in purchasing hides for import; the custom being for the seller to consign the purchase to the bank and draw on its London correspondent for the price with invoice and bill of lading attached. On arrival of the consignment, the bank indorsed the bill of lading to the company, taking a trust receipt by which the company was given the right to have the hides manufactured into leather and to sell the same, but agreed that the leather or its proceeds should be held in trust for the bank for the payment of the amount of the letter of credit and "of any other indebtedness" to the bank. A receiver was appointed for the company, which had at the time a quantity of leather for sale in the hands of commission merchants, consisting in part of leather procured through

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the bank, but intermingled with that from other sources, and it had procured advances on the consignments with the consent of the bank. The bank notified the merchants of its claim to the entire proceeds of the leather in their hands, subject to the advances. At that time the company had paid all of its obligations to the bank then due, including those arising from the particular letters of credit with which the leather then with the commission merchants had been purchased, but owed other claims not matured. *Held*, that the bank was the general owner of the leather, subject only to the company's contract right to become the owner by paying the amount due under the letters of credit with which it was purchased and any other indebtedness then due the bank, and that, such payment having been made, the title then passed to the company, free from any claim or lien on account of any indebtedness which might subsequently become due for other purchases.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 726; Dec. Dig. § 191.*]

In Equity. Suit by George C. Vaughan against the Massachusetts Hide Corporation. On exceptions to master's report on petition of Jeremiah Smith, Jr., receiver, against Brown Bros. & Company. Affirmed in part, and disaffirmed in part.

Warner, Warner & Stackpole, of Boston, Mass., for complainant and for defendants Waldron P. Brown and others in petition of Smith, receiver, against Brown.

Ferdinand A. Wyman, of Boston, Mass., for Massachusetts Hide Corporation.

Howard Stockton, Jr., of Boston, Mass., for petitioner in petition of Smith, receiver, against Waldron P. Brown.

BINGHAM, Circuit Judge. The petitioner is the receiver of the Massachusetts Hide Corporation, and brings this proceeding to recover certain funds in the hands of Brown Bros. & Co. as stakeholders, which he claims as a part of the general assets of the corporation. Brown Bros. & Co., on their part, claim the funds as the proceeds of certain property which they say the hide corporation held in trust for them, and which came into its possession under the circumstances hereinafter set forth.

The hide corporation was engaged in the business of importing and selling hides and skins, and financed its importations through Brown Bros. & Co. and other bankers. The practice with regard to importations through Brown Bros. & Co. was as follows:

When an importation was in prospect, the hide corporation applied to Brown Bros. & Co. for a letter of credit, which would be issued entitling the vendor to draw upon Brown Bros. & Co. or their European representative for the purchase price, subject, however, to an agreement of indemnity executed by the corporation, and indorsed by its treasurer individually. The letters of credit that were issued were in the following form:

No. N.

Boston, 191...

You are hereby authorized to value on Brown, Shipley & Co., London, at for account of N. for any sum or sums not exceeding in all pounds sterling for cost of merchandise to be shipped to the bills of lading to be filled up to Brown

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Brothers & Company The shipments must be completed, and the bills drawn within .. months from this date, and the advice of them to Brown, Shipley & Co., London (in duplicate) must be accompanied by bill of lading, with an abstract of invoice indorsed thereon, on receipt of which documents the bills will be duly honored.

And Brown, Shipley & Co., London, hereby agree with the drawers, indorsers and bona fide holders of bills, drawn in compliance with the terms of this credit, that the same shall be duly honored on presentation at their counting house. Drafts under this credit to contain the clause "Drawn under Credit No. X.," dated Boston, 191.....

For £ The user of this credit will please send invoice properly certified and B/L by the vessel, under cover to

[Signed] Brown, Shipley & Co.

The form of indemnity agreement executed by the corporation and indorsed by its treasurer was as follows:

Received the letter of credit, of which the annexed is a copy for pounds sterling, in consideration whereof hereby agree with Messrs. Brown, Shipley & Co. and with Messrs. Brown Brothers & Co., respectively, to provide, previous to the maturity of the bills drawn in virtue of said credit, sufficient funds in cash or in satisfactory bills on London, at not exceeding sixty days' sight, indorsed by to meet the payment of the same, together with a commission of one-half of one per cent. on drafts drawn at sight to sixty days or two months, three-quarters of one per cent. on drafts drawn at ninety days or three months, one per cent. on drafts drawn at four months, and one and one-half per cent. on drafts drawn otherwise.

It is understood that moneys paid to Brown Brothers & Co. shall be taken as a payment without recourse, and that in all settlements arising under this credit, the pounds sterling shall be calculated at the current rate of exchange at the time of such settlement.

It is further understood that each draft is to be settled to a point, with commission as above, and interest adjusted in a net rate of exchange at the time of payment. In the event, however, of settlements not being so made to a point, that Messrs. Brown, Shipley & Co. are to furnish their account current semiannually, charging interest at the rate of five per cent. per annum, or at the current rate if it be above that.

And hereby recognize and admit the ownership of Brown, Shipley & Co. in, and their right and that of Brown Brothers & Co. to, the possession and disposal of all goods and the proceeds thereof, for which Brown, Shipley & Co. may enter into any engagements in virtue of this credit, as also to the possession of Bills of Lading for and policies of insurance on such goods, until such time as any indebtedness or liability existing as against in favor of Brown, Shipley & Co. or Brown Brothers & Co., under the said credit or otherwise, shall have been fully paid up and discharged, and in the event of either of them hereafter indorsing said goods to for the purpose of sale or otherwise, hereby consent that their right to repossess themselves of the same or any proceeds thereof may be exercised at their discretion. Any proceeds of said goods coming into their hands are to be applied against the expenses of Brown, Shipley & Co., under this credit, or against any other indebtedness of to them or to Brown Brothers & Co., including all expenses incurred by either of them, and commission of sale and guaranty.

This obligation is to continue in force, and to be applicable to all transactions notwithstanding any change in the individuals composing the respective firms parties to or concerned in this contract or either of them, or in that of the user of this credit, whether such change shall arise from the accession of one or more new parties or from the death or secession of any partner or partners.

Confirmation of this credit has been telegraphed through Brown, Shipley & Co., London, at our request and sole risk.

Dated 191.....

The letter of credit having been procured, it would be sent through the European representative of Brown Bros. & Co. to the vendor, who upon receipt of it would ship the hides by bill of lading to the order of Brown Bros. & Co., and would draw upon them, or their European representative, by London draft with the bill of lading attached. The drafts would be four months' drafts and would be accepted on presentation, to be paid in London at maturity.

Upon arrival of the hides in Boston, the hide corporation would receive from Brown Bros. & Co. the bill of lading, indorsed by them, so that it could clear the goods and obtain possession of them, and as part of the same transaction it would execute and deliver to Brown Bros. & Co. a form of trust receipt, known as Form A, and reading as follows:

A. Trust Receipt.

Received from Brown Brothers & Co. the following goods and merchandise, their property, specified in the bill of lading, per dated marked and numbered as follows:

And in consideration thereof ^I_{We} hereby agree to hold said goods in trust for them, and as their property, with liberty to sell the same for their account or to manufacture and remanufacture the same without cost or expense to them, and we also agree to keep said goods, manufactured product and proceeds thereof, whether in the form of money or bills receivable, or accounts, separate and capable of identification as their property, and hand the proceeds to them to apply against the expenses of Brown, Shipley & Co., and ^{my}_{our} account under the terms of Letter of Credit No. issued for ^{my}_{our} account and for the payment of any other indebtedness of ^{mine}_{ours} to Brown, Shipley & Co. or to Brown Brothers & Co.

Brown Brothers & Co. may at any time cancel this trust and take possession of said goods, or the manufactured product, or of the proceeds of such of the same as may have then been sold, wherever the said goods or proceeds may then be found, and in the event of any suspension, proceedings in bankruptcy or failure, or assignment for the benefit of creditors on ^{my}_{our} part, or of the nonfulfilment of any obligation, or of the nonpayment at maturity of any acceptance made by ^{me}_{us} under said credit or any other credit issued by Brown Brothers & Co. or Brown, Shipley & Co. on ^{my}_{our} account or on any indebtedness on ^{my}_{our} part to either of them, all obligations, expenses, indebtedness and liabilities whatsoever shall thereupon (with or without notice) at their option mature and become due and payable. The said goods and the manufactured product thereof while in ^{my}_{our} hands shall be fully insured against loss by fire, and the insurance money received for any loss shall be subject to the trust herein contained in the same manner as the goods themselves.

Upon receipt of the bill of lading, the hide corporation cleared the hides, and either sold them or sent them to a tanner, and when tanned consigned them to a commission house for sale, together with other leather not imported through Brown Bros. & Co., but which was the property of the corporation. After the leather was delivered to the commission merchants, the corporation would from time to time obtain advances from them on the leather so delivered. This was done with the consent of Brown Bros. & Co., and it was understood that the commission merchants should reimburse themselves for the advances and expenses from the general proceeds of leather sold.

In the particular transactions out of which the funds in question

arose the hides, thus imported through Brown Bros. & Co. and other bankers, were tanned, and the leather was sent to the following commission merchants for sale, viz., Converse & Co., Grey, Clarke & Engle Co., Brown & Fiske, and Pfister & Vogel Co.; and all these merchants made advances to the hide corporation on the leather sent to them, with the consent of Brown Bros. & Co.

September 6, 1910, Brown Bros. & Co. sent letters to these commission houses, claiming all the leather held by them for the hide corporation as their property. September 13th the petitioner was appointed receiver of the hide corporation. September 19th the receiver and Brown Bros. & Co. entered into an agreement, whereby the above-mentioned commission houses were to pay over any balances due the hide corporation on their books to Brown Bros. & Co., as stakeholders; and pursuant to this agreement sums aggregating \$14,849.29 were so paid to Brown Bros. & Co., being the balances remaining in the hands of the commission merchants after satisfying their advances and expenses. The period of time during which transactions of this kind were carried on between the hide corporation and Brown Bros. & Co. was about a year and a half. On September 6, 1910, the date on which Brown Bros. & Co. notified the consignees of their claim to the funds in question, the hide corporation had met all its obligations to Brown Bros. & Co. that were then due, and all obligations with respect to the particular letters of credit under which the leather was imported, the proceeds of which are sought to be recovered in this proceeding. But on September 6, 1910, there was an outstanding draft which would become due at a later day.

By agreement of parties a special master was appointed to hear and determine the issues of law and fact in the case, his findings of fact to be final; and the case is here now on exceptions by both parties to his report.

The findings and rulings of the master are in substance that the title to the leather imported through Brown Bros. & Co. was in them as general owners, subject to an equitable or contract right in favor of the hide corporation; that the trust receipts issued by Brown Bros. & Co. are valid as against the receiver; that the fact the particular drafts under which the leather was imported were paid at maturity, and all other obligations of the hide corporation to Brown Bros. & Co. that had matured had also been paid, had no effect on Brown Bros. & Co.'s rights in the proceeds of the leather under the trust receipts; and that, although the leather imported through Brown Bros. & Co. with other leather belonging to the hide corporation had been pledged by the hide corporation with the consent of Brown Bros. & Co. to the commission merchants for advances and expenses made and incurred, so that the balances could not be identified as the proceeds of the leather imported through Brown Bros. & Co., nevertheless Brown Bros. & Co. were entitled to these balances under the principles of subrogation.

I am of the opinion that the title to the leather was in Brown Bros. & Co. as general owners, subject to a contract right in favor of the hide corporation, and that the trust receipts are valid as against the receiver.

"The decisions are so numerous, and by so many courts, to the effect that when a commercial correspondent advances money for the purchase of property, and takes possession, either actual or symbolical, he becomes the owner thereof, even when the advancement was made and the property was purchased at the request and for the ultimate use and profit of another, and there is an agreement to transfer title to that other upon the performance of conditions precedent, and ownership was taken solely for the protection of the advancement, that such may be said to be the established rule." *New Haven Wire Co. Cases*, 57 Conn. 352, s. c., 18 Atl. 266, 5 L. R. A. 300; *In re Mulligan* (D. C.) 116 Fed. 715; *Dows v. Bank*, 91 U. S. 618, 23 L. Ed. 214; *Moors v. Wyman*, 146 Mass. 60, 15 N. E. 104; *Moors v. Drury*, 186 Mass. 424, 71 N. E. 810; *Brown Bros. v. Billington*, 163 Pa. 76, 29 Atl. 904, 43 Am. St. Rep. 780; *Morris v. Kidder*, 106 N. Y. 32, 12 N. E. 818; *Bank v. Logan*, 74 N. Y. 568; *Barry v. Boninger*, 46 Md. 59.

In this case *Brown Bros. & Co.*, by their acceptance of drafts through their English correspondents drawn in pursuance of letters of credit which they had issued to the hide corporation, in effect purchased and paid for the hides with their own money. By so doing, and by taking the invoices and bills of lading for the same in their own name in pursuance of the agreement, they became absolute owners thereof; and this was so notwithstanding the fact that they were under obligation to sell the hides to the hide corporation upon the performance by the latter of its agreement. They could have sold the hides and given title to a third person, leaving the hide corporation to its action for damages for breach of contract to deliver to it. They were in every essential view the general owners, and possessed the rights necessarily attending such ownership. Although they became owners, it was for the sole purpose of obtaining their commission and the highest security possible for their advancements, and their ownership was subject to an agreement that their property in the hides should cease upon the performance of certain conditions precedent upon the part of the hide corporation. This is apparent from the provision in the indemnity agreements executed by the hide corporation upon receipt of the letters of credit in which it stipulated that we "recognize and admit the ownership of *Brown, Shipley & Co.* in, and their right and that of *Brown Bros. & Co.* to, the possession and disposal of all goods and the proceeds thereof, for which *Brown, Shipley & Co.* may come under any engagements in virtue of this credit.....until such time as any indebtedness and liability existing as against (us) in favor of *Brown, Shipley & Co.* or *Brown Bros. & Co.*, under the said credit or otherwise shall have been fully paid up and discharged."

The fair meaning of this indemnity contract, when read in connection with the letter of credit and trust receipt, is that *Brown Bros. & Co.* bound themselves to pay for the hides, and, upon the performance of conditions precedent by the hide corporation, to transfer title to it. By the trust receipt, the hide corporation obtained possession of the hides upon its agreement to hold them in trust for *Brown Bros. & Co.* and as their property, and subject to their order, with liberty to sell as the property of the bankers, and that in case of sale to keep the proceeds, whether in the form of money, bills receivable, or accounts, separate and capable of identification as their property, and hand the

proceeds to them to apply against the acceptances and for the "payment of any other indebtedness" to the bankers.

Among other requests, counsel for the receiver requested the master to rule:

"That the words 'any other indebtedness' contained in the trust receipt in Form A mean any other indebtedness due at the time the particular letter of credit involved was satisfied."

This request was denied, notwithstanding it was found that all other indebtedness due at the time the particular letter of credit under which the property, the proceeds of which are here in question, was imported had been paid. This request involves a construction of the written instruments embodying the contract under which the goods were imported and suffered to come into the possession of the hide corporation.

In the New Haven Wire Co. Cases, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300, the court was called upon to consider the claims of three different bankers to property imported under conditions similar to those here in question. One of the bankers was Brown Bros. & Co., and the contract upon which the shipment was made differed in no material respect, so far as we are here concerned, from the one we are now considering. Their claim is stated on page 389 of 57 Conn., on page 272 of 18 Atl. (5 L. R. A. 300), as follows:

"The applicants, Brown Bros. & Co., made conditional sales and deliveries of nail machines and of rods to the New Haven Wire Company upon conditions as follows: The wire company agreed to hold the nail machines and rods in trust, with liberty to sell the same, and in case of sale to hand the avails as soon as received to Brown Bros. & Co. as security for due provision for the acceptance of Brown, Shipley & Co. of Liverpool on its account noted at foot; and it further pledged to them the machines and rods and the proceeds thereof as security for the payment of any other indebtedness of it to Brown, Shipley & Co. In consideration of the letter of credit issued by Brown Bros. & Co. to it, the wire company agreed to pay the drafts drawn under the letter; it also gave to them a specific claim and lien on all goods and the proceeds thereof for which Brown, Shipley & Co. should come under any engagement in virtue of the letter; also pledged to them the goods and the proceeds thereof as security for any other indebtedness from it to them."

The court then proceeds and holds that:

"The effect of the trust receipt and of the agreement thus recited is that each nail machine and each lot of rods delivered by Brown Bros. & Co. to the wire company remained their property until the latter should repay the acceptance importing its nail machines or the rods; also all indebtedness due at the time of payment of the importing acceptance."

It further says, on page 391 of 57 Conn., on page 273 of 18 Atl. (5 L. R. A. 300):

"It was the understanding and intention of all parties to these agreements that whenever the absolute title to a particular lot of rods so delivered upon conditions should be necessary to the wire company for the profitable conduct of its business, it should then be possible to it to obtain such title; to obtain it, if need be, contrary to the will of the applicants by a sufficient tender. And as it was the expectation of all parties that importation and conditional sales and deliveries would succeed each other to an indefinite point in the future; that for these an overlapping succession of acceptances should come into existence extending to a constantly receding date, it is not within the reasonable interpretation of the contract to say that it contemplated the burdening of each lot of rods with this accumulating indebtedness; nor to

say that the applicants required from the wire company the payment of acceptances before maturity as a condition precedent to obtaining title to rods which it had paid for. It is rather to be interpreted as permitting it to obtain such absolute title by paying for the rods, and by paying in addition such other indebtedness from it to them as should then be due."

Such seems to be the reasonable construction of this contract, and as a consequence, under the facts found by the master, the money in question belongs to the hide corporation free from any claim of priority on the part of Brown Bros. & Co.

Again, as to the ruling of the master that Brown Bros. & Co. were entitled to the balance of \$1,240.06 on the Converse & Co. account; to the balance of \$3,134.36 on the Grey, Clarke & Engle Co. account; to the balance of \$2,008.26 on the Brown & Fisk account; and to the balance of \$6,349.77, less \$759.21 on the Pfister & Vogel Co. account—it may be said that, even if the contract is not subject to the construction above placed upon it, this ruling cannot be sustained. The hide corporation was permitted by Brown Bros. & Co. to pledge the hides and their proceeds to the commission merchants (to whom they were consigned for sale) to secure advances made by the merchants to the corporation. Leather imported through other bankers was also consigned and pledged to the same commission merchants by the corporation. No account was kept by the commission merchants showing from what source the hide corporation obtained the leather, and the proceeds of sales were applied by the merchants upon the advances from time to time as the sales were made, without regard to the particular source from which they came. From such circumstances no presumption arises that the advances were paid out of the proceeds of leather derived from one source rather than the other, and the finding and ruling of the master that the balances could not be identified as the proceeds of Brown Bros. & Co. leather is undoubtedly correct; but his ruling that, under these circumstances, Brown Bros. & Co. were entitled on the principles of subrogation to have the proceeds of the leather, derived from sources other than the sale of their leather, first applied to satisfy the advances, is erroneous. The rights of priority of Brown Bros. & Co. over the general creditors of the corporation to funds in the hands of the receiver, or due to him from debtors of the corporation, depend upon whether the whole or any part of the funds can be identified as the proceeds of hides imported through them. As they cannot be identified, their equitable right of priority is lost; and the proceeds having been applied from time to time as the sales were made, no question of the marshaling of assets is presented.

No claim is made by the receiver to the balance of \$834.75 on the Hunt Rankin Leather Company account, or to the balance of \$1,282.04 on the R. M. Baker account. These balances are found to be the proceeds of leather imported upon Brown Bros. & Co. letters of credit alone, and it also appears that Brown Bros. & Co. have never been reimbursed for their acceptances under these particular letters of credit.

The master's report is affirmed in part and disaffirmed in part. The parties may present drafts for a decree.

HANGES et al. v. WHITFIELD, Immigrant Inspector, et al.

(District Court, N. D. Iowa, E. D. December 3, 1913.)

1. HABEAS CORPUS (§ 92*)—PROCEEDINGS FOR DEPORTATION—REVIEW BY HABEAS CORPUS.

In habeas corpus proceedings brought by an alien held for deportation, the court cannot consider the sufficiency of the evidence if properly and fairly taken, but may, and it is its duty to, consider the means of procuring the testimony and its competency and legal admissibility against petitioner, and determine whether or not he has had a fair and impartial hearing.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. § 92.*]

2. ALIENS (§ 54*)—PROCEEDINGS FOR DEPORTATION—HEARING.

Under the provisions of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, 36 Stat. 263 (U. S. Comp. St. Supp. 1911, p. 499), which authorize the arrest and deportation of aliens who have lawfully entered the United States for certain causes subsequently arising, ex parte affidavits may be taken preliminary to and as a basis for an application for a warrant for the arrest of an alien so charged, but such affidavits cannot be again used as evidence against him on his hearing after arrest, at which he is entitled to be represented by counsel and to cross-examine the witness against him.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

3. ALIENS (§ 54*)—IMMIGRATION OFFICERS—OATHS, WHEN AUTHORIZED.

Section 24 of the Immigration Act only authorizes immigration officers to administer oaths, and take and consider evidence touching the right of aliens to enter the United States. This does not authorize such officers to administer oaths in proceedings to banish aliens from the United States for causes arising after they have been rightly admitted thereto; and pretended oaths administered in such proceedings are without authority of law and of no effect.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

4. ALIENS (§ 54*)—PROCEEDINGS FOR DEPORTATION—LEGALITY.

Petitioners, who were aliens lawfully admitted into the United States, were arrested for deportation because of their alleged subsequent acts on ex parte affidavits of others taken by an inspector, who administered the oaths, and forwarded to the department. They were severally examined by the inspector, who procured the affidavits and made the arrests, and on such examinations and the affidavits previously taken he recommended their deportation, although they denied the charges. Until the close of the examination they were not advised of their right to have counsel, and, while the counsel then employed was permitted to introduce evidence in their behalf, they were denied the right to have the persons making the affidavits called for cross-examination and were unable to procure their testimony. *Held*, that the charge against them was not supported by any competent testimony, nor were they given a fair hearing, and that they were entitled to be discharged.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

Petition by George Hanges, Demetrios Lampere, Steve Pantza, and Peter Francas against S. L. Whitfield, as Immigration Inspector, and E. Fitzgerald, as Sheriff of Cerro Gordo County, Iowa, for a writ of habeas corpus. Writ granted.

Williams & Breese and Rule & Shipley, all of Mason City, Iowa, for petitioners.

A. Van Wagenen, U. S. Atty., of Sioux City, Iowa, for defendants.

REED, District Judge. A writ of habeas corpus was issued against the defendants November 12, 1913, upon application of the petitioners therefor, to which the defendants have answered or made return. The evidence taken upon this hearing shows that complaint was made to the Bureau of Immigration some time prior to October 7, 1913, by certain of the police officers of Mason City, Iowa, that the petitioners, who are aliens and citizens of Greece, were or might be unlawfully within the United States. The matter was referred to the defendant S. L. Whitfield, as inspector of the Bureau of Immigration, who procured at Mason City the ex parte statements of certain women and girls, and other persons in that city, which purport to have been sworn to before the defendant Whitfield as such inspector, and tend to show that two of the petitioners, viz., George Hanges and Demetrios Lampere were proprietors of a restaurant in Mason City; that the other two were employed by them in said restaurant as waiters; also, that women and girls who had been previously employed in the restaurant were of ill repute and practiced prostitution in rooms over the same. This so-called testimony was taken in the absence of the petitioners, without notice to them, and was forwarded by the inspector from Mason City to the Bureau of Immigration at Washington, October 23, 1913. On the same day he sent to the Bureau a telegraphic message in cipher requesting that a telegraphic warrant issue for the arrest of the petitioners. Upon receipt of this message the Bureau of Immigration granted the request and sent to the inspector at Mason City a telegraphic message in cipher, which translated reads as follows:

"Western Union Telegraph Co., Washington, D. C., Oct. 24, 1913.

"Whitfield, Immigrant Inspector, Mason City, Ia.

"Arrest the following named aliens and bring before yourself for hearing, forwarding record of proceedings to the Department; Demetrios Lampere, Steve Pantza, George Hanges, and Pete Francas. Aliens employed by, in, or in connection with a music or dance hall or other place of amusement or resort habitually frequented by prostitutes or where prostitutes gather. Aliens connected with the management of house of prostitution. Aliens found receiving, sharing in, or deriving benefit from a part or the whole of the earnings of any prostitute.

J. B. Densmore, Acting Secretary."

Upon receipt of this warrant Inspector Whitfield arrested the petitioners, and, without informing them of their right to counsel, examined each of them separately and at length, and at the conclusion of the examination asked of each this question:

"Q. Do you understand that you are charged in this warrant with being unlawfully in the United States; in that you are employed in a house of prostitution, music or dance hall, or other place where prostitutes gather; that you are connected with the management of a house of prostitution; that you are found receiving, sharing in, or deriving benefit from a part or the whole of the earnings of prostitutes?"

Each answered: "Yes, I understand."

"Q. Are you satisfied with this hearing that has been given you, or do you desire to be represented by an attorney?"

Each answered: "I want an attorney, or lawyer."

No testimony was taken by the inspector after the receipt of the telegraphic warrant and the arrest and examination of the petitioners. After completing their examination, and taking the testimony in their behalf a few days later, he forwarded to the Bureau of Immigration the copy of the *ex parte* affidavits taken by him prior to his application for the warrant of arrest and the examination of the petitioners and the testimony taken in their behalf and recommended that warrants issue for the deportation of the petitioners.

There are some 20 of the so-called affidavits taken before the inspector at various times from October 7th to October 23d, inclusive, the date of the application for the warrant of arrest. It would unnecessarily extend this opinion to set forth these alleged affidavits in full or even an abstract of them. It must suffice to say of the contents of the so-called affidavits, and other testimony taken by the inspector, that most of it is but hearsay, and would be inadmissible against the petitioners for any purpose whatever in any judicial proceeding where the established rules of evidence prevail. Some of the girls, however, relate conversations they say they had with some of the petitioners, and some say they had sexual intercourse with one or two of them at places other than in the restaurant or in the rooms over the same. One of the petitioners, George Hanges, admits that he had sexual intercourse with one of the women several months before the hearing, on the farm where she and her husband lived; and another, Steve Pantza, admits that he was at an apartment house in Mason City with another of the girls more than a year before he was examined. Aside from this, the petitioners in the main deny the statements of the women or girls.

The purport of the testimony and the method of procuring it has been thus stated for the reason that the petitioners allege, as a ground for the issuance of the writ and to sustain the same, that they have been denied a legal, fair, and impartial hearing or trial upon the charges against them as grounds for their deportation.

[1] The court will not in proceedings of this character consider the testimony or the weight thereof, if properly and fairly taken, to determine whether or not it is sufficient to warrant the deportation of an alien. That would be for the proper immigration officials to determine. But the court may, and it is its duty to, consider the manner of procuring the testimony, its competency and legal admissibility against the petitioners, and determine whether or not they have had a fair and impartial hearing or trial. *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; *Wong Wing v. United States*, 163 U. S. 228, 237, 238, 239, 16 Sup. Ct. 977, 41 L. Ed. 140; *United States v. Sibray* (C. C.) 178 Fed. 144; *United States v. Williams* (D. C.) 185 Fed. 398; *Roux v. Commissioner of Immigration*, 203 Fed. 413, 121 C. C. A. 523; *United States v. Williams* (D. C.) 193 Fed. 228.

[2] The Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, as amended by the Act of March 26, 1910, c. 128, 36 Stat. 263 (U. S. Comp. St. Supp. 1911, p. 499), provides, in effect: That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Commerce and Labor (now Secretary of

Labor), be taken into custody and deported to the country whence he came at any time after the date of his entry into the United States. Section 20. That in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of the act, or that an alien is subject to deportation under the provisions thereof, or of any law of the United States, he shall cause such alien to be taken into custody and returned to the country whence he came, in the manner provided by section twenty of the act. Section 21. That the Commissioner General of Immigration shall under the direction of the Secretary of Labor have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall establish such rules and regulations, and issue from time to time such instructions, *not inconsistent with law*, as he shall deem best calculated for carrying out the provisions of the act, and for protecting the United States, and aliens migrating thereto from fraud and loss. Section 22. That immigrant inspectors and other immigration officers, clerks, and employes shall be appointed from time to time by the Secretary of Labor, upon the recommendation of the Commissioner General of Immigration, and that immigration officers shall have power to administer oaths and to take and consider evidence touching the right of any alien *to enter the United States*, and, when necessary, to make a written record of such evidence. Section 24.

Rule 22 of the Immigration Rules of November 15, 1911, so far as applicable, provides that officers shall make thorough investigation of all cases where they are credibly informed or have reason to believe that a specified alien in the United States is subject to arrest and deportation on warrant. Subdivision 1.

The application for the warrant of arrest must state facts bringing the alien within one or more of the classes subject to deportation after entry. The proof of these facts should be the best that can be obtained.

Note: Usually affidavits stating facts on affiants' own knowledge should be obtained. Subdivision 2.

"Execution of warrant of arrest and hearing thereon:

"(a) Upon receipt of a warrant of arrest the alien shall be taken before the person or persons therein described and granted a hearing to enable him to show cause, why he should not be deported. In the discretion of the immigration officer in charge he may, pending determination of his case, be taken into custody or allowed to remain in some place deemed by such officer secure and proper, except that an alien confined in an institution shall, in the absence of special instructions, not be removed therefrom until a warrant of deportation has been issued.

"(b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief.

"(c) At the close of the hearing the full record shall be forwarded to the Bureau, together with any written argument submitted by counsel, and the recommendations of the examining officer and the officer in charge for determination as to whether or not a warrant for deportation shall issue. * * *

Aliens who are unable to give bail shall be held in jail only in case no other secure place of detention can be found. Subdivision 5.

Upon receipt of a warrant of deportation, the alien shall be taken into the custody of the immigration officials for deportation and shall thereafter be deported. Subdivision 6.

Testimony may, no doubt, be taken in the form of affidavits, or otherwise, preliminary to, and as a basis for an application for warrants of arrest of specified aliens when the immigration officers are credibly informed, or have good reason to believe, that such aliens are unlawfully within the United States. But is the testimony so taken upon the preliminary hearing, even when lawfully taken, admissible against the aliens upon the hearing required to be given them after warrants for their arrest have issued, to determine whether or not they shall be deported; and may the officer in charge rightly deny to them the right to counsel upon such hearing until after the testimony against them has been completed?

It is not claimed that either of the petitioners entered the United States in violation of any law thereof, or that either belonged to a class who might not have been lawfully admitted thereto at the time he was admitted, and it is now sought to deport them upon the ground alone that they have violated the provisions of the Act of March 26, 1910, which amends section 3 of the Immigration Act of February 20, 1907, by adding thereto the following:

"Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this act."

It is incumbent upon the government to establish by competent evidence that the petitioners or some of them had violated all or some of the provisions of the Immigration Act as so amended after they were admitted to the United States and prior to their arrest. True, the proceeding for this purpose may be summary, and before an executive, or other authorized official of the government; but it must be a lawful proceeding, the charge established by competent evidence, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them before the Bureau of Immigration in determining whether or not they should be deported.

The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the

truth in all disputed matters of fact; and it is indispensable in all judicial proceedings in this country, civil or criminal, that *ex parte* testimony, even though given under the solemnity of a legal oath or affirmation that it is true, taken in the absence of and without opportunity at some stage of the proceedings to the party against whom it is proposed to be used to cross-examine the witnesses giving such testimony, cannot rightly be used against him. 1 Greenl. Ev. (16th Ed.) § 447; 2 Wigmore on Ev. §§ 1361, 1365; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 93, 33 Sup. Ct. 185, 57 L. Ed. 431.

[3] In this case it appears without dispute that the petitioners were not informed at any time of their right to counsel until after the inspector had taken the *ex parte* affidavits and examined the petitioners at length, when at the close of such examination he asked each "if he desired counsel." Upon each answering that he did, the inspector then fixed a time for the further hearing and postponed it accordingly. At such further hearing counsel for the petitioners requested of the inspector that the witnesses whose *ex parte* affidavits or statements had been previously taken be recalled that they might be cross-examined, which request the inspector denied. Some of the witnesses whose statements were taken by the inspector were called by the petitioners but refused to testify unless the inspector would so request, which request he refused to make. Others of the affiants the petitioners could not procure. They were thus prevented from obtaining their testimony either upon direct or cross examination. True, the petitioners and their counsel were permitted to examine the record, or copy of the testimony taken by the inspector prior to the application for the warrant of arrest; but of what avail was that? That testimony had already been forwarded to the Bureau of Immigration, and an inspection of the record kept by the inspector would only enable them to read what he had written, without opportunity to test its truthfulness by legitimate cross-examination or otherwise. That such testimony is legally admissible in any proceeding in which it is sought to deprive any person, citizen, or alien of his personal or property rights, cannot be successfully maintained.

It is contended in behalf of the inspector that he is authorized under rule 22 of the Bureau of Immigration to arrest and examine the petitioners after the warrant for their arrest was issued, without informing them of their right to counsel, and to deny to them the right upon the hearing required to be given them until such time as he may see fit to thereafter permit them to have counsel. If that is the effect of the rule, it is inconsistent with the usual and uniform procedure in all judicial proceedings under the laws of the United States wherein it is sought to deprive persons lawfully therein of their personal and property rights, and but emphasizes the necessity of immigration officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported, except upon legal evidence, which establishes with reasonable certainty, at least, the charges upon which it is sought to deport them.

The Immigration Act (section 24) only authorizes immigration officers to administer oaths and to take and consider evidence touch-

ing the right of aliens to enter the United States, and when necessary to make a written record of such evidence. The proceeding against these petitioners is not one touching their right to enter the United States, for they were lawfully admitted thereto at established ports of entry from six to ten years before it was commenced, but is one to deport or banish them from the United States for something they are alleged to have done after having been rightly admitted thereto.

There is no evidence to support the *ex parte* statements of persons made to the inspector, to whom he administered an oath which he was not authorized to administer, and such pretended oath is without authority of law and of no effect. The Immigration Act and the rules prescribed thereunder evince the purpose to afford an alien a fair opportunity to test the truth of the evidence adduced against him, and to disprove it if he can legally do so. If rule 22, properly interpreted, denies the aliens this right, then it is one not authorized by the Immigration Act. A fair interpretation of that rule, however, only invests the inspector with a discretion as to when he shall permit the alien to have the benefit of counsel upon the hearing required to be given him, and not to deny absolutely such right. Any action of the inspector which results in the denial to the alien of a substantial right to which he is lawfully entitled is unauthorized and cannot rightly be upheld.

The conclusion is unavoidable, under the testimony in this case, that the hearing before the inspector (who acted as prosecutor and judge upon such hearing) has not the semblance of a fair hearing. At the conclusion of such hearing, the petitioners were committed by the inspector to the custody of the jailer of Cerro Gordo county to be there imprisoned until the Bureau of Immigration shall act upon his recommendation that they be deported. Such imprisonment is without lawful authority, and the petitioners are entitled to be discharged therefrom. *Chin Yow v. United States*, 208 U. S. 8, 12, 28 Sup. Ct. 201, 52 L. Ed. 369.

The recommendations of the inspector to the Bureau of Immigration accompanying the *ex parte* evidence taken by him convinces that it was the murder by one of the affiants of her new-born babe at the farm upon which she lived near Mason City, as stated by her in her affidavit, that largely influenced his recommendation that the petitioners be deported. If any of these petitioners is guilty of that offense, or of any participation therein, the one so guilty should be proceeded against in the proper state courts for that crime; but they cannot rightly be deported from this country because they may have violated some criminal statute of the state of Iowa, unless such violation includes a violation of the Immigration Act, which upon competent proof thereof they may rightly be deported. The proceedings by the Bureau of Immigration in a fair and lawful manner for the deportation of these petitioners should not be interfered with except upon valid grounds. But this proceeding so far as it has progressed has not been a fair and impartial hearing, and only awaits the action of the Bureau of Immigration upon the recommendation of the inspector, which if approved is final, and will result in the immediate and unlawful de-

portation of them, unless released from such order upon the writ of habeas corpus.

The writ issued in this case is therefore sustained, and the petitioners discharged from the custody of the inspector and sheriff of Cerro Gordo county; without prejudice, however, to the right of the Bureau of Immigration to proceed against them in a lawful manner for their deportation. It is accordingly so ordered.

UNITED STATES v. BOLLES et al.

(District Court, W. D. Missouri. November 10, 1913.)

1. INDICTMENT AND INFORMATION (§ 10*)—FINDING OF GRAND JURY—EVIDENCE TO JUSTIFY.

To warrant the return of an indictment, it should be based on competent legal evidence such as is legitimate and proper before a petit jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 50-61; Dec. Dig. § 10.*]

2. GRAND JURY (§ 36*)—PROCEDURE—EVIDENCE IN BEHALF OF ACCUSED.

A person whose acts are under investigation by a grand jury has no right to himself appear and testify before such jury or to present evidence in his behalf either oral or written.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 75-78; Dec. Dig. § 36.*]

Petition by Richard J. Bolles and others for an order directing the grand jury to allow petitioners and certain witnesses named to testify before that body, and directing it to consider certain documents. Petition denied.

Edward J. White, J. G. L. Harvey, and H. S. Hadley, all of Kansas City, Mo., for petitioners.

S. R. Rush, Sp. Asst. Atty. Gen., and Francis M. Wilson, U. S. Atty., of Platte City, Mo., opposed.

YOUMANS, District Judge. R. J. Bolles, A. D. Hart, John Matthews, George A. Paddock, R. J. Martin, and Joseph H. Borders have filed a petition reciting the following facts:

1. The purchase in 1908 by Richard J. Bolles from the state of Florida of 500,000 acres of land known as Everglade lands, in Palm Beach and Dade counties in that state, the state of Florida agreeing that it would drain said land in accordance with the condition of the grant of said land to said state by the United States.

2. That during the year 1909 said Bolles, with John Matthews, A. D. Hart, and H. R. Ray, organized, under the laws of Colorado, the Florida Fruit Lands Company, which purchased from Bolles 180,000 acres of said land.

3. That during the year 1909 the Florida Fruit Lands Company entered into a contract with R. J. Martin and Joseph H. Borders for the sale of 180,000 acres of land, and that thereafter the sale of said land was conducted by Martin and Borders, as agents of the Florida

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Fruit Lands Company, and that certain literature was used in furtherance of the sale thereof; the representations contained therein being based upon written and oral representations to the officers of said company and Martin and Borders, by the state officials of the state of Florida, the official reports of the said state, and the reports and publications of the United States Department of Agriculture.

4. That upon said representations said lands were sold to about 12,000 purchasers, as tenants in common, and that pursuant to the terms of their contract of purchase, after the purchase price had been fully paid, said lands were conveyed by the Florida Fruit Lands Company to Joseph H. Borders, Claude E. Sawyer, and Fred L. Hoag, as trustees for said purchasers, in order that the lands might be divided among them.

5. That prior to the beginning of the sale of said land the contract for the sale and the plan of dividing the same were submitted to and received the approval of the Assistant Attorney General of the Post Office Department of the United States. That the deed was delivered by the Florida Fruit Lands Company to said trustees on March 15, 1911, and the lands were divided among the purchasers on that day.

6. The petitioners state that they are advised that the grand jury now in session is investigating the question of whether in the sale of said lands there has been any violation of any of the laws of the United States in the Western division in the Western district of Missouri.

7. The petitioners allege that in making the sale and distribution of said lands they have not violated any of the laws of the United States, and request that certain instructions be given to the grand jury, "to summon certain witnesses and examine certain documents before finally deciding whether indictments shall be returned."

8. The following persons are designated as the witnesses referred to: F. C. Elliott, present chief engineer of the trustees of the internal improvement fund of the state of Florida; Albert W. Gilchrist, former Governor of Florida; Gov. Trammel, present Governor of Florida and Attorney General of the state at the time said lands were sold; W. H. Ellis, former Attorney General of the state, now attorney for the trustees of said internal improvement fund; William O'Brien, attorney for the Florida Fruit Lands Company; and George L. Davis, who represented said company in certain civil litigations.

The books, papers, and documents desired are Senate Document 87; report of William R. Harr, Assistant Attorney General; application for the purchase of the land; deed of the Florida Fruit Lands Company to the trustees; Act of Congress of September 28, 1850, c. 84, 9 Stat. 519; Act of the Legislature of Florida accepting grant, passed in 1855; Acts of Florida of 1881, chapter 3326; General Statutes of Florida 1906, sections 620-628; decision of the Supreme Court of Florida in the case of Trustees of the Internal Improvement Fund v. Root, 63 Fla. 686, 58 South. 371; deed from the state of Florida to Richard J. Bolles; transcript of evidence of Joseph H. Rodes in the civil suit recently tried in the circuit court of Jackson county, Mo.

Petitioners further request that they be permitted to appear and

testify under oath before the grand jury; they waiving all rights, privileges, and immunities.

The petition closes with the following paragraph:

"Said petitioners in submitting this request urge upon the consideration of this honorable court that they are entitled, as citizens of the United States who have never heretofore been charged or convicted of any violation of its laws or the laws of any state, to the full and complete investigation by the present grand jury of the charges presented against them, and that they have as much right as citizens of the United States to enjoy immunity from indictment, if not guilty, as they have the right to enjoy immunity from conviction, if not guilty; that the chief law officer of the United States, the Attorney General, has once fully heard and investigated the matter now being investigated by this grand jury and decided that there was no basis or warrant for indictment or investigation; and that petitioners are entitled to the benefit of said decision, at least to the extent of being permitted to present their side of this controversy for the consideration of this grand jury."

To this petition the special assistant to the Attorney General and the United States attorney have filed a response, wherein they declare their intention to submit to the grand jury every document, act of Congress, act of Legislature of Florida referred to in the petition with the exception of the following:

- (1) Report of William R. Harr, Assistant Attorney General.
- (2) Transcript of evidence of Joseph H. Rodes in a certain civil suit tried in the circuit court of Jackson county, Mo.

In regard to the persons named in the petition, the response states that F. C. Elliott has been subpœnaed to appear before the grand jury, and that his testimony will be submitted; J. C. Wright was subpœnaed, and on his request was permitted to return home subject to call on telegram; William O'Brien has been subpœnaed and will appear and testify; Albert W. Gilchrist, Gov. Trammel, W. H. Ellis, and George L. Davis have been subpœnaed. The response also states that it is not the purpose of the prosecuting officers to admit the petitioners to testify.

The issue is narrowed to the following points:

- (1) The introduction of the report of the Assistant Attorney General, Harr.
- (2) The introduction of the transcript of the evidence of Joseph H. Rodes.
- (3) The admission of petitioners and certain witnesses on their behalf.

[1] To warrant the return of an indictment it should be based on competent legal evidence, such as is legitimate and proper before a petit jury. 20 Cyc. 1346; U. S. v. Kilpatrick (D. C.) 16 Fed. 765; U. S. v. Reed, Fed. Cas. No. 16,134.

The report of the Assistant Attorney General would not be competent legal evidence in a trial upon an indictment charging use of the mails in execution of a scheme to defraud, nor upon a charge of the use of the mails in carrying out a lottery scheme. *Harrison v. United States* (C. C. A.) 200 Fed. 673. It would not therefore be proper to submit it to the grand jury.

With regard to the transcript of evidence of Rodes, it is claimed in the argument that it will contradict, or tend to contradict, any evidence

he may give before the grand jury tending to sustain the charge against petitioners.

It is presumed that every witness will tell the truth. Every trial jury is so instructed. The law cannot be administered on any other theory. The contradiction of a witness by statements differing from those made by him on the stand is a form of impeachment. Impeachment involves the trial of a collateral matter; that is, the credibility of the particular witness. The machinery of the grand jury is not adapted to that character of inquiry. In this case it would require the investigation of the issues involved in the civil suit, competency and admissibility of the alleged contradictory statements, which are questions for the court, and the effect of such contradictory statements, which is a question for a trial jury.

[2] The basis of the claim of petitioners for the order prayed for is shown in the paragraph above quoted. They allege:

"That they have as much right, as citizens, to enjoy immunity from indictment, if not guilty, as they have a right to enjoy immunity from conviction, if not guilty."

As a necessary conclusion, they allege that they have the right "to present their side of this controversy for the consideration of this grand jury." The effect of this contention, if sustained, is to make the function of the grand jury identical with that of a trial jury. It was urged in argument that the claims above stated follow from a more liberal modern view of the powers and duties of a grand jury. The place that the grand jury occupies in the administration of the criminal law of this country, and the extent of the field of its inquiries, are readily ascertained and defined. The statement made by Blackstone, who died in 1780, of the procedure before a grand jury, may be taken as a correct view of the procedure as it existed in his time, and as it came to us. In Book 4, at page 302 of his Commentaries, he says:

"This grand jury are previously instructed in the articles of their inquiry by a charge from the judge who presides upon the bench. Then they withdraw to sit and receive indictments, which are preferred to them in the name of the King, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an inquiry or accusation which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths whether there be sufficient cause to call upon a party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities; a doctrine that might be applied to very oppressive purposes."

There is reported in *Respublica v. Shaffer*, 1 Dallas, 236, 1 L. Ed. 116, a ruling of Chief Justice McKean of the court of oyer and terminer at Philadelphia on a similar request to the one contained in this petition. It occurred during the year 1788, and the occasion for the ruling is set out in that report as follows:

"After some conversation with the grand inquest, the Attorney General informed the court that a list of eleven persons had been presented to him by the foreman, with a request that they might be qualified and sent to the jury, as witnesses upon a bill then depending before them. He stated that the list

had been made out by the defendant's bail; that the persons named were intended to furnish testimony in favor of the party charged, upon facts with which the inquest, of their own knowledge, were unacquainted; and he concluded with requesting that the opinion of the court might be given upon this application."

To the inquiry the Chief Justice replied as follows:

"Were the proposed examination of witnesses, on the part of the defendant, to be allowed, the long-established rules of law and justice would be at an end. It is a matter well known, and well understood, that by the laws of our country every question which affects a man's life, reputation, or property must be tried by twelve of his peers; and that their unanimous verdict is, alone, competent to determine the fact in issue. If, then, you undertake to inquire, not only upon what foundation the charge is made, but, likewise, upon what foundation it is denied, you will, in effect, usurp the jurisdiction of the petit jury, you will supersede the legal authority of the court, in judging of the competency and admissibility of witnesses, and, having thus undertaken to try the question, that question may be determined by a bare majority, or by a much greater number of your body, than the twelve peers prescribed by the law of the land. This point had, I believe, excited some doubts upon former occasions; but those doubts have never arisen in the mind of any lawyer, and they may easily be removed by a proper consideration of the subject. For the bills or presentments, found by a grand jury, amount to nothing more than an official accusation, in order to put the party accused upon his trial; until the bill is returned, there is therefore no charge from which he can be required to exculpate himself; and we know that many persons, against whom bills were returned, have been afterwards acquitted by a verdict of their country. Here, then, is the just line of discrimination: It is the duty of the grand jury to inquire into the nature and probable grounds of the charge; but it is the exclusive province of the petit jury to hear and determine, with the assistance and under the direction of the court, upon points of law, whether the defendant is or is not guilty, on the whole evidence, for as well as against him. You will therefore readily perceive that, if you examine the witnesses on both sides, you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must, consequently, be tantamount to a verdict of acquittal or condemnation. But this would involve us in another difficulty; for by the law it is declared that no man shall be twice put in jeopardy for the same offense; and yet it is certain that the inquiry now proposed by the grand jury would necessarily introduce the oppression of a double trial. Nor is it merely upon maxims of law, but, I think, likewise, upon principles of humanity, that this innovation should be opposed. Considering the bill as an accusation grounded entirely upon the testimony in support of the prosecution, the petit jury receives no bias from the sanction which the indorsement of the grand jury has conferred upon it. But, on the other hand, would it not in some degree prejudice the most upright mind against the defendant, that on a full hearing of his defense, another tribunal had pronounced it insufficient which would then be the natural inference from every true bill. Upon the whole, the court is of opinion that it would be improper and illegal to examine the witnesses, on behalf of the defendant, while the charge against him lies before the grand jury."

Amendment No. 5 of the Constitution of the United States was adopted in 1791. The part of it which applies to grand juries reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

It is safe to conclude that this amendment was adopted with the same idea as to the power of, and procedure before, the grand jury

as stated by Blackstone and Chief Justice McKean. The question now arises: What change has been made since that time? There has been no change made by statute. It is then necessary to ascertain whether a change has been made through judicial construction or decision.

In 1810, in the Circuit Court for the District of Columbia, the statement was made to the court that witnesses were about to be sent to the grand jury on the part of the United States against one Palmer, charged with perjury, and on his behalf the motion was made for leave to send up witnesses to the grand jury on the part of Palmer. The motion was refused by the court. *U. S. v. Palmer*, 27 Fed. Cas. No. 15,989, p. 410.

In 1835, in the Circuit Court for the District of Columbia, the grand jury submitted to the court the following question:

"The grand jury beg leave to represent to the honorable court that Doctors Cousine, Bohrer, Sewall, and Clark were directed to be summoned to testify in the case of Richard Lawrence (who attempted to shoot the President of the United States), to prove the sanity or insanity of the accused. The district attorney has told the jury that the examination of these witnesses for that purpose is improper. The jury therefore ask the opinion and instructions of the court upon this point."

After quoting from Chitty, vol. 1, p. 318, and citing the opinion of Chief Justice McKean, 1 Dall. 236, 1 L. Ed. 116, the court said:

"In regard to the question of law submitted to this court by the grand jury, the court instructs them that if, in any case before them, they shall be satisfied by the evidence adduced on the part of the prosecution that the party accused committed the unlawful act with which he is charged, they have no right to send for and examine witnesses to prove mere matter of justification or excuse. If such a course would be permitted, it would require the United States to produce other witnesses either to discredit those thus produced on the part of the defendant or to disprove the fact about which they are called to testify, and thus the whole trial of the case would be drawn before the grand jury, out of the presence of the court and the counsel of the parties."

In 1836, Chief Justice Taney, sitting as Circuit Justice in the Circuit Court for the District of Maryland, in charging a grand jury, said:

"But, in our desire to bring the guilty to punishment, we must still take care to guard the innocent from injury; and every one is deemed to be innocent, until the contrary appears by sufficient legal proof. You will therefore, in every case that may come before you, carefully weigh the testimony, and present no one, unless, in your deliberate judgment, the evidence before you is sufficient, in the absence of any other proof, to justify the conviction of the party accused. And this rule is the more proper, because he is not permitted to summon witnesses or adduce testimony to the grand jury, and your decision must be made without hearing his defense." *Charge to Grand Jury*, 30 Fed. Cas. No. 18,257, p. 998.

In 1861, United States District Judge Leavitt, in charging a grand jury in the Southern District of Ohio, said:

"But in regard to treason, and indeed all other crimes, the jury should reach a rational conclusion, from the law and the evidence, that the person accused is guilty, before returning a true bill against him. A grand jury has only the evidence which the government can adduce, without reference to what the defendant may have it in his power to bring forward, in proof of his innocence." *Charge to Grand Jury*, 30 Fed. Cas. No. 18,272, p. 1038.

In 1867, United States District Judge Shipman, in the District of Connecticut, in charging the grand jury said:

"In order to find a true bill against any person, the proof should be such as, in your judgment, would warrant a petit jury in pronouncing the accused guilty. You proceed upon the evidence furnished you by the government, leaving the alleged offender to meet the charge, before the petit jury, by such proof as he may command." Charge to Grand Jury, 30 Fed. Cas. No. 18,246, p. 976.

In the same year United States District Judge Erskine, in passing on a challenge to a grand jury in the Southern District of Georgia, said:

"The challenger states in his affidavit that the district attorney distinctly promised him that he should be permitted on the trial before the grand jury to have evidence in his defense laid before them. No such promise or agreement can have the sanction of this court. To allow evidence, either oral or written, to go before the grand inquest, on behalf of a defendant, would be subversive of the ancient and well-settled rules of courts of justice." *U. S. v. Blodgett*, 30 Fed. Cas. No. 18,312, p. 1158.

In 1869, United States District Judge Deady, in charging a grand jury in the District of Oregon, said:

"In respect to the manner and extent of your inquiries, your own good sense will be your best guide. You ought only to act upon legal evidence or what satisfies you that the legal evidence exists. The party accused, or concerning whom an inquiry is made, has no right to be heard before you, and you should not allow him in the jury room, or to be examined as a witness in his own behalf." Charge to Grand Jury, 30 Fed. Cas. No. 18,251, p. 986.

In the same year United States District Judge Benedict, in charging a grand jury in the Southern District of New York, said:

"It is not your province to try the cases which you may consider. That duty devolves upon the petit jury and the courts; but you are diligently to inquire and true presentment make of every offense arising under the laws of the United States which shall be made to appear by reasonable *prima facie* proof." Charge to Grand Jury, 30 Fed. Cas. No. 18,247, p. 978.

It will be seen from the foregoing authorities that, from the adoption of amendment No. 5 to the year 1869, it was the practice of the federal courts to exclude from the grand jury the parties charged and witnesses on their behalf.

It is urged in the argument on this petition that a change was made by Justice Field in a charge made by him to a grand jury, while sitting as Circuit Justice in the District of California in the year 1872, which charge is reported in 30 Fed. Cas. No. 18,255, at page 992. The portion of the charge relied upon is as follows:

"In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions, and hearsay evidence. Subject to this qualification, you will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused. If, in the course of your inquiries, you have reason to believe that there is other evidence, not presented to you, within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced. Formerly, it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable. But a different and a more just and merciful rule now prevails. To justify the finding of an indictment, you must be convinced, so far as the evidence before you goes, that the accused is

guilty; in other words, you ought not to find an indictment, unless in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury."

Justice Field did not, by this declaration, intend to overturn the practice of almost 100 years. In the same instruction he gave an account of the development of the grand jury and the office it performed in this country. He said:

"The institution of the grand jury is of very ancient origin in the history of England; it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the accounts of the commentators on the laws of that country, that it was at first a body which not only accused, but which also tried public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial."

If it had been the intention of Justice Field to overturn the rule laid down in *Blackstone* and announced by Chief Justice McKean and Chief Justice Taney and numerous other federal judges, with reference to the taking of the testimony of the person accused and witnesses on his behalf before the grand jury, he would certainly have said so. The most that can be said is that he states that the quantum of evidence necessary to justify an indictment should be such as, unexplained and uncontradicted, would warrant a conviction by a petit jury, as against the rule that they would be warranted in returning an indictment upon testimony sufficient to render the truth of the charge probable. He recognized the fact that the grand jury had been in early times the trial as well as the accusing body, and he stated that it had come to be an accusing body only. That such was the interpretation given to the instruction clearly appears from the opinion of United States District Judge Hoffman, who, in the same district, in 1889, in the case of *United States v. Terry* (D. C.) 39 Fed. 355, said:

"It is enough to say that an accused person has no right to appear in person or by counsel before a grand jury, or to have witnesses in his behalf produced and examined."

To say that one has the same right to enjoy immunity from indictment, if not guilty, as he has a right to enjoy immunity from conviction, if not guilty, is to beg the question. The point to be determined is whether the individual is or is not guilty of a certain charge. The law has provided a certain method by which this is to be ascertained. There must be, first, an inquiry by a grand jury to determine whether or not the facts are sufficient to put the individual on trial on the particular charge. If indictment is returned, he is then tried upon that charge. If his guilt must be determined before indictment, the individual is in the attitude of saying to the prosecuting officers and to the court: "I must be found guilty before I can be indicted and, under the Constitution of the United States, I cannot be found guilty until I am indicted." The whole argument thus resolves itself into an absurdity.

In the course of their argument, counsel for petitioners referred to the proceedings before the grand jury as being in the nature of, or

similar to, Star Chamber proceedings. To make such a comparison is to disregard the facts of history. The Star Chamber was an ancient court of criminal jurisdiction, which sat without intervention of a jury. It was an instrument of oppression in the hands of the Tudor kings, and was abolished during the period of the Stuarts. So far from being assimilated in any manner to the Star Chamber, the object, purpose, and effect of the grand jury are directly opposed to Star Chamber methods. There is only one element of similarity between the two, and that is secrecy. The Star Chamber convicted after having made secret investigation, or at least without having granted to the defendant public trial. The grand jury makes its investigation secretly, but it makes its accusations openly. Unlike the action of the Star Chamber, the action of the grand jury deprives the accused of no right without a public hearing. There can be no convictions by the grand jury. But, in guarding against Star Chamber convictions, it was not intended to go to the opposite extreme and authorize Star Chamber acquittals. The latter would be just as reprehensible as the former. If the grand jury could, in secret session, hear both sides of the case and be authorized, upon such hearing, to declare the individual whose acts were under investigation, acquitted of the charge, we would, to that extent, have a restoration of the Star Chamber. The grand jury would be discredited and would fall into disrepute. To grant this petition would tend to bring about the very situation against which counsel inveigh.

The statement was also made by counsel for petitioners in support of this request for the admission of the parties under investigation, and their witnesses, to the grand jury room to testify, in order to avoid the return of an indictment, that suspicion remains even after acquittal by the trial jury. I do not concede that statement, as a general rule. It may be, and doubtless is, true in some cases. In any case in which it is true, it is so on account of the facts in evidence and not on account of the fact of a trial. Conceding that such a result may follow from an acquittal secured from a jury after a trial in open court with all the publicity attending such trial, how much more suspicion will attach to an acquittal or exoneration at the hands of a body whose investigations are made behind closed doors and whose members are sworn to secrecy? The institution of the grand jury had attained such a place in the administration of the criminal law as to induce the people of the nation to require its recognition by amendment to the Constitution. If it is to maintain its place in the estimation of the people, it must be governed by the well-settled rules of law which have been found suited to its efficient operation. I can conceive of no more effective way to discredit the grand jury as an institution than to confer on it the power to determine questions of fact as a trial jury. That method of procedure which now serves a good purpose and merits no adverse criticism would provoke distrust and destroy confidence if observed in passing on disputed facts. The only safe course to pursue is to adhere to the practice developed throughout a long period of time and justified by experience.

The petition will be denied.

VAN REEN v. ÆTNA LIFE INS. CO.

(District Court, D. New Jersey. December 9, 1913.)

SPECIFIC PERFORMANCE (§ 17*)—SUIT BY PERSON NOT PARTY TO CONTRACT—POLICY OF INDEMNITY INSURANCE.

Defendant issued a policy by which it agreed to indemnify the owner of an automobile against "loss and/or expense arising or resulting from claims upon the assured for damages" on account of injuries caused in the operation of such automobile. The policy provided that defendant would, at its own cost, defend in his name any suit brought against the assured to enforce a claim for damages covered thereby, and that "no action shall lie against the company to recover for any loss and/or expense under this policy unless it shall be brought by the assured for loss and for expense actually sustained and paid in money by him after actual trial of the issue." *Held*, that the policy was one of indemnity to the assured only, and that a third person injured through his negligence, who recovered a judgment against him in an action defended by defendant, which judgment was wholly unpaid, could not maintain a suit in equity against defendant for specific performance to compel payment of the amount of the policy to him.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 38-46; Dec. Dig. § 17.*]

In Equity. Suit by Jacob Van Reen against the Ætna Life Insurance Company. Decree for defendant.

Herbert H. Gibbs, of New York City, for complainant.
Collins & Corbin, of Jersey City, N. J., for defendant.

BRADFORD, District Judge. The bill in this case was filed by Jacob Van Reen, a judgment creditor of Charles Brogan, against the Ætna Life Insurance Company, for the specific performance, as claimed by Van Reen, of the provisions of an automobile liability policy issued by the insurance company to Brogan on or about April 8, 1910, in consideration of the payment by the latter of a premium of \$99. While Brogan held the policy and it continued in full force Van Reen while traveling on a highway in New Jersey suffered serious accidental bodily injuries August 7, 1910, through the negligent and careless use by Brogan of the automobile referred to in the policy. Van Reen brought an action in the Supreme Court of New York for damages for the injuries so received and recovered judgment against Brogan in the sum of \$20,000 as damages, and \$143.12 as costs of suit. Execution against Brogan was issued on the above judgment and returned unsatisfied prior to the commencement of this suit. The insurance company at its own cost undertook the defense of the New York action in the name and on behalf of Brogan from its commencement until and including the trial, and during the pendency of the action negotiated with Van Reen for a settlement of his claim, but did not pay or settle the same or any part of it. The insurance company was and is familiar with the proceedings in the New York action and had notice of the entry of judgment and the issuance and return of the execution and that such judgment is wholly unpaid. The policy in question provides, among other things, for the payment of the maxi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

num sum of \$5,000 in case of accident resulting in bodily injuries or death to only one person, and also all costs taxed against the assured in any legal proceeding defended by the insurance company, and also all interest accruing after the entry of judgment therein, computed on the amount of the insurance which shall have become payable under the provisions of the policy. Condition M of the policy sets forth the measure of the indemnity which should become due from the insurance company, as follows:

"M. The Company's liability for loss on account of an accident resulting in bodily injuries and/or death to one person is limited to five thousand dollars (\$5,000); and, subject to the same limit for each person, the Company's total liability for loss on account of any one accident resulting in bodily injuries and/or death to more than one person is limited to Ten thousand dollars (\$10,000). The Company will, however, as provided in Conditions B and C hereof, pay the expense of litigation in addition to the sum herein limited, and will also pay all costs taxed against the Assured in any legal proceeding defended by the Company, and interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the Company's liability herein expressed."

Conditions B and C are as follows:

"B. If suit is brought against the Assured to enforce a claim for damages covered by this policy he shall immediately forward to the Company every summons or other process as soon as the same shall have been served on him, and the Company will, at its own cost, defend such suit in the name of and on behalf of the Assured.

C. The Assured, whenever requested by the Company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals, but the Assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at his own cost, without the written consent of the Company previously given except that the Assured may provide at the Company's expense such immediate surgical relief as is imperative at the time of the accident."

Van Reen seeks in this suit to compel the insurance company to pay to him on account of the judgment recovered by him against Brogan in New York the sum of \$5,000, together with interest, and the further sum of \$143.12, taxed costs as above mentioned.

The policy expressly runs to Brogan in consideration of the payment by him of the insurance premium, and was made for his benefit and not for that of Van Reen or any other person who should suffer bodily injuries through the negligent use of the automobile. Not only was Van Reen not a party to the contract of insurance, but under its terms and conditions the insurance company was under an obligation to make defense for Brogan against claims prosecuted by Van Reen against him. Further, it did not undertake to insure Brogan against mere liability to others for bodily injuries sustained through such negligent use, nor did it assume his liability or indebtedness in such cases, but only agreed to indemnify him against "loss and/or expense arising or resulting from claims upon the Assured for damages" on account of such injuries, subject to the conditions of the policy. Condition D is dominating and reads as follows:

"D. No action shall lie against the Company to recover for any loss and/or expense under this Policy unless it shall be brought by the Assured for loss

and/or expense actually sustained and paid in money by him after actual trial of the issue, nor unless such action is brought within two years after payment of such loss and/or expense."

Specific performance of a contract will be decreed only where its meaning is clear. So far as it is uncertain, whether from ambiguity or other cause, equity will not attempt to enforce it. It is not a legitimate function of the court to create or set up for enforcement a supposed contract into which the parties have not entered, or a contract which does not clearly disclose their contractual will. Much less will a court under the guise of specific performance compel one of the parties to a contract to do something in violation of its express terms and intent. Condition D, taken by itself, is wholly free from doubt on two vital points; first, that no action shall lie against the company to recover under the policy "unless it shall be brought by the Assured," and, secondly, then only "for loss and/or expense actually sustained and paid in money by him after actual trial of the issue." Van Reen is not the assured, nor has Brogan paid in money the judgment, or any portion of the judgment, or taxed costs in the New York action. To permit the former successfully to maintain this suit would be in direct contravention of that condition as it reads. It is urged that it would be unreasonable and a hardship if the insurance company could not be directly sued by Van Reen, the liability of Brogan having been established by the New York judgment, instead of requiring Brogan to pay, at least to the extent of the insurance, that judgment with interest and costs, before resorting to the insurance company. This contention cannot be sustained. Persons competent to contract who have without the practice of fraud or deception on them entered into an agreement on sufficient consideration, cannot be relieved from its binding force on account of inconvenience or hardship involved in the practical operation of its clearly expressed terms. There is nothing in condition B or condition C requiring a construction or interpretation of condition D inconsistent with the plain import of its terms. In view of the undertaking by the insurance company to indemnify the assured against loss actually sustained and paid by him after actual trial of the issue, obviously nothing could be more reasonable and for its protection than that it should have a right to defend the action for the recovery of damages for bodily injuries "in the name and on behalf of the Assured," or that "the Assured, whenever requested by the Company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals, but the Assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at his own cost, without the written consent of the Company," etc. I am unable to escape the conclusion that Van Reen is not entitled to the relief he seeks. This holding, I am satisfied, is required both by principle and an overwhelming preponderance of authority. The Supreme Court of Iowa in *Cushman v. Fuel Co.*, 122 Iowa, 656, 98 N. W. 509, where a contract of a guaranty company with an employer provided that no action should lie against the company unless brought by the assured for a "loss ac-

tually sustained and paid in satisfaction of a judgment after trial of the issue," held that an unpaid judgment recovered by an injured employé against the employer could not be enforced against the company. The court said:

"The obligation of the guarantee company was for the protection of the fuel company alone. The plaintiff was not a party to the contract, and had no legal rights thereunder. While the policy provided that the guarantee company might appear and defend for the fuel company in any action brought against it for personal injuries, such provision was for the protection of the guarantee company alone, and imposes no liability upon it beyond the terms of the contract. A court of equity can no more disregard the express provisions of the contract than could a court of law, and neither can make a new contract for the parties which would impose a liability not originally contracted for; hence, whatever relief a court of chancery might grant plaintiff in any event, must of necessity be based upon and be determined by the contract which the parties have themselves made. The only obligation of the guarantee company was to indemnify the fuel company against a 'loss actually sustained and paid in satisfaction of a judgment after trial of the issue.' This covenant is as explicit and certain as language could well make it, and, as between the parties to the contract, no recovery could be had against the guarantee company because the judgment against the fuel company was not paid, and consequently the covenant was not broken."

The decision of the case in hand is controlled by *Allen v. Ætna Life Ins. Co.*, 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958, in the circuit court of appeals for the third circuit. It is unnecessary to refer in detail to or cite other authorities.

Van Reen seeks to draw a distinction between his alleged right to compel payment by the insurance company of the costs taxed against Brogan in the New York action on the one hand, and, on the other, of the \$5,000 and interest on account of the judgment against Brogan. But no such distinction is permissible, as plainly appears from condition M in connection with the preceding portions of the policy.

The bill must be dismissed with costs and a decree entered accordingly.

PHOENIX RY. CO. OF ARIZONA v. GEARY et al.

(District Court, D. Arizona. December 27, 1914.)

No. E-11.

STREET RAILROADS (§ 12*)—STATE REGULATION—ORDER REQUIRING DOUBLE TRACK—REASONABLENESS.

An order of a state corporation commission requiring a street railroad company to double-track a portion of its line in a city of 25,000 population extending ten blocks and to connect with another portion in the business section already having a double track *held* not shown to be unreasonable, and a preliminary injunction to restrain its enforcement denied; but the company *held* entitled to the continuance of a temporary restraining order to prevent the enforcement of the extreme penalties imposed by statute for failure to obey the order until it should have a reasonable time to comply therewith.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 14, 19; Dec. Dig. § 12.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Phoenix Railway Company of Arizona against W. Paul Geary, Frank A. Jones, and Amos W. Cole, members of the Corporation Commission of the State of Arizona, George P. Bullard, Attorney General for Arizona, and Frank H. Lyman, County Attorney for Maricopa County, Ariz. On motion for preliminary injunction. Denied.

Chalmers & Kent, of Phoenix, Ariz., for complainant.

G. P. Bullard, of Phoenix, Ariz., for defendants.

Before MORROW, Circuit Judge, and VAN FLEET and SAWTELLE, District Judges.

MORROW, Circuit Judge (orally). In this case it appears from the complaint and affidavits filed in its support that the Phoenix Railway Company of Arizona owns and operates a system of street railways in the city of Phoenix; that a track of this system extends along Washington street in that city from Sixteenth street on the eastern boundary of the city, westerly through the business part of the city to Seventeenth avenue on the west; that commencing at the eastern terminus of the Washington street line, at Sixteenth street, and then running west to Seventh street, a distance of nine blocks, the line consists of a single track; that from Seventh street to Seventh avenue, a distance of fourteen blocks, in the business section of the city the line consists of a double track; that from Seventh avenue to Seventeenth avenue, a distance of ten blocks, the line is a single track, with a switch for a turnout between Twelfth and Thirteenth avenues for the passage of cars meeting at that point. At Seventeenth avenue the line turns north in front of the State Capitol and runs one block to Adams street and then turns onto and runs along Adams street to Twenty-Second avenue, the western terminus of the road.

The order of the Corporation Commission which is the subject of the complaint in this case requires the complainant to double-track its line from Seventh avenue to Seventeenth avenue, a distance of ten blocks. In the State Capitol immediately west of Seventeenth avenue, to which point the Corporation Commission orders the extension of the double track, is located the offices of the Governor of the state and the Assembly Chambers of the state Legislature, the courtroom of the Supreme Court of the state, and the chambers of its judges, together with the law library of the state. There are also in the State Capitol the offices of the land commissioners, who hold frequent sessions, the Corporation Commission, the defendant in this case, the state tax commissioners, the Secretary of State, and the Attorney General, with their assistants and clerks. All these people are dependent upon this single-track railway from the Capitol to Seventh avenue in the direction of the business portion of the city of Phoenix. From Seventh avenue eastward to the business portion of the city the track is a double track. On Washington street between Tenth and Twelfth avenues is located the public library and its park, frequented by the people of Phoenix. In the vicinity of the State Capitol there is an estimated population of from 1,200 to 1,500. The city of Phoenix as a whole is

estimated to have a population of 25,000. For these people employed at the Capitol and living in that neighborhood, a reasonably quick service is required to and from the business portion of Phoenix. The affidavits before us set forth that there are delays in the transit of the cars over the single track of the railway, by reason of the fact that there is but a single turnout for this track between Seventh avenue and Seventeenth avenue; that a car going either east or west arriving at the turnout between Twelfth and Thirteenth avenues ahead of a car going in the opposite direction must wait until the other car arrives at the turnout.

It appears to the court from the evidence that this is a real, substantial inconvenience to the public residing in and frequenting that part of the city of Phoenix in and around the Capitol and the public library, and we believe it to be the duty of the complainant upon the showing made upon this motion to comply with the order of the Corporation Commission and double-track this line from Seventh avenue to Seventeenth avenue, so that the inconvenience of delays may be avoided.

It appears that the cost of the double trackage will only amount to about \$13,000; that the value of the company's street railway property in Phoenix is something like \$500,000. We think it would be no great hardship upon the complainant to make this improvement.

In a growing, prosperous city like Phoenix, where the population is steadily on the increase, the complainant might very properly keep well up and abreast of the actual requirements of the population. The complainant is a public service corporation, and there is, of course, something due to the convenience of those who are compelled to use the complainant's line for transportation, to those who are employed in the State Capitol, and to those who find it necessary to visit it on either business or pleasure. In addition, there is the public library and its park on Washington street between Tenth and Twelfth avenues. The convenience of those who use the car line in visiting the library ought to be considered. Then there is a population of 1,200 or 1,500 in the neighborhood of the Capitol. Many of these people must go to the business section of Phoenix every day. This car line is their method of transportation, and any delay in meeting cars at the turnout must be a great and perhaps at times serious inconvenience. A double track would enable each car to pass on its way without any delay at the turnout between Twelfth and Thirteenth avenues, instead of waiting for the car passing in the opposite direction. We are of opinion that the complainant has not made a sufficient showing to prevent the enforcement of this order of the commission. The Corporation Commission is authorized by section 36, c. 90, of the Statutes of the state (act approved May 28, 1912, Session Laws of Arizona 1912, p. 521), to require public service corporations (after hearing) to make additions, extensions, repairs, or improvements to, or changes in the existing plant, equipment, apparatus, facilities, or other physical property of the corporation, to promote the security or convenience of the public. The order under consideration was made after a hearing, and there is a presumption in favor of its reasonableness. In our opinion that presumption has not been overcome in the showing that has been made

upon this hearing. But in view of the heavy penalties provided by the statute for the failure of any public service corporation to comply with its terms or the orders of the Corporation Commission, we are not prepared to dismiss the bill. We think jurisdiction should be retained by the court to see that no injustice is done the complainant while complying with the order. We have every confidence in the present Attorney General, and have no doubt that so long as he remains in office he will deal reasonably and justly with the corporation pending its compliance with the order. But the affairs of men are uncertain. The present Attorney General may not remain in office. He may be called elsewhere, and some one else in that office may seek to enforce the penalties of the statute against this corporation while it is proceeding in good faith to comply with the order. We are dealing with a statute and not with individuals. The corporation should have sufficient time to lay the double track ordered by the commission. It cannot be done in a day. Material may have to be procured from a distance and it may be hard to secure deliveries. We know that as a general rule steel rails cannot be delivered promptly upon the order being given for them. We are of the opinion that the Attorney General and the counsel for the complainant can agree upon a reasonable time for complying with the order of the commission, and such agreement will be made an order of this court. The jurisdiction of the court is invoked, as in the Pacific Gas & Electric Cases, just decided, upon the ground that the penalties of the statute are so severe and cumulative for noncompliance with the order of the commission that the complainant cannot take any chances with its provisions except under the protection of the court, and this protection we think we should give under the circumstances.

The parties will prepare orders in accordance with the views of the court as stated.

Mr. Bullard: I understand your honors' order in this particular case is that the motion for an interlocutory injunction is denied, but that the restraining order is kept in force?

Judge MORROW: Yes, the restraining order is kept in force until further order of the court. But that is only restraining the Corporation Commission from enforcing the pains and penalties.

Judge VAN FLEET: And, Gen. Bullard, there will be no difficulty about yourself, representing the commission, and the attorneys for the complainant, agreeing upon a stipulation as to the time when the company shall commence the work and the time within which the work shall be completed.

Mr. Bullard: That is what I was trying to arrive at; if we agree upon that time, then upon the expiration of that time the restraining order becomes automatically dissolved.

Judge MORROW: Yes, automatically dissolved and the case dismissed.

Mr. Kent: I very much regret to appear in the light of a bad loser, but I am compelled, if your honors please, to enter a notice here formally in the record of an appeal from your honors' determination in this matter directly to the Supreme Court of the United States as provided for by statute, and to ask such relief in respect to a stay of pro-

ceedings as your honors may see fit to grant. And without taking more than just a few minutes of your time I want to explain to your honors why it is necessary to take that action. In this case, as in many cases, there is much behind the record; there are many facts and circumstances in this case that are not proper for me to say, even now that your honors have decided this, inasmuch as Judge SAWTELLE will eventually have to try this case. If this were a mere matter of spending \$13,000 to double-track this road, I would bow to your honors' decision, for I have great respect, as your honors know, for your integrity and your wisdom; but there is much more than just this matter of double-tracking these ten blocks behind this case, and much more than the mere matter of paving these ten blocks. I can state this, and it is perfectly proper to state it because it enters into the reasons why we are going to be compelled to exhaust every legal resource that we have to avoid complying with this particular order in this case, and which we must do with all respect to your honors; I appreciate that your honors have attempted to make something in the nature of a compromise here, but if your honors—

Judge MORROW: No, it is hardly that. We do not think the showing is sufficient. That is all. So far as the appeal is concerned, that is entirely agreeable to us.

Mr. Kent: I would like to say a word to your honors as to the reason why we will have to take this appeal. We want some sort of a stay of proceedings in this case so that we can take the matter to the Supreme Court of the United States. We have other trackage in Phoenix. We have, where this line diverges at Seventh avenue, a line that runs out Seventh avenue and Grand avenue to the Fair Grounds. There is much greater reason for double-tracking that line running out to the Fair Grounds than there is for double-tracking the line involved in this case. We have an annual fair down there at Phoenix, and for a week at that time it is impossible to take care of the crowds.

Judge MORROW: Judge VAN FLEET desires to be excused, Mr. Kent, in order to proceed with his calendar.

Mr. Kent: I should very much like to have Judge VAN FLEET remain here to listen to this statement; it will not take more than two or three minutes to make it. And we have a Second avenue line, a single track, and the Brill line, a single track. If your honors had had time to read the evidence presented to the Corporation Commission, you would have found that it had, upon the complaint of six or eight persons who say they have been inconvenienced, entered an order requiring us to double-track this particular line. We cannot contest that in the state courts. We cannot hereafter contest it in the federal court because this decision will be quoted against us as a precedent. Your honors undersand that this decision ends the case—

Judge SAWTELLE: Oh, no; you cannot assume that this court will sustain the commission if they order you to double-track all those lines.

Mr. Kent: Why not? You have sustained it here now when only six or eight people have said it was an inconvenience.

Judge SAWTELLE: Our decision is not based on the fact that six

or eight people have said that it was an inconvenience. We have concluded that upon the showing made here this court cannot say that the order of the Corporation Commission is an unreasonable order.

Judge VAN FLEET: Yes, that is all we have concluded.

Mr. Kent: This will be a precedent for the next time.

Judge VAN FLEET: It cannot be a precedent for a case based on different circumstances. We do not hold that you have no right to appeal to the federal courts for relief; we simply say that your showing here is not sufficient.

Mr. Kent: That is exactly what we are complaining of. We never can have a showing that is more complete than our showing here. Six or eight people say it is an inconvenience; we have shown by the schedules that the cars have run absolutely on time except perhaps in one or two instances. We never could have a more complete showing.

Judge MORROW: Well, we differ with you, Mr. Kent, upon that feature of the case.

Judge SAWTELLE: There is no state of facts that can serve as a precedent to a court in deciding a question of law unless the second set of facts presented in the second case are absolutely identical with those in the first case.

Mr. Kent: We want an order, if your honors will grant it, in some way staying these proceedings until we can take this appeal.

Judge MORROW: We will do that. That has been done heretofore. Matters have heretofore been stayed in order to allow of an appeal to the Supreme Court. The courts have approved such a course.

Mr. Kent: Yes, your honor; it seems to be within rule 36 of the Supreme Court.

Judge MORROW: What amount of bond would you suggest?

Mr. Kent: We already have a bond on the temporary restraining orders. Would your honors allow the temporary restraining order to remain in force pending this appeal?

Judge SAWTELLE: What was the amount of the bond on the restraining order?

Mr. Kent: \$2,000.

Judge SAWTELLE: It seems to me there should be a larger bond than that.

Judge MORROW: We will fix the bond at \$5,000.

Mr. Kent: Then the order will be denying the application for an injunction, but the restraining order will be continued in force pending an appeal to the Supreme Court, and the bond will be in the sum of \$5,000.

Judge MORROW: Yes, providing that the appeal is taken within 30 days.

Mr. Kent: There will be no trouble about that, except perhaps the question of printing. We will be perfectly willing to say 30 days, and, if there is any difficulty about it, I suppose we will have no trouble in getting an extension.

Judge MORROW: Very well.

In re RHAGAT SINGH et al.

In re SUNDAR or SANDU SINGH et al.

(District Court N. D. California. First Division. December 5, 1913.)

Nos. 15,479, 15,480.

1. ALIENS (§ 54*)—EXCLUSION—HEARING—FAIR TRIAL.

Where, after petitioners in alien exclusion proceedings had been informed that the cases were closed, new evidence was introduced in opposition to petitioners' right to enter the United States, of which their attorneys had been informed, and also advised that they would be permitted to inspect the new evidence, and offer further evidence if they desired, the admission of such additional proof on behalf of the government did not deprive petitioners of a fair hearing.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

2. HABEAS CORPUS (§ 23*)—EXCLUSION—PERSONS LIKELY TO BECOME PUBLIC CHARGE—FINDINGS—REVIEW.

A finding by immigration officers that certain alien Hindoo laborers applying to enter the United States would be likely to become public charges because of there being a deep-seated prejudice in the United States against them, and, there being no demand for their labor on this account, it would be difficult for them to maintain themselves, was not reviewable on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 23.*]

3. ALIENS (§ 49*)—IMMIGRATION RULES—ENTRY OF INSULAR POSSESSIONS—RIGHT TO LAND ON MAINLAND.

Immigration rule 14 as amended June 16, 1913, providing that aliens applying at continental ports and surrendering the certificate received on entering the Philippines shall on identification be permitted to land, provided it appears that at the time they were admitted to the Philippines they were not members of the excluded classes, or likely to become public charges if they proceeded thence to the mainland and were given certificates, did not entitle aliens to land in the United States, notwithstanding the finding of the immigration officers that they were liable to become public charges, on the ground that the interior departments had no power to adopt a rule which would preclude an alien once landed in any territory of the United States from thereafter freely going thence to the mainland.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 107; Dec. Dig. § 49.*]

Habeas corpus on petition of Timothy Healy, for and on behalf of Rhagat Singh and others, and on behalf of Sundar or Sandu Singh and others. Application denied.

John L. McNab and Timothy Healy, both of San Francisco, Cal., for petitioners.

Walter E. Hettman, Asst. U. S. Atty., of San Francisco, Cal., for the government.

DOOLING, District Judge. These cases involve the right of the individuals named to land at the port of San Francisco, having already been landed at Manila and coming thence here. Upon their arrival

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

they were arrested, and after a hearing ordered deported as persons likely to become public charges.

It is sought to have the action of the Department of Commerce and Labor, denying their right to land and ordering their deportation, reviewed by this court, on three general grounds:

(1) Because they were not accorded a fair hearing by the immigration officers, at this port.

(2) Because there is no evidence to support the finding that each of said petitioners is a person likely to become a public charge.

(3) Because having already been permitted to land at Manila they are entitled, coming thence to the mainland, to be landed here as a matter of right, and without further examination.

[1] The assignment that the petitioners were not accorded a fair hearing by the immigration officers is predicated chiefly upon the fact that on or about August 20, 1913, and after the testimony of the petitioners had been taken and certain affidavits filed in their behalf, the petitioners and their attorneys were informed by the immigration authorities that the cases were closed, and that thereafter, on or about September 25, 1913, they were informed that the cases had not been closed on August 20th, but that the government had secured and presented other evidence in opposition to the right of petitioners to land. The contention that the hearing was unfair in this regard cannot be upheld. On September 27th the attorney for petitioners addressed to the Immigration Commissioner a letter as follows:

"This is in response to your letter advising me that new evidence has been taken by the government in the case of a group of Hindoos, and that we will now be permitted to inspect the same, and offer further evidence.

"I thank you for the courtesy of the information."

Having been accorded the opportunity to inspect the new evidence and controvert it if they desired, and having as a matter of fact presented further evidence, they were accorded a fair hearing within the meaning given those words by the adjudicated cases. When such is the case, the order of the executive officers within the authority of the statute is final, if there be any evidence at all to support their determination.

It is contended that there is no such evidence in the present cases, this being the second ground upon which the order of the immigration officers is assailed. The question presented by this assignment is of extreme importance, and its determination either way will have a wide and far-reaching effect.

[2] The department rests its action upon the right given it by statute to exclude "persons likely to become a public charge." Certain affidavits were introduced in the present cases tending to show, among other things, that the Hindoo laborers are obnoxious to very many of our people, that there exists a prejudice against them, and that comparatively few avenues are open to them in which to find employment. This showing is not made as against any particular individual petitioner, but as against the Hindoos generally as a race. In these

cases the application for the warrant of arrest was based upon the fact as set forth therein that the—

“above aliens are likely to become public charges for the reason that they are of the laboring class; that there is no demand for such labor, and there exists a strong prejudice against them in this locality.”

The warrant of arrest and the order of deportation are based upon the fact as set forth in each of them:

“That the said aliens are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States.”

The finding that they were persons likely to become public charges is based in reality, however much the immigration officers may disclaim the fact, upon the general showing and implied finding that there is a prejudice against the Hindoo, and little demand for his labor. It is true that there was a strong counter showing made by petitioners, but the matter having been passed on by the department, and there being some evidence to support the implied finding, the merits of the case in this regard are no longer open, and may not be reviewed by the courts. The question then presented, stripped of all its masks, is the following:

“May the Department of Commerce and Labor, upon a showing satisfactory to itself and a finding not open to review that a prejudice exists in this country against aliens of any race, and that there is no demand for the labor of such race, exclude all laborers of such race on the ground that they are, for such reasons, likely to become public charges?”

Stated thus, if it were a new question, I would not hesitate a moment to answer in the negative. But the Supreme Court has gone so far in holding that the findings of the department cannot be reviewed if there be any testimony at all to support them that I am not prepared to deny to it the power implied in the foregoing question. The department has the power to pass upon the facts of each individual case. And if it determine upon any substantial evidence that there is no demand for the labor of an alien applying for admission, and that a prejudice exists against him, and for these reasons conclude that, if admitted, he would be likely to become a public charge, the court cannot say, where the alien must depend upon securing labor in order to subsist, that this conclusion is so without support as to require it to be set aside. But let there be no delusion that this power, once conceded, can be used only in the case of Hindoos. It is equally applicable to every other race. Conceding the power to the Department of Labor to exclude the Hindoo laborer for this reason, we must concede to it the power to exclude, for the same reason, the laborer of any other race. It is a vast power, and one which, upon the argument of this case, I was very unwilling to believe was lodged in any executive department of the government. But an examination of the adjudicated cases shows a uniform holding that whenever an alien has had an opportunity to present such testimony as he desired to present, the conclusions of the Department of Commerce and Labor, upon the facts, are not open to review if there be any testimony to support

them. Nor can the courts inquire whether or no such conclusions are wrong. In the present cases, therefore, the department, having the right to determine the fact as to whether these petitioners are persons likely to become public charges, has determined that they are. The fact that this determination is based upon conditions existing in this country, rather than upon any particular physical or mental defect in the individual petitioners, does not in my judgment make such determination any the less final, or render it any more open to review by the courts. For a strong man unable to obtain an opportunity to labor is just as helpless as a weak one unable to perform such labor if the opportunity were afforded him. For these reasons the order of deportation cannot be disturbed because of failure of proof. There is left, then, to be considered only the third contention of petitioners, that having been permitted to land at the port of Manila, they are entitled to come to the mainland without further question.

[3] The statute provides that the Commissioner General of Immigration shall have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall establish such rules and regulations, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of the Immigration Act. (Act Feb. 20, 1907, c. 1134, 34 Stat. p. 898 [U. S. Comp. St. Supp. 1911, p. 499]). At the time that some of these petitioners landed in the Philippines, rule 14 of the immigration rules was as follows in so far as applicable here:

"Sec. 1. Aliens arriving in the Philippines bound for the continent shall be inspected and given a certificate signed by the insular collector of customs at Manila showing the fact and date of landing."

"Sec. 2. Aliens who, having been manifested bona fide to the Philippines and having resided there for a time, signify to the insular collector of customs at Manila an intention to go to the continent shall be furnished such certificate, as evidence of their regular entry at an insular port."

"Sec. 3. Aliens applying at continental ports and surrendering the certificate above described shall, upon identification, be admitted without further examination."

On June 16, 1913, however, the foregoing rule was amended to read as follows:

"Sec. 3. Aliens applying at continental ports and surrendering the certificate above described shall, upon identification, be permitted to land, provided it appears that at the time such aliens were admitted to the Philippines they were not members of the excluded classes, or likely to become public charges if they proceeded thence to the mainland."

Some of the petitioners here landed at Manila on June 20, 1913, after the foregoing amendment was in force. But whether they landed at Manila before or after the amendment does not seem to me to be at all material, as the amendment was in force for some time before any of them left the Philippines for the mainland. It is urged that this amendment is beyond the power of the department to enact, and that an alien once landed in any territory, or other place subject to the jurisdiction of the United States, may freely go thence to any portion of the United States whether it be the mainland or any of its island possessions. With this conclusion I am unable to agree.

There may be reasons for rejecting an alien at continental ports which would not exist if he were applying to enter the Philippines. Labor and climatic conditions and standards of living are so diverse that one going to the Philippines who would not there be likely to become a public charge might well be likely to become such if he proceeded thence to the mainland. A more rigid test may therefore well be applied to those seeking admission to the mainland than that applied to those seeking admission to the Philippines. And as the amendment to the immigration rules, providing that the possession of a certificate of lawful entry into the Philippines should not be conclusive as to the holder's right to enter a continental port, was in effect at the time that all of these petitioners sailed from Manila, the question was properly open for investigation by the immigration officers here as to whether or no, at the time these aliens were admitted to the Philippines, they were likely to become public charges if they proceeded thence to the mainland. This question was investigated upon their arrival here, and was decided adversely to the petitioners. As we have heretofore seen, this decision is final and not subject to review.

The application for a writ of habeas corpus must therefore be denied; and it is so ordered.

CULLEN v. ARMSTRONG et al.

(District Court, D. Maryland. December 20, 1913.)

1. LOGS AND LOGGING (§ 3*)—RIGHT TO CUT TIMBER—CONVEYANCE—NATURE OF PROPERTY.

In Maryland the right to cut timber from land is personal property and may be sold as goods, wares, and merchandise.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. BANKRUPTCY (§ 140*)—OWNERSHIP OF PROPERTY—TIMBER—TRANSFER.

Where defendant, having a bill of sale conveying the right to cut timber from certain land, transferred the same to a bankrupt, with the bill of sale, receiving the latter's notes for the purchase price, this was sufficient to transfer his title to the timber as between the parties.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

3. BANKRUPTCY (§ 188*)—PROPERTY PURCHASED BY BANKRUPT—LIEN FOR PRICE—SUSPENSION.

Where defendant transferred his right to cut timber from certain land to a bankrupt accepting its notes for the price, the notes and renewal thereof suspended his right to enforce his lien on the timber for nonpayment of the price until the notes were due or the bankrupt's inability to pay them became manifest.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

4. LOGS AND LOGGING (§ 3*)—PRICE—ACCEPTANCE OF NOTES—TERMINATION OF LIEN.

That a seller receives the buyer's notes for the price of timber and negotiates the same does not terminate the seller's lien.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. BANKRUPTCY (§ 188*) — LIEN—WAIVER — ENFORCEMENT AGAINST BUYER'S TRUSTEE.

Defendant A., having purchased the right to cut timber from certain land for \$6,250, resold the same to a bankrupt for \$8,500, taking its notes therefor. The notes were renewed from time to time until the bankrupt became unable to pay them, after having unsuccessfully attempted to dispose of the rights to third persons. The bankrupt never took possession of the rights transferred, nor did he notify the landowner of his interest, or do anything except send certain prospective purchasers to look over the timber. No sale, however, was made, and thereafter the bankrupt retransferred the rights to A. in settlement of the notes while it was insolvent. *Held*, that there had been no waiver or loss of A.'s lien upon the rights transferred to secure payment of the price, and, it not appearing that the timber rights were worth more than \$8,500, A. was entitled to retain the same as against the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

In Equity. Action by Charles W. Cullen, as trustee in bankruptcy, against Daniel C. Armstrong and another. On application to set aside a preliminary injunction. Application granted, and bill dismissed on condition.

Stevenson A. Williams, of Belair, Md., for complainant.

Alonzo L. Miles and Morris A. Soper, both of Baltimore, Md., for defendants.

ROSE, District Judge. The plaintiff is the trustee in bankruptcy of the Delmar Lumber Manufacturing Company, a Delaware corporation. He will be called the trustee; it, the bankrupt. He seeks to set aside a transfer by the bankrupt to the defendant Armstrong of a right to cut timber on a tract of land in Somerset county in this state. He says that the transaction assailed was a voidable preference. Bounds, the other defendant, now claims to be the owner of the timber leave in question. The trustee says that as against him Bounds has acquired no rights therein. In January, 1911, the land and the timber thereon belonged to a Mrs. Anderson. For \$6,250 she sold this timber leave to Armstrong. She gave him a bill of sale therefor. It was duly recorded. On November 15, 1911, he resold it to the bankrupt for \$8,500. No cash passed. The bankrupt gave Armstrong its three promissory notes. Two of these were for \$1,250 each. They were respectively payable 30 and 60 days after date. The third note was at four months and was for \$6,000 and interest. Four of the bankrupt's directors individually indorsed each of the notes. It and they were then in good credit. Some of them were supposed to be well to do. In return for the notes Armstrong handed over to the bankrupt the original bill of sale from Mrs. Anderson to him. He prepared another paper and delivered it also. What that instrument was is one of the disputed questions in the case. Armstrong's counsel claim that it was a reservation of title in the timber until the purchase money was paid, or at all events until both the \$1,250 notes were. The trustee contends that it was an out and out assignment of the bill of sale. It was never recorded. Armstrong subsequently, under circumstances

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 209 F.—45

to be described, obtained possession of it. He lost or destroyed it. He does not pretend to be able to tell how it was worded. He has been more than once examined concerning it. With each repetition his recollection that it in some way reserved title becomes clearer. The evidence does not justify a finding that there was any such reservation made by it. The trustee, on the other hand, is equally unable to prove that it was an assignment of the bill of sale. As the record stands, the case must be disposed of as it would have been had no such paper ever existed.

Armstrong discounted the three notes at the Bank of Somerset. When the first of them fell due, the bankrupt induced Armstrong to consent to its renewal. As each of the others matured, the same thing happened. Some of the earlier renewals again matured and were again renewed. The renewals all bore the same indorsements as the originals. By early June, 1912, the financial condition of the bankrupt and its indorsers had become bad. On June 10th a suit for upwards of \$4,000 of undisputed indebtedness was brought against it and them. Within the next ten days other suits followed. As early as June 18th an application to put it in the hands of a receiver was made to the state court for Sussex county. On the 21st the application was granted. On July 11th an involuntary petition in bankruptcy was filed. In due course adjudication followed. Two of the four indorsers were likewise adjudicated. Another died while bankruptcy proceedings were pending against him. The property of the fourth was sold upon execution issued against him.

The bankrupt never took physical possession of the timber or of the land upon which it stood or of any part of either. It never made any preparation to fell any of the trees. It never notified the owner of the soil that it had succeeded to Armstrong's rights. All that it did to which plaintiff can now refer as acts of ownership was to send a couple of possible purchasers to look at the timber in the hope that they would become buyers.

On June 14th or 15th the bankrupt, acting through two of the indorsers, agreed with Armstrong to rescind the sale. None of the bankrupt's renewed notes matured before July 15th. On that day all of them would become due. Armstrong signed a note for \$8,620. Bounds indorsed it as surety. The Bank of Somerset discounted it. Out of the proceeds Armstrong took up the notes of the bankrupt. He returned them to the bankrupt with his check for unearned interest. The bankrupt gave him back the bill of sale and the other paper. The parties had put each other in the situation in which they were before the sale was made. Armstrong now says that when all this was done he neither knew that the bankrupt was insolvent nor had he any reasonable cause to believe that such was the case. Actions speak louder than words. He did precisely what any one in his place would have done had he believed that the bankrupt and its indorsers were on the eve of failure. If he did not think so, there was no reason for doing anything until the notes fell due. If he thought that his debtors were insolvent, he must have also had good reason to believe that if he got back the timber he would be better off than the balance of their cred-

itors. His counsel say that, even if for the sake of the argument they admit all that has been thus far said, yet he did nothing which he had not the right to do and nothing which the bankrupt law will avoid.

[1, 2] In Maryland this timber leave is personal property. It is bought and sold as are goods, wares, and merchandise. There is no question that what was done was sufficient as between themselves to pass title from Armstrong to the bankrupt. Was it enough to extinguish the former's lien for the unpaid purchase money under the rules laid down in *Thompson v. B. & O. R. R. Co.*, 28 Md. 406? If the bankrupt had not taken possession of the timber before June 14th, that lien then existed and Armstrong had the right to enforce it.

[3] The acceptance of the notes suspended his right to act upon it until the notes matured or until the bankrupt became insolvent. The acceptance of renewal notes worked a further suspension until they became due or until prior to that time the inability of the bankrupt to pay them became manifest. *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 308, 16 C. C. A. 232.

[4] It is true that in *Arnold v. Delano*, 4 Cush. (Mass.) 41, 50 Am. Dec. 754, Chief Justice Shaw suggested that the negotiation by the seller of the buyer's note ended the lien. That is no longer the law even of Massachusetts. *Brewer Lumber Co. v. Boston & Albany R. R. Co.*, 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. Rep. 375. Nor is it the law of the federal courts. *McElwee v. Metropolitan Lumber Co.*, supra. The doctrine of these cases is embodied in the Uniform Sales Act now in force in Maryland.

[5] The plaintiff says the bankrupt had so taken possession of the timber as to extinguish the lien. Had it? If the timber was in the actual custody of the owner of the land, the bankrupt had not taken the steps required by law to get possession. It had never notified the owner of its rights, nor had she ever recognized them or, so far as the record shows, ever heard of them.

The handing over of the original bill of sale may have been a sufficient symbolical or constructive delivery to pass title as between the parties. It is not every such delivery that suffices to destroy the vendor's lien. *Thompson v. B. & O. R. R. Co.*, supra.

The mere sending of one, two, or three people to look at the timber in order, if possible, to get an offer from them, did not change the situation. They went casually on the land and as casually left it. They did not buy. There is no element of estoppel present. It does not appear that any third person ever acted to his hurt upon the supposition that the bankrupt owned the timber. That remained on June 14th precisely as it was on the preceding November 15th. Nothing had happened to it in the meantime. Not one penny had ever been paid for it. We are not embarrassed by any question as to whether on June 14th the bankrupt was insolvent. The assumption that it was is a necessary part of plaintiff's case. When that became manifest, before the bankrupt had in any way reduced the timber into possession, or any one else had acquired any rights in it, the suspension of Armstrong's vendor's lien which had resulted from his accepting renewal notes which did not expire until July 15th came to an end. He had a right to assert

it. The bankrupt was bound to yield to it. It is true that, if there had been an equity in the timber over and above the sum due Armstrong, the trustee would have been entitled to it. I do not understand that anybody claims that there is, or that more than \$8,500 could on June 14, 1912, or at any time since, have been obtained for the timber. At all events, Armstrong had a right then to take possession of it, and he has now the right to retain that possession until the purchase price shall be paid him. His rights appear, upon settled principles of law and the terms of the Uniform Sales Act (Code Pub. Gen. Laws Md. 1904, art. 83, §§ 22-98) in force in Maryland, to be superior to those of the trustee.

It follows that the preliminary injunction heretofore granted restraining the removal of timber by the defendants must be dissolved, and the bill of complaint dismissed, unless within ten days the trustee shall signify his intention to tender within a reasonable and short time to the defendants the sum of \$8,500, with interest thereon from June 14, 1912.

EICHHORST v. LINDSEY, District Court Clerk.

(District Court, W. D. Pennsylvania. December 5, 1913.)

No. 933.

ALIENS (§ 68*)—NATURALIZATION—TIME FOR FILING PETITION.

The provision of Naturalization Act June 29, 1906, c. 3592, § 4 (2), 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529), limiting the time for filing a petition for naturalization to seven years after the making of the declaration of intention, applies to the declaration prescribed by the preceding paragraph, and does not in any way affect the rights of an alien, who made his declaration prior to the date when the act became effective in accordance with the law then in force, to file a petition at any time.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

In Equity. Petition for mandamus by August Eichhorst against William T. Lindsey, Clerk of the District Court of the United States for the Western District of Pennsylvania. Writ granted.

Samuel J. Horvitz, of Pittsburgh, Pa., for petitioner.

ORR, District Judge. Petitioner is a resident alien, who declared his intention to become a citizen of the United States on December 8, 1905, in accordance with the provisions of law then in force. On September 30, 1913, he appeared in the office of the clerk of this court and sought leave to file his petition for naturalization. The clerk refused to permit such petition to be filed, because he was advised of an objection by the Commissioner of Naturalization that, inasmuch as more than seven years had elapsed, such declaration of intention was insufficient to support a petition for naturalization under the Naturalization Act of June 29, 1906, and its various supplements. The petition for mandamus and the answer of the clerk setting up

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the foregoing facts raise but a single question: Is the act of June 29, 1906, retroactive?

The second paragraph of section 4, which prescribes the manner in which an alien may be admitted to citizenship, begins with this language:

"Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing"

—being the petition for naturalization. That provision gives rise to the present controversy. It, however, should not control the meaning of other portions of the act, if that meaning is equally clear. The words "such declaration of intention," found in the above quotation, refer to the declaration of intention provided for in the immediately preceding paragraph of said section 4. Turning thence, we find specific provisions as to the manner in which such declaration of intention shall be made, before whom it shall be made, when it may be made, and what it shall contain in detail, with the proviso:

"Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration."

That proviso seems to control the meaning of the words heretofore quoted from the second paragraph, because the word "such" in the latter can have its ordinary meaning, viz., "like what has been said."

Other portions of the act throw light on the question. Another portion of the second paragraph of section 4 requires the petitioner for naturalization to sign his petition in his own handwriting, yet has this proviso:

"Provided, that if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting."

It seems that Congress did not wish to wholly vitiate declarations of intention made prior to the passage of the act. Indeed, a fair construction of the act discloses the intention of Congress to save to aliens all benefits which they may have acquired by reason of their declarations made under prior law. This view is strengthened when we note that on June 25, 1910, Congress amended the first paragraph of section 4 of the act by providing for the naturalization of aliens under certain circumstances without proof of former declaration of intention.

The case of *In re Wehrli*, 157 Fed. 938, has been brought to our attention. The learned judge in that case expressed the view that the Naturalization Act of June 29, 1906, by the provision first above quoted, was intended to given aliens who had made their declarations of intention under prior laws seven years from that date in which to become citizens. This court cannot reach that conclusion. To do so would necessitate an opinion that the act was in some degree retroactive, at least to the extent of imposing some new limit which had not theretofore existed. The declaration of intention is the first step in proceedings which the law has imposed upon the courts, the last

step being a judicial decree. It is difficult to see why a different rule should be applied in the construction of an act relating to such proceedings than in the construction of an act relating to proceedings in cases properly so called. As said by Mr. Justice Clifford in *Twenty Per Cent. Cases*, 20 Wall. 179, 187 (22 L. Ed. 339):

"Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms."

Applying this rule to the Naturalization Act of 1906, we must conclude that declarations of intention filed prior thereto were not in any way affected thereby and may support petitions for naturalization at any time. The petitioner in these proceedings may present his petition for naturalization. It is not probable that any formal order to that effect will be necessary. If it be necessary, one may be presented.

BLAKSLEE, PERRIN & DARLING v. OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited.

(District Court, W. D. New York. October 21, 1913.)

REMOVAL OF CAUSES (§ 2*)—JUDICIAL CODE—CONSTRUCTION—RIGHT OF ACTION "ACCRUING."

Defendant issued a policy of credit insurance by which it insured plaintiff for one year against loss on provable bad debts arising on sales of merchandise above an initial loss of a stated per cent. on the first \$200,000 of sales and a smaller per cent. on sales above that amount. About March 1, 1912, plaintiff made a sale which resulted in a loss above the specified percentage. *Held*, that a right of action did not accrue on the policy until at least that date, nor was such right "accruing" prior to such sale within the meaning of Judicial Code, § 299 (Act March 3, 1911, c. 231, 36 Stat. 1169 [U. S. Comp. St. Supp. 1911, p. 246]), providing that the repeal or amendment of existing laws by such Code shall not affect any "right accruing or accrued," and that an action on the policy commenced after January 1, 1912, when the Code took effect, and involving less than the \$3,000 required thereby to give a District Court jurisdiction, was not removable.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 2, 3; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 1, pp. 101, 102.]

At Law. Action by Blakslee, Perrin & Darling against the Ocean Accident & Guarantee Corporation, Limited. On motion to remand to state court. Motion granted.

H. D. Blakslee, Jr., of Buffalo, N. Y., for plaintiff.

Wright & Mitchell, of Buffalo, N. Y. (Wm. Burnett Wright, Jr., of Buffalo, N. Y., of counsel), for defendant.

HAZEL, District Judge. This is a motion to remand this action to the state court on the ground that under the Judicial Code, which went into effect January 1, 1912, the amount involved, \$2,406.92, is insuffi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cient to confer jurisdiction on this court; the required amount being in excess of \$3,000. But the repealing act contains a saving clause (section 299) which provides that it shall not affect "any act done, or any right accruing or accrued," and the question presented is whether the right of action is based upon a right accruing at the time the act went into effect.

Under the policy of credit insurance issued by the defendant corporation, the plaintiff was insured against loss on provable bad debts arising on sales of merchandise from December 1, 1911, to November 30, 1912, over and above an initial loss of one-half of 1 per cent. on the gross aggregate amount of plaintiff's sales up to \$200,000, and ninety-twentieths of 1 per cent. of such sales in excess of said amount. The defendant contends that in credit insurance the right of action does not accrue at the time the loss is actually sustained but is a right accruing continuously from the date of the policy, and that the right to sue on the policy depends not upon the amount of the bad debts but upon the sales of merchandise made by the insured during the time the policy was in force. I do not agree with this contention. I cannot conceive of any right of action in the insured against the insurer until there had been at least a sale to the debtor. Concededly there was no loss until after March 1, 1913, at about which time the merchandise was sold.

The fallacy of defendant's argument appears clearly, I think, when consideration is given to the precedent conditions of the policy, namely, that the insured after sustaining loss of an account must notify the insurer of the insolvency of the debtor, file proof of claims, and afford an opportunity for arbitration before beginning an action to recover on his policy. Under these circumstances I am disinclined to hold that the saving clause contained in section 299 of the Judicial Code applied to any other rights of action than such as were accruing or had accrued prior to January 1, 1912. The term "accruing" plainly implies a liability that is in the act of accruing, or that is happening in due course, or that is increasing, enlarging, or augmenting. *Richards v. Bellingham Bay Land Co.*, 54 Fed. 209; 4 C. C. A. 290. If the debt had been created before the Judicial Code went into effect, then it might safely be held that, while the right of recovery on the policy had not accrued, there was nevertheless an accruing right which was litigable in this court.

But as the particular debt was then nonexistent and the loss in question unsustained, I hold that there is no enforceable right of which this court has jurisdiction, and the action is remanded to the state court.

THE QUEEN ELIZABETH.

(District Court, N. D. California, First Division. December 11, 1913.)

No. 15,342.

SHIPPING (§ 84*)—INJURIES TO STEVEDORE—LIABILITY OF VESSEL.

While a vessel chartered to a fuel company was being unloaded by its employés, libelant was directed with others to climb the cargo battens in order to dislodge coal that had settled behind them, and when he was 12 or 15 feet from the bottom of the hold, one of the battens supporting him gave way because of a broken cleat, and he fell to the bottom, sustaining serious injuries. The battens were not intended to be used as a ladder, but were to prevent the cargo from touching the sides of the vessel, and there was no evidence that the owner or master of the vessel knew that they were customarily used by stevedores in cleaning out the so-called pigeon holes. There was proof that this duty was generally performed by the crew while standing on the coal as it was being taken out. *Held* that the ship was not liable for the negligence of the fuel company, if any, in directing its men to use the battens as ladders without first ascertaining that it was safe to do so.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. § 84.*]

In Admiralty. Libel by John Downey against the British steamship Queen Elizabeth. Dismissed.

Denman & Arnold, of San Francisco, Cal., for libelant.

Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, Cal., for respondent.

DOOLING, District Judge. Libelant was injured while in the employ of the Western Fuel Company discharging a cargo of coal from the steamer Queen Elizabeth. The vessel was under charter to the Western Fuel Company, which had full charge of her for all the purposes attending the discharge of her cargo. The libelant was, with others, directed by the foreman to climb the cargo battens in order to dislodge the coal that had settled behind them. When 12 or 15 feet from the bottom of the hold one of the battens supporting him gave way because of a broken cleat, and he fell to the bottom, receiving serious injuries. He brought this action against the vessel, and in the state court brought another action against the Western Fuel Company to recover damages for the same injuries. This latter action resulted in a compromise by which he was paid \$1,250; and it is urged that this payment precludes him from recovering here. It is quite possible that under all the facts elicited at the trial concerning libelant's settlement with the Western Fuel Company such settlement may be a bar to his recovery here, but it does not seem to me at all necessary to determine this question, as I am of the opinion that if there were any liability, the Western Fuel Company was solely liable. It is sought to fix a liability, on the ship, upon the well-known principle that an employer is bound to furnish his employé with a reasonably safe place in which to work. That principle is not questioned. Even when, as here, the employé is not working for the ship, if the ship does supply the place in which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the work is to be performed, such place must be reasonably safe, or the ship will be liable for any resulting injury. But these cargo battens are not intended to be used as ladders. Their function is to prevent the cargo from touching the sides of the vessel, and while there is some evidence tending to show that such battens are customarily used at this port as ladders to support the stevedores in cleaning out the so-called pigeon holes, there is no evidence tending to show that either the owner or the master of this vessel had knowledge of any such custom. On the contrary, it appears that these pigeon holes are frequently, if not ordinarily, cleaned by the crew of the vessel instead of by the stevedores, and that in the discharge of this very cargo of coal the crew of the vessel had been cleaning the pigeon holes up to the day of the accident, and had done so by standing on the coal, which is shown to have been the method customarily followed on this vessel. The day of the accident being Sunday, the crew did not work, the evidence showing that the crew of a British vessel does not work on Sunday while in port. No request was made of the master to put his crew to work cleaning out the pigeon holes on this day, nor was any request made, by the stevedore in charge of the unloading, that the ship furnish either a ladder or staging to enable his men to reach the pigeon holes. These could have been cleaned by the stevedores by standing on top of the coal as it was being taken out, but this method would have consumed more time. As these battens were not used by the ship's crew as ladders, as they were not placed there to be used as such, and as it does not appear that either the owner or master had any reason to believe that they would be used as such, I am of the opinion that the ship cannot be held responsible because the Western Fuel Company directed its men to use them without first ascertaining that they could do so with safety. If there were any negligence, it was on the part of the fuel company in failing to ascertain the condition of the battens before directing its employes to climb them.

The libel will therefore be dismissed.

GINN et al. v. APOLLO PUB. CO.

(District Court, E. D. Pennsylvania. August 2, 1913.)

No. 1,069.

1. COPYRIGHTS (§ 85*)—INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction will not be granted in a suit to enjoin the infringement of copyrights, where complainant's title to rights in the works alleged to have been copyrighted is denied in defendant's answer, and complainants introduced no proof of title, or documentary evidence of the copyrights, or of the agreement under which it was claimed they acted as licensees.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 78; Dec. Dig. § 85.*]

2. COPYRIGHTS (§ 85*)—INFRINGEMENT—PRELIMINARY INJUNCTION.

Where a bill for injunction to restrain alleged unlawful competition only averred as to the amount in controversy that the copyrights in ques-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion were of the value of \$20,000, and there was no averment of the amount in controversy by reason of defendant's acts alleged to constitute unfair competition, and it did not appear that defendant was not financially responsible to answer for any damage that complainants might suffer, a preliminary injunction would not be granted.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 78; Dec. Dig. § 85.*]

In Equity. Action by Edwin Ginn and others against the Apollo Publishing Company. On motion for preliminary injunction. Denied.

W. K. Stevens, of Reading, Pa., for plaintiffs.

E. Hayward Fairbanks, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. [1] An examination of the bill of complaint and affidavits in support of the motion and defendant's answer and affidavits makes it apparent that the plaintiffs have not shown a sufficiently clear case to warrant the granting of a preliminary injunction. The plaintiffs' title to rights in the works alleged to be copyrighted is denied in the answer, and the plaintiffs have not introduced any evidence to prove their title. No documentary evidence of the copyrights in the works in question was offered, nor was the alleged agreement under which it claimed the plaintiffs are licensees produced. As the proof of the rights of the plaintiffs under the copyright and license constitute the primary step in establishing their case, it is not necessary to consider other questions arising upon the record.

[2] Upon the charge of unfair competition in trade, it is objected by the defendant that the bill does not contain the necessary averments as to the amount in controversy to establish jurisdiction of the court, and this objection appears to be well taken. The only averment as to the amount in controversy is that the copyrights of the books are of the value of \$20,000. Nowhere in the bill is there any averment of the amount in controversy by reason of the alleged acts of the defendant in unfair competition. Moreover, the answering affidavits for the purpose of this motion, and in the absence of any fact appearing to the contrary in the plaintiffs' bill or affidavits, show that the defendant is solvent and of sufficient financial responsibility to answer for any damages which the plaintiffs may suffer. The cause is at issue upon bill and answer and with due diligence may be brought up upon final hearing without great delay.

Without further going into the merits, the grounds stated above are sufficient in my opinion to justify the refusal of the writ, and the motion is therefore denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HILLMAN et al. v. NEW YORK STATE STEEL CO.

(District Court, W. D. New York. October 27, 1913.)

CORPORATIONS (§ 560*)—ADMINISTRATION OF ESTATE—COMPROMISE OF JUDGMENT.

Receivers for an insolvent corporation appointed in a creditors' suit instructed not to compromise and settle a judgment recovered against the corporation by an employé, where the question whether the receivers could recover the amount paid in such settlement from an insurance company on an indemnity policy, or only the amount the judgment creditor would receive on a distribution of assets, was doubtful under the state decisions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253–2260, 2262; Dec. Dig. § 560.*]

In Equity. Suit by John H. Hillman, Jr., Ernest Hillman, and Arthur B. Sheets against the New York State Steel Company. On application by receivers for instructions as to compromise of judgment recovered by Francesco Bruno.

Love & Keating, of Buffalo, N. Y. (George P. Keating, of Buffalo, N. Y., of counsel), for receivers.

William H. Gorman, of Buffalo, N. Y., for judgment creditor.

MacGregor & Stone, of Buffalo, N. Y. (Daniel J. Kenefick, of Buffalo, N. Y., of counsel), for Insurance Company.

HAZEL, District Judge. The question of the legal liability of the Standard Accident Insurance Company for the full amount of \$5,000, at which, according to the petition, the judgment recovered against the defendant can be compromised, is involved in such doubt as to the right of the receivers to recover the full amount paid by them that I am constrained to advise that such offer of compromise or settlement be not accepted. Payment of the judgment on the basis of the proposed settlement would no doubt involve the receivers in a protracted and expensive litigation with the insurance company, and as I believe the policy to be distinctly one of indemnity—one that does not in terms compel the insurance company to pay the judgment when the liability is established, but only to reimburse the assured for the loss sustained—I am disinclined to authorize a settlement, especially in view of the construction which the Appellate Division of the Supreme Court of this state has given to insurance policies of this description. See *Saratoga Trap Rock Co. v. Standard Accident Insurance Co.*, 143 App. Div. 852, 128 N. Y. Supp. 822, *Beyer v. International Aluminum Co.*, 115 App. Div. 853, 101 N. Y. Supp. 83, *Burke v. London Guarantee Accident Co.*, 47 Misc. Rep. 171, 93 N. Y. Supp. 652, and *Munro v. Maryland Casualty Co.*, 48 Misc. Rep. 184, 96 N. Y. Supp. 705; which cases in principle disagree with the case of *Sanders v. Insurance Co.*, 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688, and in addition the case of *Travelers' Insurance Co. v. Moses*, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663, which substantially warrants holding that the claim of the receivers against the insurance

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

company can only be for the proportionate share that will be paid out of the assets of the defendant corporation to the judgment creditor on final distribution. I recognize that in that case the judgment debtor was in bankruptcy and the judgment creditor had filed proof of claim in bankruptcy, yet as here the affairs of the corporation are sought to be wound up in equity, the action having been brought for the protection of the creditors of the corporation, there is such analogy between the two cases that the principle of the Moses Case is thought applicable.

An appropriate order may be entered.

In re EXUM.

(District Court, S. D. Alabama, S. D. December 8, 1913.)

No. 1,184.

1. BANKRUPTCY (§ 399*)—EXEMPTIONS—WAIVER OF RIGHT.

The claim of a bankrupt to exemption, being a personal right, is waived unless asserted in due time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

2. BANKRUPTCY (§ 399*)—EXEMPTIONS—CLAIM OF EXEMPTION.

Bankr. Act July 1, 1898, c. 541, § 7a (8), 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), requires a bankrupt to file a schedule of his property, which shall also contain a claim for such exemptions as he may be entitled to, and, where the exemption under the law of the state is in specific property, it must be fully described; if not, he cannot claim an exemption subsequently out of the proceeds of property sold by the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

In Bankruptcy. In the matter of J. C. Exum, bankrupt. On review of order of referee denying exemptions. Affirmed.

Granade & Granade, of Chatom, Ala., for bankrupt.

Gordon & Edington, of Mobile, Ala., for trustee.

TOULMIN, District Judge. [1] 1. While exempt property is no part of the bankrupt estate, still, the claim being a personal right, if it is not asserted and maintained, the property which might have been covered by it would form part of the bankrupt estate for distribution among the general creditors. Collier on Bankruptcy (9th Ed.) pp. 192, 193; In re Bolinger (D. C.) 108 Fed. 374, 6 Am. Bankr. Rep. 172; In re Sloan (D. C.) 135 Fed. 873.

2. Exemption, being personal to the bankrupt, must be asserted, or he will be deemed to have waived it. He may assert it at any time before the sale of the property by the trustee. Collier on Bankruptcy, supra, 191, and authorities cited in note.

3. Compliance with the state statute is required. Under the Bankrupt Act claims for exemption are to be allowed and administered under the state laws and in accordance with the decisions of the Supreme

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Court of the state. Collier on Bank'cy, *supra*, 191; In re Pfeiffer (D. C.) 155 Fed. 892; In re Bassett (D. C.) 189 Fed. 410, 26 Am. Bankr. Rep. 800; In re Cochran (D. C.) 185 Fed. 913, 26 Am. Bankr. Rep. 459; In re Gerber, 186 Fed. 693, 108 C. C. A. 511, 26 Am. Bankr. Rep. 608.

[2] 4. The Bankrupt Act directs that the bankrupt shall prepare and file in court a schedule containing, among other things, a claim for such exemptions as he may be entitled to. Section 7a (8).

It was his duty to indicate in his schedule the property he selected to have set apart to cover his exemptions. He must comply with the law and exercise his right and privilege in the manner prescribed. If he does not describe or designate any specific property, his claim is invalid. Collier on Bank'cy, *supra*, 191, 192; In re Baughman (D. C.) 183 Fed. 669. He must minutely and accurately schedule his property. A claim of the exemptions in general is not sufficient. It should appear what property is claimed as exempt.

"If when the schedules are filed, the property is still in specie, the articles themselves should be described, and he will not be permitted to claim subsequently his exemptions out of the proceeds of the property sold." Collier on Bank'cy, *supra*, 236, 237; In re Von Kerm (D. C.) 135 Fed. 447; In re Wunder (D. C.) 133 Fed. 821; In re Haskin (D. C.) 109 Fed. 789.

The right to exemptions may be waived. A waiver may arise either from the bankrupt's failure to claim exemptions, or by a general or specific surrender of them. Collier on Bank'cy, *supra*, 192; Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010; authorities cited in notes to Collier, *supra*, 192.

The first and fourth grounds of objections to the allowance of the exemptions claimed by the bankrupt are well taken.

I, therefore, find no error in the finding and decree of the referee disallowing the claim, and the same is affirmed.

IN RE JONES.

(District Court, E. D. Tennessee, N. D. November 14, 1913.)

No. 1,410.

BANKRUPTCY (§ 89*)—INVOLUNTARY PROCEEDINGS—DEMURRER TO PETITION.

Proceedings in bankruptcy are to be conducted in accordance with the rules and practice in equity in so far as consistent with the Bankruptcy Act and general orders in bankruptcy; and in view of new equity rule 29 (33 Sup. Ct. xxvii), which abolishes demurrers, a demurrer will not lie to a petition in involuntary bankruptcy, but any defense in point of law arising on the face of the petition must be made by motion to dismiss or in the answer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 120-122; Dec. Dig. § 89.*]

In Bankruptcy. In the matter of Mary Jones, alleged bankrupt. On demurrer to petition to adjudicate her a bankrupt, and on motion of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

petitioning creditors for leave to amend. Demurrer and petition overruled.

E. G. Stooksbury, of Knoxville, Tenn., and H. B. Brown, of Jellico, Tenn., for creditors.

Bowen & Anderson, of Knoxville, Tenn., for other creditors.

John Jennings, Jr., of Jellico, for alleged bankrupt.

SANFORD, District Judge. 1. The demurrer to the petition in bankruptcy must be stricken out without consideration of its merits. Proceedings in bankruptcy generally are in the nature of proceedings in equity. *Bardes v. Hawarden Bank*, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175. In so far as consistent with the provisions of the Bankruptcy Act and the General Orders in Bankruptcy they are to be administered in accordance with the rules and practice in equity. *In re Broadway Savings Trust Co.* (8th Circ.) 152 Fed. 152, 153, 81 C. C. A. 58; *Westall v. Avery* (4th Circ.) 171 Fed. 626, 628, 96 C. C. A. 428; *Collier on Bank'cy* (9th Ed.) 21; 1 *Remington on Bank'cy*, § 20, p. 37; 3 *Remington on Bank'cy*, § 20, p. 3. And the 37th General Order in Bankruptcy (89 Fed. xiv, 32 C. C. A. xxxvi) specifically provides that:

"In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be."

However, by rule No. 29 of the Rules of Equity Practice (33 Sup. Ct. xxvii), which were promulgated by the Supreme Court November 1, 1912, and went into effect on February 1st of this year, demurrers are abolished, and it is provided that every defense in point of law arising upon the face of the bill which might heretofore have been made by demurrer shall be made by motion to dismiss or in the answer. I think it is clear that under the authorities above cited the necessary effect of this new equity rule is to abolish demurrers to petitions for an adjudication in bankruptcy, and to require that every defense in point of law arising upon the face of such petition which might heretofore have been made by demurrer shall be made by motion to dismiss or in the answer. For that reason, without considering the sufficiency of the demurrer otherwise, it must be stricken out.

2. The petition of the petitioning creditors for leave to amend the original petition for an adjudication so as to specifically allege as an act of bankruptcy a preference through legal proceedings, as set forth in said petition to amend, must be denied, for the reason that the proposed amendment, as set forth in the petition to amend, does not show that the alleged act of bankruptcy was committed within four months prior to the filing of the original petition in bankruptcy.

3. An order will accordingly be entered striking out the said demurrer and denying the petitioners leave to amend, as prayed.

UNITED STATES v. VAUGHN.

(District Court, W. D. New York. October 24, 1913.)

PROSTITUTION (§ 3*)—INTERSTATE COMMERCE—WHITE SLAVE TRAFFIC ACT—SUFFICIENCY OF COMPLAINT.

The complaint on which a defendant was arrested and held for removal to another federal district for trial held to charge an offense under White Slave Traffic Act June 25, 1910, c. 395, § 2, 36 Stat. 825 (U. S. Comp. St. Supp. 1911, p. 1343).

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 3; Dec. Dig. § 3.*]

Criminal prosecution by the United States against John C. Vaughn. On application for order removing defendant to another district. Order granted.

William Palmer, of Buffalo, N. Y., for the United States.
Edmund J. Plumley, of Buffalo, N. Y., for defendant.

HAZEL, District Judge. United States Commissioner Keating, before whom the preliminary investigation was had, and by whom the defendant was held pending application for his removal to the Eastern district of Oklahoma for the violation of the so-called Mann White Slave Act, on motion by the defendant for discharge on the ground that the offense shown was not contemplated by the statute under which the complaint was filed, rendered the following opinion:

"Since this case commenced I have examined the case of *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906; also, the cases of *Athanasaw v. U. S.*, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, and *Bennett v. U. S.*, 227 U. S. 333, 33 Sup. Ct. 288, 57 L. Ed. 531. The Supreme Court in those cases has clearly held that the White Slave Traffic Act of June 25, 1910, is a legal exercise of the power of Congress under the commerce clause of the Constitution, and holds that, while women are not articles of merchandise, the power of Congress to regulate their transportation in interstate commerce is the same and it may prohibit such transportation for immoral purposes.

"The court substantially says that commerce among the states includes the transportation of persons and property, and that therefore there may be a movement of persons as well as of property. The act condemns transportation aided or obtained, or transportation induced for the immoral purposes mentioned. The statute therefore, reasonably construed in the light of this broad interpretation of the constitutional power of Congress, would include the facts shown here for the reason that section 2 of said act makes it an offense to transport in interstate commerce, or to aid or assist in obtaining transportation for any woman or girl for the purpose of debauchery or any other immoral purpose. Hence I have no other alternative than to hold the defendant pending application for an order of removal to the district judge of this district, as there is no question that the transportation of the girl in this case was interstate and for an immoral purpose."

I concur in the foregoing, and an order may be entered removing the defendant to the Eastern district of Oklahoma for trial.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ex parte PUGLIESE.

(District Court, W. D. New York. July 24, 1913.)

HABEAS CORPUS (§ 23*) — DEPORTATION OF IMMIGRANT — CONCLUSIVENESS OF FINDINGS OF SECRETARY OF LABOR.

The decision of the Secretary of Labor, based on substantial evidence, that an alien immigrant, at the time of entering the United States, was a person likely to become a public charge is not reviewable by the courts in habeas corpus proceedings.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 23.*]

On application by Maria Pugliese for writ of habeas corpus. Petition denied.

John Lord O'Brian, U. S. Atty., of Buffalo, N. Y.

Zimmer, Sanford & Zimmer, of Rochester, N. Y., for petitioner.

HAZEL, District Judge. The relator was excluded from the United States upon a finding that she was at the time of her entry a person likely to become a public charge; that she entered the United States for immoral purposes; and that she gained admission by means of false and misleading statements. The evidence taken before Inspector Martin was sufficient to show that at the time of her entry the relator was likely to become a public charge. It is now well established that the Secretary of Labor is empowered to pass on the evidence presented as to the right of an alien to remain in this country and to determine its validity, weight, and sufficiency.

The relator landed here with one Loguitice on May 9, 1911, occupying the same stateroom with him aboard the vessel and living with him at Rochester, N. Y., as his wife for seven or eight months thereafter. She had no means of her own upon her arrival; her passage having been paid by her paramour, who was not legally bound to support her, and who has since deserted her. And, although she has a brother in this country, he likewise is not obliged to provide for her and his willingness to do so is wholly immaterial. United States ex rel. Kutas v. Williams (D. C.) 204 Fed. 847. As her right to remain in this country rested upon the question of whether or not at the time of entering she was likely to become a public charge, and as it is shown that she entered for immoral purposes with a man not legally bound to support her, I think, in view of her subsequent dependence upon the charities of the city of Rochester, that the evidence is sufficient to sustain the charge specified in the warrant. In any event, the conclusion of the acting Secretary of Labor is well founded and must be considered as final without power in this court to review or modify it. United States ex rel. Aronowicz v. Williams (D. C.) 204 Fed. 844.

The petition for a writ of habeas corpus is dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LAWLOR et al. v. LOEWE et al.

(Circuit Court of Appeals, Second Circuit. December 18, 1913.)

No. 32.

1. MONOPOLIES (§ 14*)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—BOYCOTT—TRADE UNIONS.

Where members of a labor union attempted to compel a hat manufacturer to unionize his factory, left his employment, and prevented others from taking employment therein, and with the assistance of members of affiliated organizations declared a boycott on his goods in other states into which the goods had been shipped for sale at retail, such acts constituted a combination or conspiracy in restraint of interstate commerce, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 207 (U. S. Comp. St. 1901, p. 3200), for which the manufacturer was entitled to recover treble damages under section 7.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. § 14.*]

2. CONSPIRACY (§ 1*)—WHAT CONSTITUTES.

A "conspiracy" is a combination between two or more persons to do a criminal or unlawful act, or a lawful act by criminal or unlawful means. There need not be a formal agreement between the conspirators, if it appears they acted in concert and with the design to consummate an unlawful purpose; nor is it necessary that each conspirator shall know of all the means to carry out the purposes of the conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 1-5; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

3. MONOPOLIES (§ 28*)—COMBINATION IN RESTRAINT OF TRADE—NOTICE TO CONSPIRATORS—EVIDENCE.

On an issue as to whether certain members of a trade union had knowledge of a conspiracy to compel a hat manufacturer to unionize his factory by means of a strike, picketing, and boycott, evidence that copies of a trade journal published by the United Hatters, in which articles relating to the affair were printed and which were distributed in various factories without charge so that the workmen could read them if they desired, minutes of the meetings of the local unions of which defendants were members and extracts from another monthly journal containing a notice that all members of labor unions would be held responsible for unlawful acts of such unions, their officers and agents, a copy of which notice was sent to all hatters whose names appeared in the directory in the city where the manufacturer's factory was located, was admissible to show notice.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

4. MONOPOLIES (§ 28*)—RESTRAINT OF INTERSTATE TRADE—NOTICE TO CONSPIRATORS—QUESTION FOR JURY.

In an action against members of a trade union for conspiracy in attempting to destroy plaintiff's business or compel him to unionize his factory, whether defendants had knowledge of the conspiracy and participated therein *held* for the jury.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

5. MONOPOLIES (§ 28*)—ACTION FOR DAMAGES—INSTRUCTIONS.

In an action against members of a trade union for conspiracy in aiding an effort to compel plaintiff to unionize his factory, the court charged

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 209 F.—46

that mere membership in a labor union and payment of dues did not amount necessarily to counseling, advising, aiding, or abetting in a conspiracy of the officers and members to destroy plaintiff's business, but that if the members paid their dues and continued to delegate authority to their officers and agents to commit unlawful acts which constituted an interference with plaintiff's interstate trade and commerce, under such circumstances as lead you to believe they knew or "ought to have known," and that such officers and agents were in that matter warranted in the belief, that they were acting within their delegated authority, then such members and no others were liable. *Held*, that the words "ought to have known," in the connection in which they were used, were intended to mean only that the jury must be justified in drawing the conclusion that the defendants must have known of the existence of the conspiracy, and so construed did not render the instruction objectionable as misleading.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

6. WITNESSES (§ 330*)—EXAMINATION—CROSS-EXAMINATION.

Where, in an action against members of a trade union for fraudulent conspiracy in restraint of interstate commerce to regulate plaintiff's business or to compel him to unionize his factory, two of the witnesses testified that they continued to be members of the union after the suit was brought, evidence of their payment of dues after the complaint was served, offered solely as a matter of cross-examination bearing on the truthfulness of their testimony in chief, was competent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330.*]

7. MONOPOLIES (§ 28*)—RESTRAINT OF TRADE—ACCRUAL FOR SUIT BROUGHT.

In an action for fraudulent conspiracy in restraint of interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), evidence showing damages which accrued after suit brought because of acts previously committed was properly admitted.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

8. MONOPOLIES (§ 28*)—INTERSTATE TRADE—RESTRAINT—INSTRUCTIONS—DAMAGES.

In an action for conspiracy in restraint of interstate commerce in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), an instruction that the only acts for which plaintiff may recover are such as are alleged in the complaint and as were done by defendants or their agents before suit brought, and that plaintiffs were entitled to recover all damages which are the proximate and natural result of such acts, including such damages as may have continued or resulted therefrom after suit was commenced, but that no recovery could be had for acts constituting a continuance of the conspiracy after suit brought, was proper.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

In Error to the District Court of the United States for the District of Connecticut.

Action by D. E. Loewe and others against Martin Lawlor and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

On writ of error to the District Court for the District of Connecticut to review a judgment entered November 15, 1912, in favor of the plaintiffs and against the defendants for \$252,130, being the amount of a trebled verdict,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

interest, costs and counsel fees. This controversy has been before the courts for nearly a decade. It first appears in the reports in (C. C.) 130 Fed. 633, where a demurrer to a plea in abatement was sustained. A motion to compel the plaintiffs to correct their complaint was denied in (C. C.) 142 Fed. 216. And in (C. C.) 148 Fed. 924, a demurrer to the complaint was sustained upon the ground that the complaint did not allege an interference with interstate commerce. From this decision a writ of error brought the case to this court which, after stating the facts, certified to the Supreme Court the following question:

"Upon this state of facts can plaintiffs maintain an action against defendants under section 7 of the Anti-Trust Act of July 20, 1890?"

Both sides joined in asking that the entire record be sent to the Supreme Court, which was done and the case came before that tribunal upon the complaint and demurrer. Under section 6 of the Judiciary Act of 1891 (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]), the court was called upon to "decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

In an elaborate opinion by Chief Justice Fuller the court decided that the complaint stated a case within the statute and overruled the demurrer. 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815.

The case then came on for trial upon the merits on October 13, 1909, and, with various adjournments, lasted until February 4, 1910, when the court directed a verdict for the plaintiffs, sending to the jury the question of damages only, which they assessed at \$74,000, which was trebled under the law.

The defendant then sued out a writ of error and this court, being of the opinion that the question of the defendants' liability should have been submitted to the jury, reversed the judgment and remanded the case for a new trial. A petition for a rehearing was denied by this court, 187 Fed. 522, 527, 109 C. C. A. 288. The plaintiffs thereafter petitioned the Supreme Court for a writ of certiorari which was denied, 223 U. S. 729, 32 Sup. Ct. 527, 56 L. Ed. 633. The new trial was commenced on August 26, 1912, and on October 11th a verdict was rendered for the full amount demanded. The sections of the Anti-Trust Act which are involved are the first, second and seventh. They are as follows:

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The parties will be alluded to hereafter as plaintiffs and defendants as they appeared in the District Court.

Alton B. Parker, of New York City, and Frank L. Mulholland, of Toledo, Ohio, for plaintiffs in error.

Daniel Davenport, of Bridgeport, Conn., and Walter Gordon Meritt, of New York City, for defendants in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). [1] When this cause came on for the second trial all of the fundamental questions of law had been disposed of. That the Anti-Trust Act is applicable to such combinations as are alleged in the complaint is no longer debatable. It makes no distinction between classes, employers and employes, corporations and individuals, rich and poor, are alike included in its terms. The Supreme Court particularly points out that although Congress was frequently importuned to exempt farmers' organizations and labor unions from its provisions, these efforts all failed and the Act still remains, after nearly a quarter of a century of trial, unmarred by amendment, in the language originally adopted. In short, the court held that if the plaintiffs proved the conspiracy or combination as alleged in the complaint, they were within the Anti-Trust Act and entitled to the damages sustained by them.

The plaintiffs proved, either without contradiction or by testimony which the jury was justified in accepting as true, the following propositions:

First. That they were engaged in making hats at Danbury, Connecticut, and had a large interstate business, employing union and non-union labor.

Second. That the individual defendants are members of a trade union known as the United Hatters of North America, which was organized in 1896 and, with a few exceptions unnecessary to consider, paid dues to the local unions at Danbury, Bethel or Norwalk, Connecticut. These dues, after deducting a certain percentage for the expenses of the local unions, were sent to the treasurer of the United Hatters.

Third. That the United Hatters were affiliated with the American Federation of Labor, one of the objects of the latter organization being to assist its members in any "justifiable boycott" and with financial help in the event of a strike or lockout.

Fourth. That the United Hatters, through their connection with the Federation of Labor and affiliated associations, exercised a vast influence throughout the country and, by the use of the boycott and secondary boycott, had it in their power to cripple, if not destroy, any manufacturer who refused to discharge a competent servant because he was not a member of the union.

Fifth. That in March, 1901, the United Hatters had resolved to unionize the plaintiff's factory and informed Mr. Loewe to that effect, their president stating that they hoped to accomplish this in a peaceful manner, but if not, they would resort to their "usual methods."

Sixth. That on the morning of July 25, 1902, the plaintiffs' employes were directed to strike and the union men left the factory on that day, the non-union men the day after.

Seventh. That this strike temporarily paralyzed the plaintiffs' business and they were not able to reorganize until January, 1903, and then with a force many of whom were unskilled.

Eighth. That almost immediately after the strike a boycott was established and agents of the Hatters were sent out to induce the plaintiffs' customers not to buy any more hats of them. This boycott was successful, and converted a profit of \$27,000 made in 1901 into losses ranging from \$17,000 in 1902 to \$8,000 in 1904, destroying or curtailing a large part of the plaintiffs' business carried on between Danbury, Connecticut, and several other states.

It appears, then, that a combination or conspiracy in restraint of interstate trade was entered into to the great damage of the plaintiffs and that all of the defendants who participated therein or aided and abetted the active workers in the conspiracy or contributed to its support are liable if they knew of its existence.

[2] The principal question of fact, therefore, is, did the defendants know of the conspiracy or is the evidence of such a character that the jury were justified in finding that they must have known of its existence? And here it is important to remember that the law does not require the proof of conspiracy by direct and positive proof. This is true even in criminal cases and the reason therefor is plain. Conspirators do not put their agreements in writing; they do not disclose their identity or publish their plans. They work in the dark, they may never be seen together, their acts may have no apparent relation to each other, but if it appears that they are all working to accomplish an unlawful purpose which is for their common benefit and in the gains of which all are to share, a jury is justified in finding the existence of a conspiracy. A conspiracy has been well defined as:

"A combination between two or more persons to do a criminal or an unlawful act or a lawful act by criminal or unlawful means." 8 Cyc. 620.

It is not necessary that there be a formal agreement between the conspirators. If the evidence satisfies the jury that they acted in concert, understandingly and with the design to consummate an unlawful purpose, it is sufficient. It is not necessary that each conspirator shall know of all of the means employed to carry out the purposes of the conspiracy. If then, the evidence is sufficient to warrant the jury in finding that the defendants knew of the unlawful purpose, by means of boycotts and strikes, to destroy the interstate business of the plaintiffs and thereafter continued to aid and abet such purpose, it is sufficient. *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; *U. S. v. Cassidy* (D. C.) 67 Fed. 698.

As to the defendants who were in the employ of the plaintiffs at the time of the strike and participated therein, we understand that it is not pretended that they were ignorant of the general purpose of the United Hatters. As to the remainder, estimated by the defendants' counsel to be about ninety per cent., it is contended that they knew nothing of the purpose of the strike except that it was "to establish union conditions in that particular (Loewe's) factory."

The plaintiffs insist that the measures adopted by the United Hatters for establishing "union conditions" were well known to every

member of the organization, as they had been frequently enforced before. The plaintiffs assert that every member of the union knew that these measures consisted in calling a strike and if that failed then in declaring a boycott and withdrawing patronage from all who dealt in the prohibited goods. To accomplish these ends it had been customary in the past to send so-called "missionaries" to the customers of the manufacturer throughout the country to induce them to refuse to handle his goods under threat of the destruction of their own business if they refused.

[3, 4] The defendants reside at Bethel, Norwalk or Danbury, all in the same general locality and so near that it is highly improbable that an event of vital importance to one union would not be known to the other two. But in order to show that the dispute between Loewe and the union excited general interest in the community, newspaper articles published in these towns were introduced in evidence, not as proof of the circumstances therein narrated but to show the improbability of the defendants being ignorant of matters which were constantly being made public and were of vital significance to them, relating as they did, to a controversy which might impair or destroy their own means of livelihood. As to one hundred and fifteen of the defendants it was stipulated that if called as witnesses they would testify "that they read with more or less regularity some local newspapers in their respective towns, but not completely or invariably." As to the Journal of the United Hatters, it was stipulated that the secretaries of the local unions in question received copies which were distributed in the various factories without charge, so that the workmen there could read them if they desired to do so. The plaintiffs introduced the minutes of the meetings of the local unions of which the defendants were members; also extracts from the Federationist, a monthly journal of the Federation of Labor and a notice, warning all members of labor unions that they would be held responsible for unlawful acts of such unions, their officers and agents. A copy of this notice was sent to all hatters whose names appeared in the Danbury Directory. It cannot be denied that all this evidence was competent as to those who actually received it or had knowledge of it and we think it was for the jury to say whether it was sufficient to put the alleged conspirators upon notice of the illegal measures by which it was proposed to enforce the demands of the defendants.

We do not deem it necessary to deal with each of these pieces of evidence separately, principally because, in our judgment, such an analysis would be a wholly inadequate and indeterminate procedure. It may be that many of the items considered alone failed to give the adequate information, but considered in its entirety have not the plaintiffs shown a situation where the jury were justified in finding that the members of the unions knew what was being done? A bitter and acrimonious dispute was being waged between employers and employes in a comparatively small community. It was a dispute which involved loss of employment on the one side and the loss of a flourishing business on the other. The progress of the controversy was described in the local press and in the papers published by the unions. Was it not

clearly a question of fact for the jury to say whether the defendants, thus vitally interested, could have remained ignorant of the measures adopted by their own societies in their behalf? We are clearly of the opinion that it was.

The learned counsel for the defendants argue, and cite numerous cases to sustain the contention, that labor unions are lawful. No one disputes this proposition. All must admit, not only that they are lawful, but highly beneficial when legally and fairly conducted, but like all other combinations, irrespective of their objects and purposes, they must obey the law.

Any discussion of these questions is rendered unnecessary by the decision of the Supreme Court overruling the demurrer. That the complaint states a cause of action is no longer debatable. The question is, does the testimony sustain the allegations? Without attempting to review the testimony in detail, it suffices to say that the jury were fully justified in finding that the measures adopted by the defendants prevented the free flow of commerce between the states. The great bulk of the plaintiffs' business was in states other than Connecticut, to which states the product of their factory was shipped and the proof shows that they suffered great pecuniary loss, equal at least to the amount found by the jury, because of their inability to sell to their interstate customers.

[5] The court charged the jury as follows:

"Now if this evidence falls short of satisfying you that certain of these defendants did know of this unlawful conspiracy, or were in duty bound to know of it, or did tacitly approve of it, then such defendants should be acquitted, if any there may be; or, in other words, assuming that there was a conspiracy to violate the federal statute, as I have explained to you, and that the statute was, in fact, violated, to the damage of the plaintiffs, then every person who had a part in planning or a hand in executing, or aided, or abetted therein, is jointly liable. Membership in a Labor Union and the payment of dues, are not acts of themselves that necessarily constitute counseling, advising, aiding or abetting. Membership and payment of dues are the life of the voluntary association, and are the foundation of all its authority and the source of financial assistance in executing that authority.

"If these members paid their dues and continued to delegate authority to their officers and agents to commit unlawful deeds, which, in this case, is the interference with the plaintiffs' interstate trade and commerce, under such circumstances as lead you to believe that they knew, or ought to have known, and that such officers and agents were, in that matter, warranted in the belief that they were acting within their delegated authority, then such members are jointly liable, and no others."

The defendants excepted to this charge, and have presented the question by proper assignments of error. The principal criticism of the charge is directed to the use of the words "or ought to have known" in the last paragraph quoted above. If these words had been used alone, with no qualification or explanation, there might be some room for criticism, but when considered in connection with the rest of the charge, we are entirely satisfied that the jury could not have been misled. As previously pointed out, in cases of conspiracy it is sufficient if a state of facts be shown from which the jury are justified in drawing the conclusion that the defendants must have known of the existence of the conspiracy. It was in this sense that the judge used the

words "ought to have known." He left to the jury the question which the judge, on the preceding trial regarded as established by such overwhelming proof that he decided it as matter of law, viz.: Did the defendants know of the combination to destroy the plaintiffs' business?

In cases where actual knowledge is not shown, the question is, was the proof of such a character that the jury was justified in finding that a member of the local unions in good standing, attending their meetings, paying his dues, having access to their publications, knowing their methods and having struck with his fellow members because of the plaintiffs' refusal to be dictated to by the union as to the manner in which their business should be conducted, must have known what was being done? A soldier who with his regiment charges the enemy's line can hardly be heard to assert that he did not know a battle was in progress.

In *Martin v. Webb*, 110 U. S. 7, at page 15, 3 Sup. Ct. 428, at page 433 (28 L. Ed. 49), Mr. Justice Harlan says:

"Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

[6] It is true that in our former opinion we said that testimony of the payment of dues by the defendants after the complaint was served was inadmissible, but we do not think that this ruling applies to the testimony of Hoy and Bressen, for the reason that the answers of these witnesses that they continued members after the suit was commenced, elicited on cross-examination, were admitted "solely as a matter of cross-examination bearing upon the truthfulness of the testimony in chief." That it was proper for this purpose we have no doubt. In order to understand the attitude of the witnesses to the controversy and to the parties, it was competent to show what their relations were to the parties. The plaintiffs on cross-examination had the same right to show that the witness was a member of the local union in good standing, as the defendants would have to show that a witness called by the plaintiffs was a partner in their firm. In either case the testimony shows the jury what manner of man the witness is and what interest he has in the result.

[7] We see no error in the admission of testimony showing damages accruing after the commencement of the action. It must be admitted that it is for the interest of all parties that this controversy be disposed of finally in a single action. If a plurality of actions are brought the defendants will have good ground for the complaint that they are subjected to unnecessary expense and annoyance by being compelled to defend a second action, the trial of which will consume several months. The charge of persecution in such circumstances would not be without justification.

[8] The judge charged the jury on this subject as follows:

"The only acts of the defendants for which the plaintiffs may recover damages in this case are such acts as are set forth in the complaint and as were done by the defendants or their agents before the suit was commenced, and the plaintiffs are entitled to recover all damages which are the proximate and natural result of such acts, including such damages as may have continued or resulted therefrom after the suit was commenced by the plaintiffs, but cannot recover in this suit for any damages which are the result of the continuation of the alleged conspiracy after the suit was commenced or which are the result of the performance of any acts in furtherance of said conspiracy after the suit was commenced."

We think this instruction states the rule correctly; it is based upon authority and common sense. The trial proceeded throughout upon the theory that the only acts of the defendants for which a recovery could be had must have taken place before the suit and must have been acts alleged in the complaint. Damages resulting or continuing from such previous acts might be recovered in the present suit, but no damages resulting from acts committed in furtherance of the conspiracy after the commencement of the suit could be so recovered. In other words, if the damages due to acts done previous to the suit continued thereafter, the plaintiffs could recover, but they could not recover for acts subsequent to the suit or for damages resulting from a continuance of the conspiracy after the commencement of the suit. Assuming that the suit was commenced September 30, 1903, the plaintiffs were permitted to recover damages for acts done prior to September 30, although the damages resulting therefrom continued after that date. The plaintiffs were not permitted to recover damages resulting from the continuation of the conspiracy after September 30, and they were not permitted to recover damages resulting from an act done after September 30, 1903.

We see no error in the charge or in the rulings of the judge upon these questions, which rulings are sustained by the following authorities: *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292; *Occidental Con. Mining Co. v. Comstock Co. (C. C.)* 125 Fed. 244; *Cooper v. Sillers*, 30 App. D. C. 567.

Other exceptions were taken which are argued in the defendants' brief, but we do not deem it necessary to discuss them further than we have already done, in view of the decision of the Supreme Court and our own previous decision.

No one can examine this voluminous record without being impressed with the fact that the trial was conducted with perfect impartiality and with a determination on the part of the judge that both parties should have an absolutely fair trial. We are convinced that the defendants have had such a trial and that no error was committed which would justify us in imposing upon the parties the expense and delay of a third trial.

The judgment is affirmed with costs.

GOULD et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 3, 1913.)

Nos. 3924, 3925, 3926, 3970, 3971, 3972.

1. POST OFFICE (§ 48*)—MISUSE OF MAILS—SCHEME TO DEFRAUD—INDICTMENT.

Since, in a prosecution for misuse of the mails in furtherance of a scheme to defraud, the use of the post office in the execution of the scheme, and not the scheme itself, is the gist of the offense, an indictment, describing the acts alleged to have been done by accused in the execution of the scheme, was not fatally defective because it did not allege the scheme with sufficient particularity.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*]

2. POST OFFICE (§ 48*)—MISUSE OF MAILS—SCHEME TO DEFRAUD—INDICTMENT—PERSONS TO BE DEFRAUDED.

Where an indictment for misuse of the mails in furtherance of a scheme to defraud charged that defendants promoted a land and irrigation company to irrigate certain arid land without a reasonable expectation of being able to complete the system, etc., and that they devised a scheme to defraud all such persons who could or might be induced by means of defendants' fraudulent and false devices, etc., to become purchasers of contracts for water rights or for water from the irrigation company, etc., it sufficiently alleged that the public generally was to be defrauded, and was not objectionable for failure to state the names of the persons it was intended to defraud.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*]

Nonmailable matter, see notes to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

3. POST OFFICE (§ 49*)—MISUSE OF MAILS—SCHEME TO DEFRAUD—MAILING LETTERS.

Where, in a prosecution for misuse of the mails in furtherance of a scheme to defraud, it appeared that certain letters were mailed by defendants in connection with the scheme, and for the purpose of carrying it out, such proof sufficiently showed that the letters were mailed in execution of the scheme.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. § 49.*]

4. POST OFFICE (§ 48*)—MISUSE OF MAILS—SCHEME TO DEFRAUD—INDICTMENT.

Where an indictment for misuse of the mails in furtherance of a scheme to defraud alleged that certain letters written by defendants were deposited in the post office, addressed, etc., the indictment was not defective for failure to charge that the letters were addressed "to" the persons designated.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*]

5. CRIMINAL LAW (§ 901*)—TRIAL—DIRECTION OF VERDICT—WAIVER.

Where defendants' counsel at the close of the evidence for the prosecution moved for a directed verdict, but did not renew the same at the close of all the evidence, objection was waived, and they could not thereafter claim that the evidence was insufficient to sustain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2124; Dec. Dig. § 901.*]

6. POST OFFICE (§ 49*)—EVIDENCE—RELEVANCY—RECORDS.

In a prosecution for misuse of the mails in furtherance of a scheme to defraud in the promotion of a land and irrigation company, a complaint,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In an action against the company by a third person to recover for maps and literature, in which the false representations were alleged to have been made to the public, together with a default judgment, execution, and return thereon, but containing no recital in the judgment that there had been any service of process on the defendant, and in the absence of proof that the court rendering the judgment had any jurisdiction, was inadmissible as bearing on defendants' solvency or ability to carry out the representations made.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. § 49.*]

7. CRIMINAL LAW (§ 448*)—EVIDENCE—MATERIALITY.

On an issue as to the financial responsibility of accused, an answer of a witness that she was led to believe at first that accused had a great deal of money, but later in witness' employment she came to the conclusion that he had nothing, was objectionable as a mere opinion or conclusion of the witness, without facts on which to base it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. § 448.*]

8. CRIMINAL LAW (§ 364*)—EVIDENCE—RES GESTÆ.

In a prosecution for misuse of the mails in furtherance of a scheme to defraud, a letter written by one defendant to another, at a time when it was claimed that the writer was engaged in executing the fraudulent scheme, and tending to show good faith in attempting to bring the project in question to a successful conclusion, when it did not appear that he was informed that any prosecution was contemplated, was admissible as res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 364.*]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

John Gould and others were convicted of misuse of the mails in furtherance of a scheme to defraud, and they bring error. Reversed and new trial granted.

Henry McAllister, Jr., of Denver, Colo. (Joel F. Vaile and William N. Vaile, both of Denver, Colo., on the brief), for plaintiffs in error.

Fred A. Maynard, Sp. Asst. Atty. Gen. (Harry Eugene Kelly, U. S. Atty., of Denver, Colo., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

CARLAND, Circuit Judge. Gould, Wright and White were convicted and sentenced for a violation of section 215 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]), which so far as is material to the present case reads as follows:

"Sec. 215. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, * * * whether addressed to any person residing within or outside the United States, in any post office, * * * to be sent or delivered by the post-office establishment of the United States, * * * shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The validity of the indictment was challenged in the the trial court by demurrer and motion in arrest. The indictment, so far as it relates to a fraudulent scheme, is copied in the margin.¹

The indictment then proceeded to allege the representations and promises to be false and fraudulent to the knowledge of defendants. It was then further alleged that the defendants, for the purpose of executing said fraudulent scheme, caused to be placed in the United States post office at Denver, Colo., two certain letters, set out in the indictment, to be sent and delivered by the post office establishment of the United States. Four other defendants were jointly indicted with plaintiffs in error, namely, Woody, Gibson, Baker, and Rose. Woody was not tried. Gibson, Baker, and Rose were acquitted.

[1] It is claimed that the indictment does not set forth with sufficient particularity the scheme which it is alleged defendants had devised. *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; *U. S. v. Stokes*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667;

¹ "That John Gould, Corydon A. Woody, J. Albert Wright, Frank White, Homer A. Gibson, Sam N. Baker, and Robert W. Rose * * * had devised a scheme to defraud all such persons who could or might be induced, by means of any of the fraudulent and false devices, representations, pretenses, and promises hereinafter mentioned, to become purchasers of contracts for water rights and for water from the Riverside Land & Irrigation Company, a corporation organized and existing under the laws of the state of Colorado, and for the purpose of obtaining from said purchasers of such water rights and water, by means of the false and fraudulent representations, pretenses, and promises aforesaid, money and other property, which said fraudulent scheme was then and there substantially as follows, to wit:

"That the said defendants falsely represented and pretended that a certain corporation known as the Riverside Land & Irrigation Company, at all the times since its incorporation, managed, operated, and controlled by the said defendants, was the owner of and controlled a certain reservoir and ditch system situated in the counties of Mesa, Delta, and Gunnison in the state of Colorado, called the 'Riverside Project,' the 'Excelsior Ditch and Reservoir System,' the 'Riverside Canal,' and by various other names and words, all and singular used to designate a pretended irrigation project and system advertised, promoted, operated, and controlled by said defendants, all, each, and every of said names referring to and meaning the said irrigation system claimed by said corporation, the Riverside Land & Irrigation Company; that said defendants falsely represented, pretended, and promised that said corporation, the Riverside Land & Irrigation Company, had constructed, had in process of construction, and would in the near future construct, a system of large reservoirs for water storage purposes, and ditches for distributing, carrying, and delivering water to certain lands situated in the counties of Mesa and Delta aforesaid, and represented by the said defendants as susceptible of irrigation by means of said pretended irrigation system; that said corporation had valuable water and water rights for said ditches and reservoirs, and that said corporation was the owner of said ditch and reservoir system, and was the owner of and entitled to sufficient water to irrigate, by and through said pretended irrigation system, 100,000, or more, acres of the said lands hereinbefore and hereinafter mentioned, and that said company could and would sell water and water rights to persons who desired to purchase the same for the irrigation of the lands under said ditches, at fixed prices, which prices were set forth in contracts for water rights issued by the said the Riverside Land & Irrigation Company, and otherwise made known by said defendants as hereinafter set forth; that said water right contracts so offered for sale were falsely represented to be valuable water right contracts because of the alleged ownership by said corporation, the Riverside Land & Irrigation Company,

Dalton v. United States, 127 Fed. 544, 62 C. C. A. 238; Etheredge v. United States, 186 Fed. 434, 108 C. C. A. 356; Stewart v. United States, 119 Fed. 89, 55 C. C. A. 641; Miller v. United States, 133 Fed. 337, 66 C. C. A. 399. It is first claimed that in the general allegation at the commencement of the charging part of the indictment no scheme is set forth, for the reason that certain "false devices, representations, pretenses, and promises *hereinafter* mentioned" are referred to, and then in the same clause is found the following language: "By means of the false and fraudulent representations, pretenses, and promises *aforesaid*." We are clearly of the opinion, however, that if the use of the words "*hereinafter*" and "*aforesaid*" may be said to have been pleaded, with the result that nothing is alleged, there still remains the allegation that the defendants had devised a scheme to defraud, "which said scheme was then and there substantially as follows"; but when we get this far, we are met by the contention that the language which follows describes acts done in the execution of the scheme, but not the

of large quantities of water available for irrigating the lands hereinbefore and hereinafter mentioned; that said defendants falsely pretended and represented that, by virtue of said water right contracts to be entered into by and between the said prospective purchasers and the said the Riverside Land & Irrigation Company, and the payment of the sums of money in said water right contracts stipulated to be paid to said corporation, the purchasers thereof would be entitled to and receive of said corporation, and said corporation would procure and deliver to such purchasers waters sufficient to irrigate the lands described and referred to in such contracts, and that the said defendants falsely represented that there were large tracts of vacant public land of the United States subject to entry under the desert land laws of the United States, susceptible of irrigation and reclamation under and by means of said pretended reservoir and irrigation system, and that all entrymen of said public land who [purchased] water from said corporation, and who entered into water right contracts with said corporation would and could receive from said corporation water sufficient to irrigate and reclaim all lands for which water or water rights were purchased, and would thereby be enabled to reclaim land so entered and to secure patents for same from the United States of America; that to prospective purchasers of land, water, and water right contracts, and to prospective entrymen of said vacant public lands of the United States, the said defendants falsely represented and pretended that, upon the purchase of water and water right contracts from said defendants and said corporation, water would be furnished, commencing in the years 1910, 1911, and in the near future, for the irrigation and reclamation of the lands so purchased or entered; and defendants further falsely and fraudulently promised and engaged to and with persons entering upon said public lands of the United States under the desert land laws that, in consideration of the conveyance by such entrymen to said defendants, or to some corporation or person nominated and designated by said defendants, of a certain number of acres of the land so entered, the defendants would furnish water and water rights, free of all expense to such entrymen, for the irrigation and reclamation of the remainder of said lands so entered; that the defendants further falsely represented and promised that all money received and to be received from purchasers of water and water contracts would be by said defendants devoted and applied to the construction and completion of the aforesaid irrigation system; that the water claimed by said defendants for the irrigation of all such lands was falsely represented by said defendants to be owned by said defendants and said corporation; that it was further falsely represented by said defendants that the money necessary for the completion of said reservoir and ditch system had been raised, and that bonds for the construction of said system had been issued and negotiated for sale, and that the building

scheme itself which defendants had devised before they entered upon its execution. The rule which applies to indictments for conspiracy is invoked, namely, that a charge of conspiracy cannot be aided by the averment of acts done in pursuance thereof. *United States v. Britton*, 108 U. S. 205, 2 Sup. Ct. 531, 27 L. Ed. 698. We do not think from the standpoint of pleading a charge of conspiracy and using the post office establishment in the execution of a scheme to defraud are at all parallel. In the former the conspiracy is the whole offense. The acts done in pursuance thereof simply make the conspiracy punishable. While in the case at bar the use of the post office establishment in the execution of a scheme to defraud is the offense which the statute denounces, and while it is held that the scheme must be sufficiently set forth so as to acquaint the defendant with the particulars thereof, still the scheme need not be set forth with that particularity which would be required if the scheme was the gist of the offense. *Brooks v. United States*, 146 Fed. 223, 76 C. C. A. 581; *Lemon v. United States*, 164 Fed. 953, 90 C. C. A. 617; *Brown v. United States*, 143 Fed. 60, 74

and construction of said reservoir and ditch system was assured; and that the said defendants, as a part of said fraudulent scheme and device, and for the purpose aforesaid, did, in the name of the Riverside Land & Irrigation Company, the Riverside Colonization Company, J. B. Frisbee & Co., J. B. Frisbee, and divers others names, firms, and individuals to the grand jury now unknown, but all for the said defendants and for their use, gain, and benefit, by means of and through the United States mails and otherwise, circulate, distribute, and publish to the public generally, by placing and causing to be placed in public newspapers, by distributing, sending, and delivering, and causing to be distributed, sent, and delivered, circulars, advertisements, plats, and letters, all and each setting forth the false representations, pretensions, and promises hereinbefore set forth, for the purpose of inducing persons to purchase the water rights and water right contracts hereinbefore mentioned; and that the said false pretenses, promises, and representations were made by said defendants and their various agents to prospective purchasers for the purposes aforesaid.

"Whereas, in truth and in fact, neither the said defendants nor the said corporation, the Riverside Land & Irrigation Company, at any time, or now, own any reservoir or ditch system situated in the counties of Mesa, Delta, and Gunnison, or elsewhere; and whereas, in truth and in fact, neither the said defendants nor the said corporation, the Riverside Land & Irrigation Company, had constructed, nor was there in the process of construction by said defendants or by said corporation, the Riverside Land & Irrigation Company, nor will there be in the near future, or at all constructed by said defendants or said corporation, any system of large reservoirs or otherwise, for water storage purposes or ditches for the distribution, carriage, or delivery of water to any of said lands situated in the counties of Mesa and Delta as aforesaid, or elsewhere; and whereas, in truth and in fact, neither the said defendants nor the said corporation, the Riverside Land & Irrigation Company had, or now have, any valuable water rights, or any water rights at all, for the reservoir and ditch system, claimed by the said defendants to be owned by the corporation, nor were the said defendants or the said corporation, the Riverside Land & Irrigation Company, the owners, or owner, of any reservoir and ditch system; nor were the said defendants or the said corporation, the Riverside Land & Irrigation Company, the owners, or owner, of sufficient water, or any water at all, to irrigate or reclaim 100,000 acres of land, or any land whatsoever; nor were the said defendants, or the said corporation, the Riverside Land & Irrigation Company, the owners, or owner, of any water or any water rights whatsoever for the irrigation of any lands or for any other purposes whatsoever."

C. C. A. 214; *Hyde v. United States* (C. C. A.) 198 Fed. 610. The force of the contention made by counsel under this head is illustrated by the fact that if the indictment had alleged "that the defendants would falsely represent and pretend" instead of the words "that the defendants falsely represented and pretended" the point urged would have had no application. There is no doubt in our minds but that any person of common understanding would easily understand from the indictment the scheme which it is alleged the defendants had devised. We do not wish to be understood as indorsing this mode of pleading, but we do not think the pleading in this instance is sufficiently bad to warrant a reversal of the judgment.

[2] It is next urged that the names of the persons to be defrauded must be stated. Of course the defendants, when they devised the scheme to defraud set out in the indictment, if they did devise it for such purpose, did not know the names of the individuals who would be defrauded, and the grand jury in stating the scheme must state it as the defendants understood it. We think the indictment sufficiently charges what is equivalent to a charge that it was the public generally which was to be defrauded. *Brown v. United States*, 146 Fed. 219, 76 C. C. A. 577; *Horn v. United States*, 182 Fed. 721, 105 C. C. A. 163.

[3] It is next urged that the letters set out in the indictment show on their face that they were not mailed in the execution of the scheme set out in the indictment. We cannot agree to this. The letters show that they were mailed in connection with the scheme, and for the purpose of carrying the same out. Whether the scheme was fraudulent or not was a question for the jury. *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; *Lemon v. United States*, 164 Fed. 953, 90 C. C. A. 617.

[4] It is further urged that the indictment is bad in not alleging that the letters set out therein were addressed to some person. The indictment alleges that the letters were deposited in the post office, addressed "Mr. U. S. Willey, Whitewater, Colo.," and "Mr. Q. A. Woodward, Brush, Colo." We are of the opinion that the criticism is too technical. Letters so addressed, in our judgment, were addressed to the respective addressees.

[5] It results from what has been said that the demurrer and motion in arrest were properly overruled. It is assigned as error that the evidence was not sufficient to justify the verdict. While this assignment is argued by counsel for both sides, there was no ruling of the trial court upon which such an assignment could be based. A motion was made by counsel for the defendants at the close of the evidence for the prosecution for a directed verdict, but it was not renewed at the close of all the evidence, and was therefore waived. Neither was there any exception to the charge of the court. There remain to be considered, however, the assignments of error relating to the admission and rejection of evidence.

[6] It is contended that the trial court erred in admitting in evidence United States Exhibit No. 7. This exhibit consisted of certified copies of a complaint, judgment, execution, and return thereon in the

case of George S. Clayson, doing business as the Clayson Map Company, Plaintiff, v. The Riverside Land & Irrigation Company, a Corporation, Defendant, at one time pending in the county court, state of Colorado, county of Denver. It is said in the brief of counsel for the United States that "the purpose for which said exhibit was introduced is evident, and for that purpose it is competent testimony." We regret if the purpose of the admission of this exhibit was evident to counsel that he did not think it best to inform us of that purpose, for we are involved in some doubt upon the subject. At the time the exhibit was first offered testimony was being given on the part of the United States for the purpose of showing that Wright and White ordered the maps and map literature which were circulated by the Riverside Land & Irrigation Company and which embodied the alleged false representations made by the defendants; the Clayson Map Company being the company which printed the maps and map literature. The complaint which forms a part of the exhibit alleges a cause of action for a balance of \$424.20 for maps and map literature. The judgment rendered was upon default, and there is no recital in the judgment that any service of process was ever had upon the defendant, and nothing appears in the exhibit to show that the court had any jurisdiction over the defendant to render the judgment which it did. The return of the sheriff indorsed on the execution shows that \$150 of the judgment was collected from the irrigation company, and a further certificate appears that a demand was made upon J. A. Wright, president of the company, for the balance of the judgment, which Wright failed to pay. The exhibit, when offered, was objected to for the reason that there was no evidence that process had been served upon any one in the action, and that the same was incompetent, irrelevant, and immaterial. This objection was sustained, but at a subsequent period of the trial the exhibit was again offered and admitted, over the same objection. If the exhibit was introduced for the purpose of showing that the Riverside Land & Irrigation Company purchased the map literature which was circulated, and contained the promises, representations, and pretenses which the indictment allege to be false, it certainly ought to have been excluded. The ex parte statements in the complaint were not competent evidence against any one (*Lemon v. United States*, 164 Fed. 953, 90 C. C. A. 617), and the judgment rendered by a court which was not shown to have any jurisdiction over the defendant amounted to nothing. Again, if the exhibit was offered for the purpose of showing that the Riverside Land & Irrigation Company, and hence the defendants, were insolvent, it was wholly inadmissible for that purpose, and its admission may have been very prejudicial to the defendant. In this connection it is proper to refer to a paragraph in the charge of the trial court, which reads as follows:

"And so here, Gentlemen of the Jury, the prime question for consideration and determination is whether or not the water, in fairly sufficient amount to irrigate a substantial tract of land on the mesa, could be had, and if had, whether it was possible to conduct it, within the bounds of reason, to the land and apply it for irrigation purposes, and, if so, and if it was, in your judgment, the intent and purpose of the defendants to do that, they were not guilty

of concocting the fraudulent scheme charged in the indictment. But it appears from the testimony in this case that some of the defendants were men without any substantial means of their own to put in this venture, and I believe their counsel has said, in argument, that none of them were men of large means. The company which was organized apparently had no capital fund that it could devote to that purpose; the whole project, if it could be carried out, must rest upon the future value of the land, raising the first payment on sold water rights from those who took up the land, or would purchase water rights on land already patented, waiting thereafter for sufficient money to construct the system."

This language from the charge is not quoted for the purpose of making any criticism of the charge, but for the purpose of showing that the apparent insolvency of the company was regarded as a material factor in determining the question as to whether or not the defendants intended to defraud. The judgment in Exhibit No. 7, together with the return of the sheriff, might have been strong evidence in the minds of the jurors bearing upon the question of whether the defendants had any right to assume they could carry out any such scheme as they had entered upon. We cannot come to any other conclusion than that the admission of this exhibit was error.

[7] Error is assigned in the admission of the testimony of Mary N. Hicks, a witness on the part of the United States. The defendant Woody was not on trial. Still he was manager of the Colonization Company, which was the sales agent of the Riverside Land & Irrigation Company, and Woody had much to do with the circulation of advertising literature. The witness Hicks was asked the following question:

"What was Mr. Woody's financial condition? Can you give us that?"

The question was objected to as incompetent, irrelevant, and immaterial. The objection was overruled, and an exception taken. After counsel for the United States had directed the witness to the years 1909 and 1910, the witness answered as follows:

"I was led to believe at first that he had a great deal of money, but later on in my employment I came to the conclusion that that was not true, and that he had nothing."

Counsel for defendants then moved that this testimony be stricken from the record as incompetent and immaterial. The motion was overruled, and exception taken. We think the motion should have been granted. The answer of the witness simply stated the belief of the witness, and no facts upon which it was based. Such testimony bore directly upon the financial ability of Woody one of the defendants; and, while Woody was not on trial, he still was jointly indicted with the other defendants, and the force of the testimony fell upon the defendants who were being tried.

[8] It is next assigned as error that the court erred in excluding defendants' Exhibit M. The offer of Exhibit M was objected to by counsel for plaintiff on the ground that it was immaterial. The objection was sustained and an exception taken. The effect of this rul-

ing cannot be very well understood without setting forth the exhibit in full. It appears in the record as follows:

"The Paonia Hotel,

"John McNaughton, Proprietor.

"[See diagram at close.]

"Paonia, Colo. Aug. 29, 1909.

"Dear Mr. White: I talked with Mr. Martin this morning and found that he got the line to the river last night. He struck the North Fork 100 feet vertical above the forks of the river so that it will take about 7 mi. more of line if we adopt this elevation. After leaving Somerset there will be some rock work but taken as a whole he thinks this a very satisfactory line, for two reasons: We cross high enough to avoid most of the difficulty in crossing side gulches and there will be but little cost for right of way. Back of the Big Indian the line contemplates a 6000 ft. tunnel which will cut out about 6 mi. of hard ditching. He will go to Bridgeport with me in the morning and pick up the line and extend back to Pickett Ranch. I have asked him to do this at your suggestion and I think you can calculate that the line will be to Pickett's not later than Wednesday. He will then (platt) up his notes and by Monday Sept. 5th we will be ready for Anderson.

"As I wrote yesterday I will have a camp at Dominguez Tuesday morning. Will have Herring there and will handle all business from there. Woody has four people that I will locate tomorrow, and I am arranging so that I will be free to look after the surveys, &c. in two or three days. I have arranged here for camping outfit and will take my long (d-ferred) trip as soon as I can get away. Of course in all this matter I will carry out your wishes as to the order of the work undertaken. I would like however to suggest again that in the event of my finding adequate storage high up, Anderson's report if made at this time would necessarily be premature. It would seem as if the right thing to do would be to run the line back to the Pickett Ranch, there let Martin (platt) his notes while I take a trip in the hills. Then let Anderson come and go over the line. This would bring him here about the last of Sept. as I would like to take a matter of three weeks for my trip. We have got the location of the land well in hand and I can leave it with Herring all right in a couple of days.

"I note what you say in regard to finances and I need not say to you that I appreciate the situation. It was necessary that we go any length to locate the land but now that that is practically an accomplished fact I think we must know where we are at before we go on. Not paying our bills promptly will queer us here for years to come. I would like to suggest again that as far as the *Irrigation Co.* is concerned let's stop until we get some money. I do not wish to stop any more than any one else as I realize that every minute at this time is golden, but we must pay our bills especially wages when they are due. In the meantime I am going right on with the work unless I hear from you differently. I paid up my bills last night and have 10.00 now on hand. I will need \$100.00 the end of this week as I will have to pay the men Martin has employed and also a teamster for the camp and a grocery bill.

"You may still direct my mail to the Delta House. I will not be there but will have it forwarded to me. A wire care of conductor of the Montrose-Grand Jct. train will reach us all right. We will meet both trains and be ready for any one who comes. I will have Herring make an estimate of the amount of unlocated land and report to you at once for your guidance.

"Martin tells me that he can put on a number of surveying parties now if we desire but I think it very desirable to run at least one fly line below his last one and I would like to have him do this while I am away, if I do go to the mountains. He seems to think though that he has got the line he wants right now. After talking the matter over with him tomorrow if it seems best not to run an additional line I will go with him horse back over the present line from Palisade back to the river. I am going to do this so as to suggest any additional information and work which I need at once.

"I am yours very sincerely, John Gould."

This letter was written at a time when it is claimed that the defendant was engaged in executing the fraudulent scheme set out in the indictment. It was a letter written by one defendant to another, and, generally speaking, would not be admissible except in cases like the one at bar. It was written over a year before the indictment in this case was returned, and there is no evidence that at the time the letter was written the defendants were aware that any proceedings were to be taken against them seeking to punish them for using the post office establishment in the execution of a scheme to defraud. In cases involving schemes to defraud the courts very properly allow a wide latitude in the admission of evidence for the prosecution, for it is only in this way that fraud can usually be established. The defendants are called upon to meet this situation and are entitled, within reasonable limits, to show good faith and honest intent. We think this letter was a part of the *res gestæ* and was admissible for the purpose of throwing light upon and characterizing the transaction in which the defendants were engaged.

In *Hibbard v. United States*, 172 Fed. 66, 96 C. C. A. 554, 18 Ann. Cas. 1040, the correspondence between the defendant and every patient which he had secured for treatment was held admissible on his behalf, as a part of the *res gestæ* tending to show the real nature of the business done by him, although this correspondence embraced other cases than those shown in evidence by the government. The court in its opinion said in reference thereto as follows:

"The elementary rule in reference to hearsay testimony, cited in support thereof, is inapplicable to either of the tenders of file wrapper contents. While it is true that the applications and correspondence thus appearing are incompetent to prove that facts existed as therein stated, they were expressly produced and offered for another purpose, well recognized for their admissibility under the rules of evidence. In connection with the testimony of the witness Edmondson, the initial exhibits were admissible (as offered) by way of illustration; and the subsequent tender of the 13 cases, alleged to contain the record of the entire course of business, became admissible as original evidence of the nature of *res gestæ*. With a fraudulent scheme charged, these records (as described) were competent, as circumstances in the course of the business which may tend to prove its real nature as carried on. In so far as such circumstances are fairly contemporaneous with the proofs offered to establish fraudulent device and execution, the doctrine is elementary that they constitute parts of the *res gestæ* and may always be shown to the jury, along with the principal fact."

In *Harrison v. United States* (C. C. A.) 200 Fed. 662, it was said:

"The nature of the issue to be tried, as it has been developed in this opinion, will make it clear that the respondent's acts and efforts in the summer of 1910 to raise money with which to meet these refunds will directly bear on his intent to pay, or to avoid payment. Even his statements made in the course of such efforts, if natural to be made in connection therewith, and if not made in anticipation of this controversy, will be admissible as part of the *res gestæ* bearing on his intent. His statements in August that he wished his agent to use all available property as security to borrow money on account of its urgent need for making refunds was, so far as the court could say, very probably an 'incident immediately and unconsciously associated with the act.' If the jury regarded it as 'voluntary individual wariness,' then it would lose its evidential force. *St. Clair v. United States*, 154 U. S. 134 [14 Sup. Ct. 1002, 38 L. Ed. 936]."

In *St. Clair v. United States*, referred to in the language above quoted, the rule in regard to the admission of evidence as being a part of the *res gestæ* is stated as follows:

"Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal facts that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence."

In this opinion the Supreme Court approves the following language taken from 1 Wharton on Evidence, § 259 (2d Ed.) 1879:

"Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense: That they are part of the immediate preparations for or emanations of such act and are not produced by the calculating policy of the actors. In other words, they must stand in immediate casual relation to the act, a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act."

We are satisfied that error was committed in the exclusion of Exhibit M.

We have examined the other errors assigned as to the admission and exclusion of evidence, and have arrived at the conclusion with reference thereto that no error appears in the rulings complained of; but, for the errors which we have herein mentioned, the judgments below must be reversed, and a new trial granted; and it is so ordered.

BASKIN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1,939.

1. INDICTMENT AND INFORMATION (§ 59*)—REQUISITES AND SUFFICIENCY OF ACCUSATION—AVERMENT OF FACT.

The cardinal tests of the sufficiency of the averments of fact in an indictment are twofold: (a) They must embrace every element of the offense charged and plainly apprise the accused of the proof he must be prepared to meet, and (b) must so state the charge that judgment thereunder can be pleaded in bar of further prosecution for the same offense. If these requisites are sufficiently stated, the indictment will be upheld, especially after verdict, although cumbered with inaccuracies otherwise, or improper statements not applicable to the issues.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 180, 181; Dec. Dig. § 59.*]

2. PERJURY (§ 26*)—SUFFICIENCY OF INDICTMENT—AVERMENT OF FALSENESS OF OATH.

An indictment for perjury *held* to charge with sufficient definiteness that the testimony of the accused, on which the indictment was predicated, was untrue.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 90-94; Dec. Dig. § 26.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PERJURY (§ 25*)—INDICTMENT—NECESSITY OF AVERRING FACTS TO SHOW MATERIALITY OF TESTIMONY.

It is unnecessary in an indictment for perjury to set forth the various circumstances which render the testimony material; general averments of materiality being sufficient.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*]

4. PERJURY (§ 29*)—INDICTMENT—VARIANCE BETWEEN ALLEGATIONS AND PROOF.

There was no material variance between an indictment for perjury and the proof, where the indictment charged that defendant falsely testified that he did not see any goods delivered from the rear of a bankrupt store on certain dates named, and the evidence on the trial showed that he was asked if he had ever seen any goods so delivered, to which he answered, "No," and that the particular dates stated in the indictment had been previously mentioned in his examination.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 97-106; Dec. Dig. § 29.*]

5. PERJURY (§ 32*) — EVIDENCE — DESCRIPTION OF PROCEEDINGS IN WHICH OATH WAS ADMINISTERED.

Where an indictment charged defendant with perjury committed on his examination as a witness before a referee in involuntary bankruptcy proceedings against a person named, by petition of certain other persons named, the identity and character of the proceedings were sufficiently proved by the introduction of the bankruptcy docket of the District Court showing the pendency of proceedings against the alleged bankrupt by one of the petitioners named in the indictment and others, although the names of the other petitioners were not stated in the entries.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 108-116; Dec. Dig. § 32.*]

6. EVIDENCE (§ 332*)—MAKING FALSE OATH IN BANKRUPTCY PROCEEDING.

A further entry in such docket, "Cause spl. refd. to referee Eastman for ex. etc." was admissible to sustain an averment in the indictment that the cause had been duly referred to Eastman, who was a referee in bankruptcy, to examine the alleged bankrupt and other witnesses, before whom defendant was charged with giving the false testimony, and was sufficient, together with a transcript of the testimony before the referee on such examination, to bring the case within Bankr. Act July 1, 1898, c. 541, § 29b(2), 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), making it a criminal offense to make a false oath in a proceeding in bankruptcy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1237-1246; Dec. Dig. § 332.*]

7. PERJURY (§ 33*)—EVIDENCE—AUTHORITY OF COURT.

Under Rev. St. §§ 5392, 5396 (U. S. Comp. St. 1901, pp. 3653, 3655), which define perjury as including the giving of materially false testimony in any case in which a law of the United States authorizes an oath to be administered and provide that it shall be sufficient in the indictment to set forth by what court and by whom the oath was taken, averring such court or person to have competent authority to administer the same, without setting forth the commission or authority of the court or person, where an indictment charges the commission of perjury before a referee in bankruptcy it is not necessary to aver or prove that the particular proceeding in which the testimony was given was specially

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

referred to such referee, but is sufficient to aver that the testimony was taken within the general scope of his authority.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 117-124; Dec. Dig. § 33.*

For other definitions, see Words and Phrases, vol. 6, pp. 5305-5310; vol. 8, p. 7751.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Criminal prosecution by the United States against Samuel Baskin. Judgment of conviction, and defendant brings error. Affirmed.

The plaintiff in error was convicted under an indictment for perjury in violation of section 29b of the Bankruptcy Act, and this writ of error is brought for reversal of the sentence and judgment thereupon. The indictment reads as follows:

"The grand jurors for the United States of America, impaneled and sworn in the District Court of the United States of America, for the Eastern Division of the Northern District of Illinois, and inquiring for that division and district, upon their oath present that on, to wit, the seventeenth day of October, in the year nineteen hundred and eleven, at Chicago aforesaid, an involuntary petition in bankruptcy was filed in the District Court of the United States, for the Northern District of Illinois, in the Eastern Division thereof, by the Harper & Kirschten Shoe Company, a corporation organized and existing under and by virtue of the laws of the state of Illinois, and one F. Benjamin (whose Christian name is to the said grand jurors unknown), and Bernstein & Goldstein, a copartnership, composed of Morris D. Bernstein and Maurice D. Goldstein; which said petition prayed that one Morris H. Offner be adjudged by the said court to be a bankrupt, which said court then and there had due and competent authority and jurisdiction in the matter of the said petition and of proceedings in bankruptcy thereon; that on, to wit, the eighteenth day of October in the year nineteen hundred and eleven, at Chicago aforesaid, the Honorable George A. Carpenter, a duly appointed and qualified judge of said court, and then and there acting as such, in the said bankruptcy proceedings upon the said petition, duly ordered, as said judge then and there had due and competent authority and jurisdiction to do, that the said bankruptcy cause be specially referred to Referee Sidney C. Eastman, for the purpose of examining the said bankrupt and other witnesses, and that the said referee cause the said bankrupt and any and all other persons who might be required as witnesses to appear before him, the said referee, and be examined generally with respect to the assets of the said bankruptcy estate; and that the said Sidney C. Eastman was then and there a duly appointed and qualified referee in bankruptcy of and for said court, and then and there had due and competent authority and jurisdiction to have and hold the said examination aforesaid.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in accordance with and under authority of the said order of the said court as aforesaid, on, to wit, the twenty-seventh day of October, in the year nineteen hundred and eleven, at Chicago aforesaid, a certain hearing and examination in the matter of said bankruptcy proceedings came to be had and held before and by the said referee, which said referee then and there had due and competent authority to have and hold said hearing and examination as aforesaid; and that one Samuel Baskin, then and there duly appeared as a witness in and upon the said hearing and examination, and was then and there duly sworn by and took his corporal oath before the said Sidney C. Eastman as referee in bankruptcy, that the testimony which he, the said Samuel Baskin, would give in the said hearing and examination would be the truth, the whole truth, and nothing but the truth, which said referee then and there had due and competent authority and jurisdiction to administer the said oath to the said Samuel Baskin in that behalf.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Samuel Baskin so having been sworn as aforesaid, and so having taken his oath as aforesaid, then and there, at Chicago aforesaid, on the twenty-seventh day of October, in the year nineteen hundred and eleven, in and upon the said hearing and examination, unlawfully, willfully, corruptly, feloniously, knowingly and falsely and contrary to his said oath, did swear falsely and make a false oath, that he, the said Samuel Baskin, did not see any goods delivered from the place of business of the said Morris H. Offner, at, to wit, number four thousand six hundred and eight South Ashland avenue, Chicago, Illinois, through the rear entrance thereof, on any of the following days, to wit, October fourteenth, October fifteenth and October sixteenth, all in the year nineteen hundred and eleven; whereas, in truth, and in fact, the grand jurors aforesaid, upon their oath aforesaid, do further present the facts to be, and present that the said Samuel Baskin when so taking his oath as aforesaid, and so swearing as aforesaid, and when so testifying as aforesaid, at and upon the said hearing and examination, then and there well knew, that he, the said Samuel Baskin, did see certain goods removed from the said place of business of the said Morris H. Offner, at, to wit, number four thousand six hundred and eight South Ashland Avenue, Chicago, Illinois, through the rear entrance thereof, on, to wit, the fourteenth day of October, in the year nineteen hundred and eleven, to wit, seven packing boxes, and on, to wit, the fifteenth day of October, in the year nineteen hundred and eleven, to wit, four packing boxes, and, on, to wit, the sixteenth day of October, in the year nineteen hundred and eleven, to wit, four packing boxes; said boxes containing, to wit, shoes, men's suits, men's overcoats and articles of men's wearing apparel (a further and more particular description of which said boxes, shoes, suits, overcoats and articles, is to the said grand jurors unknown).

"And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said twenty-seventh day of October, in the year nineteen hundred and eleven, at Chicago aforesaid, upon the occasion of the said hearing and examination had and held at the time and place aforesaid, and as aforesaid, the said matters above set forth so testified to by the said Samuel Baskin were then and there material matters as to the truth of which it was necessary that the said referee be informed, and that the said Samuel Baskin did not then and there believe the said matters above set forth so testified to by him to be true; and that the said hearing and examination was then and there a case in which a law of the said United States authorized the said oath to be administered to the said Samuel Baskin in the behalf aforesaid; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided."

B. M. Shaffner, of Chicago, Ill., for plaintiff in error.

James H. Wilkerson and Frederick Dickinson, both of Chicago, Ill., for the United States.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The conviction of the plaintiff in error arises under an indictment charging that he made false oath and testified falsely in bankruptcy proceedings as specified—in effect charging violation of section 29b of the Bankruptcy Act. For reversal of the judgment the contentions relied upon are: (1) That the indictment is "fatally defective." (2) That material variance appears between the averments of the indictment and the proof submitted, as to testimony of the accused before the referee. (3) That the proof is "fatally defective" as to the names of petitioning creditors in the bankruptcy proceeding. (4) That reference for examination before the referee in the bankruptcy proceeding was not proven. (5) That there was no actual examination before the referee.

1. The most serious proposition of defect in the indictment arises out of diffuseness in the averments to negative the truth of the testimony charged to be false. It is unquestionable that the common-law requirement for charges of perjury is applicable to the indictment in this respect: The general averment that the testimony was false must be accompanied by special "averment to falsify the matter wherein the perjury is assigned" (*Markham v. United States*, 160 U. S. 319, 323, 16 Sup. Ct. 288, 40 L. Ed. 441), so that an indictment resting on the mere general charge of falsity is insufficient to support conviction; and the contention is that the attempted special averments of this indictment are without force to meet such requirement.

After extended averments in reference to the bankruptcy proceedings against one Offner and examination of the accused as a witness therein, before the referee, the indictment charges in various terms that the accused made false oath and testified falsely that he "did not see any goods delivered from the place of business" of the bankrupt as described, at times specified in the inquiry—with subsequent averments of materiality—and proceeds with special averments (a portion of which we have italicized for convenient reference), as follows:

"Whereas, in truth and in fact, the grand jurors aforesaid * * * do further present the facts to be, and present that the said Samuel Baskin when so taking his said oath as aforesaid, and so swearing as aforesaid, and when so testifying as aforesaid, at and upon the said hearing and examination, then and there well knew, that he, the said Samuel Baskin, did see certain goods removed from the said place of business" of the bankrupt (at the times and place specified in the inquiry).

And then states the number of packages so removed each day and their general contents. Cannot this averment, however awkward in expression, reasonably be interpreted to falsify the matter testified, together with the averment that it was known to be false?

[1] The cardinal tests of sufficiency of the averments of fact in an indictment are twofold: (a) They must embrace every element of the offense charged and plainly apprise the accused of the proof he must be prepared to meet, and (b) must so state the charge that judgment thereunder can be pleaded in bar of further prosecution for the same offense. These essentials cannot be disregarded, but the rule is settled in the federal jurisdiction that the entire purpose of criminal pleadings, "to convict the guilty as well as to shield the innocent" (*Evans v. United States*, 153 U. S. 584, 590, 14 Sup. Ct. 934, 38 L. Ed. 830), must be observed in considering their sufficiency; and that the test to be applied is not whether the material averments might have been made more accurate and certain, but whether they plainly embrace in their terms both requirements, of notice of the ultimate facts to be proved against the accused and specification thereof which will leave no second prosecution open for the alleged offense; and that, if these requisites are sufficiently stated, the indictment will be upheld, especially after verdict, although cumbered with inaccuracies otherwise, or improper statements not applicable to the issues. *Cochran v. United States*, 157 U. S. 286, 290, 15 Sup. Ct. 628, 39 L. Ed. 704; *Rosen v. United States*, 161 U. S. 29, 34, 16 Sup. Ct. 434, 480, 40 L. Ed. 606;

Markham v. United States, 160 U. S. 319, 323, 16 Sup. Ct. 288, 40 L. Ed. 441.

[2] In the light of this rule we believe the ultimate fact that the accused did see the goods removed notwithstanding his denial thereof in his testimony to be sufficiently stated in the above averments, and that the further statement of his knowledge of such fact when he testified in denial thereof—entirely set apart as embraced in the part of the above quotation in italics—is superfluous as an entirety for support of the charge, so that it may rightly be treated as having no force in the indictment nor in the present inquiry of sufficiency. The essential averment of fact to support the charge of perjury remains complete and accurate, whether it is carefully read with or without the other statement—and was presumptively framed and understood in that view—leaving no room for doubt, as we believe, that it authorized submission of the proof that he actually saw the removal of goods in question.

The contention therefore that conviction for perjury cannot rest on an averment that the accused well knew, when he testified in denial thereof, that he had seen the goods removed, does not arise for decision, nor call for comment upon the cases cited (*Bartlett v. United States*, 106 Fed. 884, 46 C. C. A. 19; *Commonwealth v. Still*, 83 Ky. 275; *Commonwealth v. Weingartner* [Ky.] 27 S. W. 815) in support of such contention.

[3] The remaining objection urged against the indictment is, in effect, that the general averment of materiality of the false testimony in the bankruptcy proceeding is insufficient, and the failure to aver that the bankrupt owned the goods in reference to which the accused testified he had not seen them removed from the store constitutes a defect. In the first place, ownership of the goods was neither involved in the question so answered by the witness, nor essential for materiality of his testimony before the referee. But the objection is without merit otherwise, as it is unnecessary in any indictment for perjury to set forth the various circumstances which render the testimony material; general averments of materiality being sufficient. *Markham v. United States*, 160 U. S. 319, 325, 16 Sup. Ct. 288, 40 L. Ed. 441, and authorities cited.

[4] 2. The contention of fatal variance between the alleged false testimony described in the indictment and the evidence thereof submitted at the trial, however well supported by the citations for the proposition of law pressed for reversal, is without substantial basis, as we believe, for its premise of fact. It rests on the absence of proof that the particular dates of removal of goods in question were embraced in his answer, "that he did not see any goods delivered," as averred. The proof was, however, that he answered, "No," to the question, "Did you ever see any delivered from the rear?" and that particular dates in reference to such transactions were theretofore mentioned in his examination. We are impressed with no doubt of substantial support therein for the averments of the indictment.

[5] 3. In the indictment the bankruptcy proceedings, in which the accused was called as a witness before the referee and gave the testimony in question, are well described, inclusive of the fact that they

arose upon an involuntary petition filed by creditors named, one mentioned as a corporation and another as a copartnership. Proof of such proceedings rests on production of the so-called "Bankruptcy Docket 35," entitled: "Case No. 19,268. In the matter of Petn. of F. Benjamin et al. to have Morris H. Offner of Chicago adjudged bankrupt." It shows the date of filing the petition, followed by entries of successive dates and proceedings, briefly described with abbreviations of words in various instances. The contention is that "the proof is fatally defective as to the names" of the petitioning creditors, resting on the assumptions that they stand in the relation of plaintiffs in the cause, and that all their names must be in evidence for identification with the proceeding described in the indictment—citing *State v. Green*, 100 N. C. 547, 6 S. E. 402, *Walker v. State*, 96 Ala. 53, 11 South. 401, and *Jacobs v. State*, 61 Ala. 448, as authorities for reversal upon like defective proof.

We believe, however, that the evidence so introduced was both admissible and sufficient for *prima facie* proof that the bankruptcy proceedings were pending in the District Court within its jurisdiction, as averred in the indictment. Both docket and entries therein were properly identified as records of that court and thus import verity. The provisions of the act for involuntary proceedings against the bankrupt leave no room for question of their identity with those described in the indictment, whether all or part only of the petitioning creditors are mentioned in the docket entry. Such proceedings are instituted by the petitioning creditors and other creditors may intervene therein, as of course, but the proceeding must be carried on as a single cause of involuntary bankruptcy, whereof the District Court has exclusive jurisdiction; and neither of the petitioners can withdraw or dismiss without notice to all creditors and hearing thereupon. These proceedings are therefore distinguishable for identification from the ordinary suits between litigants, involved in the above citations, so that their rulings are inapplicable here, even if it be assumed that their doctrine is consistent with the rule governing the federal courts in perjury cases, as exemplified in *Markham v. United States*, *supra*. It may be that introduction of the creditors' petition, through which jurisdiction was acquired, together with the docket entries, would furnish more satisfactory proof upon any issue involving either jurisdiction or identity of the proceeding; but no question was raised at the trial upon the sufficiency of the docket evidence, and we are satisfied that no reversible error is embraced in the assignment.

[6] 4. The alleged error for want of proof of the averment of special reference to Referee Eastman for the examination in the bankruptcy proceedings, alike with the last-mentioned assignment, is predicated on the assumption that the docket entries are without force to show such reference, because abbreviations are used in such entries. The entry reads, under serial date October 18th, following several other entries of like date: "Cause spl. refd. to Referee Eastman for ex. etc." The testimony of the accused "given before Sidney C. Eastman, referee in bankruptcy," was then introduced through the testimony of the "court stenographer," as shown by the bill of exceptions, with no

objections interposed nor exceptions preserved at the trial, in any form.

The docket in evidence was the court's record book of proceedings in open court, and whether the entries therein were made by the judge personally, or by the clerk as the hand of the court, they are not only competent but first-hand evidence of the orders or rulings pronounced in open court in the proceedings in question; and the order referred to is presumptively written up by the clerk for further record, in conformity with his understanding of the direction. We do not understand that any provision of federal law prescribes the method, language or terms in which such minutes are to be made, so that *Stein v. Myers*, 253 Ill. 199, 97 N. E. 295, and other Illinois cases cited for the contention of error, are inapplicable to the case; and their meaning, if not clear, can well be ascertained in the methods authorized by law. As the act of bankruptcy expressly provides for appointment of referees, as judicial officers, invested with specified judicial powers in bankruptcy proceedings—including the citation and examination of witnesses under oath—to be exercised whenever an order of reference is entered by the court, the meaning of the above entry is free from doubt to this extent, at least, that the cause was specially referred to Referee Eastman for some purpose. The record shows: That the creditors' petition for involuntary bankruptcy was filed the day before; that a receiver had been appointed and qualified upon petition therefor, in conformity with the well-known practice of the court in such cases; that the receiver was granted leave "to employ counsel, custodian and insure"; that no issue was thus presented upon the petition, so that the only inquiry open for reference or hearing was to ascertain the property and its whereabouts subject to the receivership; and that Referee Eastman forthwith proceeded to call witnesses and make the examination in question. In this view, we believe the meaning of the terms "ex. etc." clearly appears to authorize such examination, and may well support the verdict, under the assumption that proof was needful, both of the fact and purpose of an order of reference for affirmance.

[7] We are of opinion, however, that this assignment of error is untenable upon another ground, irrespective of the foregoing view, namely, that proof of an order of reference is not essential for support of the conviction, under the federal statutes and authorities applicable to the case, which have materially modified the common-law requirements in perjury prosecutions. The statutes referred to are sections 5392 and 5396 of the Revised Statutes (U. S. Comp. St. 1901, pp. 3653, 3655), construed in *Markham v. United States*, *supra*. In the one section perjury is defined to reach material false testimony given "in any case in which a law of the United States authorizes an oath to be administered," and the other prescribes it to be sufficient in the indictment to aver "such court or person to have competent authority to administer" the oath, "and without setting forth the commission or authority of the court or person before whom the perjury was committed." The *Markham Case* referred to clearly involved the above proposition as to the effect of these provisions upon a charge of perjury, under analogous facts of authority for administering the oath

and taking the testimony, and plainly decides: That they render it sufficient for support of conviction to aver and prove that the officer was authorized by statute of the United States to administer the oath, and that the material testimony in question was taken within the general scope of his authority, and thus dispense with any requirement to aver or prove that such exercise was expressly authorized or rightly invoked in the instant examination. It arose upon conviction of the accused under a charge of false testimony, in an examination and deposition made under oath before a "special examiner of the Pension Bureau," alleged to be "a competent officer and having lawful authority to administer said oath," in a matter alleged to be "material to an inquiry then pending before and within the jurisdiction of the Commissioner of Pensions." The federal statutes under which the testimony was taken (Rev. St. 4744; Act July 25, 1882, c. 349, 22 Stat. 175 [U. S. Comp. St. 1901, p. 3276]; Act March 3, 1841, c. 548, 26 Stat. 1083 [U. S. Comp. St. 1901, p. 3278]) authorized the Commissioner of Pensions to appoint special examiners to conduct inquiries pending in the department, who were thereupon empowered by the statute to administer oaths and take depositions, in the course of their examinations when detailed by the department for such inquiries. For want of an averment that the special examiner in question was detailed or expressly authorized by the department to make the inquiries and take the testimony alleged to be false, it was contended that the accused was not sufficiently informed "of the official character and authority of the officer before whom the oath was taken"; but this proposition was expressly overruled upon the doctrine above stated, which we believe to be equally applicable to the authority of a referee in bankruptcy under the statute. Thus the present averment of an order of reference in the cause is made superfluous by the above provisions, and failure of competent proof thereof furnishes no ground for reversal.

5. The concluding proposition of error is that the evidence establishes the entire examination of the witness in the bankruptcy proceeding to have been conducted without the presence of or actual hearing by Referee Eastman. On reference to the record, however, it appears that this contention rests alone on affidavits presented after verdict, on motion for a new trial—which form no entertainable portion of the record, although erroneously incorporated in the bill of exceptions—so that it is both needless and improper to discuss the import of such affidavits. As the evidence preserved in the record proves the averment that the accused testified under oath administered by the referee and shows the testimony thereupon given, these assignments are overruled without further comment.

Finding no reversible error in the assignments, the judgment of the District Court is affirmed.

OFFNER v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1,940.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Criminal prosecution by the United States against Morris H. Offner. Judgment of conviction, and defendant brings error. Affirmed.

B. M. Shaffner, of Chicago, Ill., for plaintiff in error.

James H. Wilkerson and Frederick Dickinson, both of Chicago, Ill., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. This writ of error is brought for review of a judgment upon conviction of the plaintiff in error, under an indictment charging that he testified falsely in bankruptcy proceedings, in violation of section 29b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433]). The assignment of error and all questions of law presented are substantially identical with those involved in No. 1,939, *Baskin v. United States*, 209 Fed. 740, decided herewith, and answered by the opinion and rulings therein.

The judgment against the plaintiff in error in the District Court is therefore affirmed.

H. D. STILL'S SONS v. AMERICAN NAT. BANK et al.

(Circuit Court of Appeals, Fourth Circuit. December 19, 1913.)

No. 1,175.

1. BANKRUPTCY (§ 69*)—PERSONS SUBJECT TO ADJUDICATION—PARTNERSHIP ENGAGED IN FARMING—STATUTES—CONSTRUCTION.

Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), provides that any natural person except a wage-earner or a person engaged chiefly in farming or tillage of the soil may be adjudged an involuntary bankrupt. Section 5a declares that a partnership during the continuance of the partnership business, or after its dissolution, and before the settlement, may be adjudged a bankrupt. *Held*, that section 5a should be construed in connection with section 4b and not separately, and hence did not authorize an adjudication against a partnership engaged chiefly in farming.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 51-53, 56; Dec. Dig. § 69.*]

2. BANKRUPTCY (§ 70*)—PERSONS SUBJECT TO ADJUDICATION—"UNINCORPORATED COMPANY."

A partnership is not an "unincorporated company" within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), providing that any unincorporated company may be an involuntary bankrupt, so as to authorize its adjudication, though it would be otherwise exempt as a person chiefly engaged in farming.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 70.*]

3. BANKRUPTCY (§ 69*)—PARTNERSHIP—"NATURAL PERSON."

A partnership, except in so far as the distribution of its assets among its creditors by bankruptcy proceedings is concerned, is not an entity separate and distinct from its members so as to make it an artificial person and not a "natural person," within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), that any natural person, except

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a wage-earner or a person engaged chiefly in farming or the tillage of the soil, etc., may be adjudged an involuntary bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 51-53, 56; Dec. Dig. § 69.*

For other definitions, see Words and Phrases, vol. 5, p. 4670.]

Appeal from and Petition to Revise Order of the District Court of the United States for the Eastern District of South Carolina, at Charleston and Columbia; Henry A. Middleton Smith, Judge.

Application by the American National Bank and others, petitioning creditors, for bankruptcy adjudication against H. D. Still's Sons, alleged bankrupt. From an order granting such adjudication, the alleged bankrupt appeals, and also files a petition to revise. Reversed, with directions to dismiss.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

S. G. Mayfield, of Denmark, S. C., and Chas. Carroll Simms, of Barnwell, S. C., for appellant.

Alexander Akerman, of Macon, Ga., and R. J. Southall, of Augusta, Ga., for certain judgment creditors.

George S. Jones, of Macon, Ga., and William H. Fleming, of Augusta, Ga. (Jas. A. Willis and H. L. O'Bannon, both of Barnwell, S. C., W. H. Townsend, of Columbia, S. C., and James Simons and Julian Mitchell, both of Charleston, S. C., on the brief), for appellees.

KNAPP, Circuit Judge. A brief summary of facts will disclose the question to be decided in this case.

On December 27, 1912, the American National Bank of Macon, and other creditors, filed in the District Court of the United States for the Eastern District of South Carolina a petition in bankruptcy against H. D. Still's Sons, a partnership consisting of S. H. Still, L. C. Still, and H. D. Still, Jr., alleging insolvency and the commission of various acts of bankruptcy, and praying that the firm be adjudged a bankrupt as provided by law. The proceeding was solely against the partnership as such, and not against its individual members. A supporting affidavit showed, among other things, that certain creditors had obtained judgments against H. D. Still's Sons in the court of common pleas of Barnwell county in that state, for upwards of \$26,000 in the aggregate, and that executions thereon had been issued to the sheriff of that county, who had levied upon "large bodies of real estate" belonging to the partnership and advertised the same for sale on the 6th day of January following.

The usual order was thereupon issued requiring the alleged bankrupts to show cause on January 3d why the marshal should not seize and hold their property subject to the further order of the court, and also requiring the sheriff and the several judgment creditors mentioned to show cause on the same day why the sale of the real es-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tate levied upon should not be restrained and enjoined until the further order of the court.

On the day named a return was filed in which was set forth with considerable detail the nature and extent of the business carried on by the firm and the manner in which it was conducted. From this it appears that the partnership was in possession of a number of farms aggregating nearly 5,500 acres, of which about one half were owned and the other half leased, and that its farming operations were correspondingly extensive. It is stated, for example, that the value of the crops marketed in 1910, 1911, and 1912 exceeded \$175,000. The firm also kept a general store or commissary, where miscellaneous goods and farming implements were sold; but this was conducted mainly, as appears, for the convenience of those living or working on its farms, as the patronage of other persons was relatively unimportant. Aside from the management of their partnership affairs, neither of the partners had any separate or individual business.

It was further alleged that the partnership in question was engaged chiefly in farming or the tillage of the soil, and for that reason was not amenable to the bankruptcy act and could not lawfully be adjudged a bankrupt in involuntary proceedings. A return of similar import was filed by the judgment creditors.

Upon these returns and accompanying affidavits a hearing was had on the day named, and an order entered by the District Court which in effect held that H. D. Still's Sons, although principally engaged in farming, could nevertheless be adjudged bankrupt because they were a partnership, and therefore not entitled to the exemption of natural persons, within the meaning of the bankrupt act. Some comment was made upon the extent and methods of their business, which was said to have a commercial character, but the decision was not based upon that ground. Inasmuch, however, as there was a denial of insolvency and of the commission of the alleged acts of bankruptcy, those issues were set for trial by jury, which had been demanded, at a term to be held on the third Tuesday in January at Columbia, the injunction being continued until the further order of the court.

Upon the trial of the issues stated the jury found that the firm was insolvent and had committed the acts of bankruptcy alleged. The matter was thereupon brought on for final hearing and a decree entered adjudging the partnership bankrupt, and from that decree appeal was taken to this court.

In the meantime, however, the alleged bankrupt and the judgment creditors had filed in this court their several petitions to superintend and revise in matter of law the order of January 3, 1913, and those petitions were heard in connection with the argument on this appeal.

It is urged by respondents that the appeal should be dismissed because the pleading by which review is sought is neither an appeal nor a petition to revise, but an attempt to combine the two, and therefore without sanction in the rules and practice of this court. The criticism is not without force, for the pleading in question is of a hybrid nature, indicating that the pleader was in doubt as to the

proper legal remedy and therefore attempted for safety's sake to unite an appeal with a petition to revise. But a technicality of this sort, which may be disregarded without prejudice to the respondents, ought not to prevent consideration of the merits, and we are of opinion, without discussing the point, that this pleading can be and should be treated as an appeal which is sufficient in form and substance to authorize this court to examine and decide the real controversy.

It appears from the record, and is not seriously disputed here, that H. D. Still's Sons were in fact engaged chiefly in farming or the tillage of the soil. Indeed, this was substantially found by the court below, as we read the opinion of the learned judge. It is true that the business carried on by this firm was of exceptional extent, but it differed from ordinary farming only by reason of the greater area of land controlled and the larger number of persons directly employed or held in the relation of tenants. At any rate, we think it not doubtful that an individual conducting the same business would clearly be engaged in "the tillage of the soil," within the meaning of that phrase in the bankruptcy act; and obviously the nature of the business was not affected by the circumstance that it was carried on by a partnership.

The facts thus outlined present this question: Is a partnership so engaged, and because it is a partnership, liable to be adjudicated an involuntary bankrupt, or is it exempt from such adjudication?

[1] The provisions of the bankruptcy act involved in the determination of this question read as follows:

Sec. 4b. Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any * * * corporation, except, * * * may be adjudged an involuntary bankrupt, etc.

Sec. 5a. A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

The argument in support of the decree appealed from rests upon various grounds which we will proceed to briefly examine. It is insisted in the first place that section 5a is an independent and all-embracing provision which includes literally every partnership whatsoever, without regard to the purpose of its formation or the nature or extent of the business in which it may be engaged. In other words, the mere fact that a partnership exists, no matter what its objects or activities, operates to remove it from the excepted classes and to subject it to involuntary bankruptcy, although all its members would be exempt if they carried on the same business as individuals. A farmer, it is said, might work any amount of land, employ hundreds of laborers, and raise crops of unusual value, yet remain completely immune so long as his operations were conducted by himself; but the taking of a partner, for example, with the transfer of title from the individual to a firm, would have the instant effect of making the partnership liable to be forced into bankruptcy if insolvency afterwards occurred. If this be the true construction of the act, the correctness of the decree below cannot be questioned, for the contention resolves itself into an ipse dixit and leaves no room for discussion.

But we are of opinion that the section should not be so construed. It seems to us hardly reasonable to suppose that the Congress, which was careful to exempt from liability to involuntary bankruptcy the two largest classes of persons, wage-earners and tillers of the soil, nevertheless intended that the exemption should not apply when two or more of those persons were associated as partners. Nothing in the nature of the farming industry suggests such an intention, nor does it find support, so far as we are aware, in considerations of public policy. On the contrary, we perceive no reason for placing the individual farmer in the excepted classes which does not equally apply to a partnership of farmers. To impose liability on farmers of the ordinary type merely because they happen to be partners, while exempting the individual farmer however extensive his operations, would be so illogical and purposeless that we cannot believe it was ever in contemplation.

Moreover, the contention here considered involves difficulties which lead to its rejection. In the first section of the act, which is devoted to definitions, it is declared (19) that "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, etc. On the face of it this brings a partnership of farmers expressly within the exception in section 4b, because the "persons" referred to, except as the word is otherwise defined, are obviously natural persons. But if section 5a is complete in itself and means, as is claimed, that a partnership of farmers can be forced into bankruptcy, because of the partnership, it results that the exemption granted in the former section is taken away by the latter. It can scarcely be doubted, we think, that a construction should be adopted which avoids such a plain contradiction.

[2] It is further argued that a partnership is liable to involuntary bankruptcy, whatever the business in which it is engaged, because a partnership is an unincorporated company within the meaning of section 4b, which imposes such liability upon "any unincorporated company." In a certain sense it may, of course, be said that a partnership is an unincorporated company, for it is commonly described as a company, though of a well-defined class, and it is not incorporated. We are convinced, however, that the Congress did not intend to include partnerships among the unincorporated companies made subject to compulsory proceedings. The terms of the bankruptcy act, like those of statutes in general, are to be interpreted in accordance with their ordinary meaning unless a contrary intention is manifest, of which there is no evidence in this case. When use is made upon occasion of the rather unfamiliar phrase "unincorporated company," it is not commonly understood to refer to partnerships, which are very often mentioned, but rather to voluntary associations and other forms of organization which differ from both partnerships and corporations, and of which there are frequent examples. It is therefore not necessary to infer that the specification of unincorporated companies was intended to include partnerships, since there are many such companies which are not partnerships, and to those companies the phrase undoubtedly

applies. Nor is it to be readily believed that the Congress would specify unincorporated companies, of which there are comparatively few, and omit to mention partnerships, which are exceedingly numerous, if it was understood and intended that the latter were embraced in the clause imposing liability upon the former. Besides, the contention here considered involves a contradiction similar to the one above suggested. As already pointed out, the first section declares that "persons" shall include partnerships, and this apparently makes a partnership of farmers expressly exempt. But if the phrase "unincorporated companies" also takes in partnerships, it results that farming partnerships are put in the excepted classes by the first clause of the section and then made liable by the succeeding clause. It seems evident that a construction should be found which avoids such a palpable inconsistency.

The view we entertain of these sections is this: The first paragraph of section 4, subdivision "a," specifies those who may, namely, any person who owes debts, and those who may not, namely, certain corporations, have the benefits of voluntary bankruptcy. Subdivision "b" specifies those who are subject to involuntary bankruptcy, and those who are not subject because expressly excepted. Partnerships are not mentioned in either subdivision. Section 5a, in our judgment, was intended to be supplementary to and in a sense explanatory of the preceding section. It will be observed that this section contains neither the word "voluntary" nor the word "involuntary," but simply provides that a partnership "may be adjudged a bankrupt." This section was added, as we believe, for the purpose of making it plain that when the individuals composing a partnership are entitled to the benefits of voluntary bankruptcy the partnership as such is also entitled to the same benefits. Similarly, when the persons composing a partnership would be subject to involuntary bankruptcy if they carried on the same business as individuals, the partnership as such is subject to the same liability. It seems to us that this construction fairly harmonizes the two sections and gives to both of them proper and consistent application. True, it may be said that section 5a is unnecessary because the definition of "persons" in the first section includes partnerships. But in cases of partnership bankruptcy, whether voluntary or involuntary, conditions exist which are peculiar to partnerships, such as the marshalling of assets and the like, and for these conditions needful provision is made in the subsequent paragraphs of this section. If the entire section be examined, and the purposes of its various subdivisions kept in mind, it will be found, we think, to support the construction which we have adopted.

[3] This brings us to the contention, which pervades the entire argument of respondents, that the exclusion in section 4b of farmers and tillers of the soil is confined to the "natural persons" engaged in those occupations and therefore does not exempt a partnership of farmers because a partnership is not a natural person. In other words, it is claimed that when two or more persons enter into partnership with each other a new and distinct entity is created, which differs so materially from the individual entity of the several members as to be in law

a separate person; that one is a natural person, the other an artificial person; and that these "persons" are so different as respects their legal status that rights and privileges expressly accorded to the former do not inure to and cannot be enjoyed by the latter. Undoubtedly there are a number of cases which go far to sustain this proposition, though some of them, we venture to say, indulge in refinements which to the ordinary mind seem rather fanciful. However, we deem it unnecessary to trace the development of this doctrine in the decisions referred to, because the subject has received recent consideration by the Supreme Court of the United States in *Francis v. McNeal*, decided May 26, 1913, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029. In the opinion in that case, from which we quote at considerable length, Mr. Justice Holmes, among other things, says:

Since *Cory on Accounts* was made more famous by *Lindley on Partnership*, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remain able to pay its debts. * * *

The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is so far as may be to preserve, not to upset, existing relations. It is true that, by section 1, the word "person" as used in the act includes partnerships; * * * that, by section 5a, a partnership may be adjudged a bankrupt; and that, by section 14a, any person may file an application for discharge. No doubt these clauses taken together recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets and that of individual debts upon the individual estate. * * * But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from section 5, clauses "c" through "g," that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered. * * *

On the other hand, it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate after paying private debts is part of those assets so far as needed. * * * Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint but to leave the same persons liable for it considered as several. We say the same persons, for, however much the difference between firm and members under the statute be dwelt upon, the firm remains at common law a group of men and will be dealt with as such in the ordinary courts for use in which the discharge is granted. * * *

If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, in an able opinion, in *Re Forbes* [D. C.] 128 Fed. 137, it is a sufficient answer that no such objection has been taken, but, on the contrary, *Francis*

has consented and agreed to hand over his property according to the order of the court. So far as *Vaccaro v. Security Bank of Memphis*, 103 Fed. 436, 442 [43 C. C. A. 279], is inconsistent with the opinion of the majority in *Re Bertenshaw*, 157 Fed. 363 [85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986], we regard it as sustained by the stronger reasons and as correct.

If we rightly apprehend the import of these observations, they cannot be said to sustain the contention here considered. On the contrary, the opinion seems to imply that when two or more individuals unite with each other, for their mutual benefit, under the "commercial device" of a partnership, "without the aid of law," the partnership thus formed does not bring into existence another and different entity distinct and separable from the persons who compose it, so that, for instance, it can sue and be sued without joining its members, or, as in this case, be put into involuntary bankruptcy by itself while the partners as individuals remain strangers to the proceeding. We do not, however, rest our conclusions herein upon the fact that the proceedings under review are directed against the partnership only, whatever doubt of their validity may arise from that fact, but upon the broader conception which appears to be indicated by the views of the Supreme Court above recited. If, as Mr. Justice Holmes declares, the most important purpose for which we may "recognize" the partnership as an entity has to do merely with the distribution of assets, a purpose without the slightest bearing upon the question here involved, we may well be convinced that the difference between a natural person and a partnership—that is, two or more natural persons using this "commercial device" for their joint operations—is quite insufficient, within the intent of the bankruptcy act, to impose upon partnerships a liability from which natural persons are exempt. In the light of reason and authority we are constrained to hold that a partnership "engaged chiefly in farming or the tillage of the soil" has the same immunity from involuntary bankruptcy as a "natural person" of like avocation.

And this view is confirmed by belief that it accords with the intention of Congress. Examination of the debates in both Houses when the bankruptcy measure was pending discloses the frequently expressed purpose to exempt farmers as a class from compulsory proceedings. In assigning reasons for this exemption reference was made to the fact that the property of farmers consists mainly of real estate and permanent fixtures, which cannot be removed or concealed, and that incumbrances upon such property are usually matters of public record. Primarily, as appears, it was sought to impose involuntary bankruptcy upon traders and middlemen, because of the wider range of their transactions, the convertible nature of their assets, and the inadequacy of state laws to prevent frauds upon their creditors. In short, the whole course of discussion indicates a purpose to exempt from liability the business or occupation of farming, and is quite inconsistent with any intent that the exemption should not apply to a partnership of farmers.

For the reasons above stated, we are of opinion that the partnership of H. D. Still's Sons was not liable to be adjudged an involuntary bankrupt, and therefore the court below was in error in decreeing adjudication. It follows that the decree appealed from should be re-

versed, and the proceedings remanded to the District Court for the Eastern District of South Carolina, with instructions to dismiss the petition.

Reversed.

H. D. STILL'S SONS v. AMERICAN NAT. BANK OF MACON et al.

(Circuit Court of Appeals, Fourth Circuit. December 19, 1913.)

No. 1,157.

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of South Carolina; Henry A. Middleton Smith, Judge.

Application of the American National Bank of Macon against H. D. Still's Sons, alleged bankrupts. On petition of the latter to superintend and revise in matter of law, an adjudication against them as bankrupts. Petition dismissed, without prejudice.

S. G. Mayfield, of Denmark, S. C., and Chas. Carroll Simms, of Barnwell, S. C., for petitioners.

George S. Jones, of Macon, Ga., and William H. Fleming, of Augusta, Ga. (Jas. A. Willis and H. L. O'Bannon, both of Barnwell, S. C., W. H. Townsend, of Columbia, S. C., and James Simons and Julian Mitchell, both of Charleston, S. C., on the brief), for respondents.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

KNAPP, Circuit Judge. As the decision of this court in No. 1,175, H. D. Still's Sons v. American National Bank et al., 209 Fed. 749, will have the effect of securing to petitioners the relief sought in this proceeding, the petition herein will be dismissed without prejudice.

BARRETT & DOUGHTY, Inc., et al. v. AMERICAN NAT. BANK OF
MACON et al.

(Circuit Court of Appeals, Fourth Circuit. December 19, 1913.)

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of South Carolina; Henry A. Middleton Smith, Judge.

In the matter of the bankruptcy proceedings against H. D. Still's Sons, alleged bankrupts. On petition by Barrett & Doughty, Inc., and others, creditors of the bankrupt, against the American National Bank of Macon and others, to superintend and revise in matters of law an adjudication against petitioners. Dismissed, without prejudice.

Alexander Akerman, of Macon, Ga., and R. J. Southall, of Augusta, Ga., for petitioners.

George S. Jones, of Macon, Ga., and William H. Fleming, of Augusta, Ga. (Jas. A. Willis and H. L. O'Bannon, both of Barnwell, S. C., W. H. Townsend, of Columbia, S. C., and James Simons and Julian Mitchell, both of Charleston, S. C., on the brief), for respondents.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

KNAPP, Circuit Judge. As the decision of this court in No. 1,175, H. D. Still's Sons v. American National Bank et al., 209 Fed. 749, will have the effect of securing to petitioners the relief sought in this proceeding, the petition herein will be dismissed without prejudice.

CANADIAN NORTHERN RY. CO. v. NORTHERN MISSISSIPPI RY. CO.

(Circuit Court of Appeals, Eighth Circuit. December 11, 1913.)

No. 3,890.

(Syllabus by the Court.)

1. CONTRACTS (§ 147*)—CONSTRUCTION—INTENTION OF PARTIES—ENTIRE CONTRACT EVIDENCES.

The intention of the parties at the time the contract is made determines its interpretation, and that intention must be deduced not from any part of it, or from the agreement without any part, but from every part so construed as to be consistent with every other part and with the entire contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

2. SALES (§ 218½*)—CONTRACT—TITLE TO PROPERTY—BILL OF LADING.

A bill of lading wherein the vendor is named as consignee, accompanied with a draft in his favor for the purchase price of the property, is almost conclusive evidence that the parties intended that the title and ownership of the property should remain in the vendor until the purchase price was paid. And when the bill of lading contains or is accompanied with an order that the property described therein shall not be delivered without a surrender of the bill of lading, compelling evidence is required to establish a counter intention.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 586, 587; Dec. Dig. § 218½.*]

3. SALES (§ 202*)—CONTRACT—TITLE OF PROPERTY.

A contract of sale of personal property, which declares that the vendor hereby sells and conveys property in consideration of \$39,000 to be paid from time to time on the surrender of order bills of lading in the name of the vendor of shipments of parts of the property accompanied by drafts for the agreed payments for such parts, respectively, and which contains a final stipulation that when the entire \$39,000 has been paid the remaining property shall thereupon and thereafter become the property of the vendee, is a contract of sale for cash, and the title and ownership of each part of the property remains in the vendor until the purchase price thereof is paid in cash.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 542-551; Dec. Dig. § 202.*]

4. ESTOPPEL (§ 52*)—"EQUITABLE ESTOPPEL."

One who by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and the latter rightfully acts on such belief so that he would be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped from making such denial.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. § 52.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2497-2508; vol. 8, p. 7655.]

5. ESTOPPEL (§ 97*)—EQUITABLE ESTOPPEL—SALES—PURCHASE FROM BUYER.

A vendor who made a contract of sale of personal property for cash to be paid on or before the delivery of each shipment thereof, which provided that its vendee should remove the property from the ground, load and ship it in the vendor's name, wrote a letter to its agent to the effect that it had sold the property to its vendee, and in that letter directed its

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

agent to deliver the property to the vendee. A purchaser from the vendee saw this letter in the hands of the agent.

Held, the letter was insufficient to evidence an estoppel of the vendor from proving and enforcing against the purchaser from its vendee the terms of its contract of sale because the letter disclosed no intention to deceive and no culpable negligence toward that purchaser.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 289; Dec. Dig. § 97.*]

6. ESTOPPEL (§§ 71, 75*)—EQUITABLE ESTOPPEL—STATEMENT—SILENCE—SALES.

A statement by the vendor to the purchaser from such vendee that the vendor had no claim or interest in the property sold, when the fact was that the purchase price had not been paid and the vendor held the title to the property, was sufficient to estop the vendor from proving any title or interest in the property to the damage of the purchaser who acted upon that statement.

But the silence of the vendor, or its mere statement that it had sold the property, was insufficient foundation for such an estoppel, because neither evidenced any intention to deceive or any culpable negligence toward such purchaser.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 173-182, 192-195; Dec. Dig. §§ 71, 75.*]

In Error to the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Action by the Northern Mississippi Railway Company against the Canadian Northern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. V. Mercer, of Minneapolis, Minn. (Hector Baxter, of Minneapolis, Minn., on the brief), for plaintiff in error.

William A. Tautges, of Minneapolis, Minn., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. This is an action against the Canadian Northern Railway Company, which will be called the "defendant," for the value of certain rails and fasteners which it transported under bills of lading which specified the Northern Mississippi Railway Company, the plaintiff below, as consignor and as consignee, and stipulated, as to each carrier thereof over any portion of the route designated therein, that every service performed thereunder should be subject to the conditions specified in the bills of lading and that surrender of the bills properly indorsed should be required before delivery of the property. The ground of the recovery was that the defendant delivered the property to third parties without requiring a surrender of the bills of lading and refused to deliver it or to pay its value to the plaintiff, the consignee named in and the holder of the bills. The defenses were that the defendant delivered the property to the true owners, Shaw Bros., whose title was superior to that of the plaintiff, that the bills of lading were fraudulently issued to the knowledge of the plaintiff, and that the plaintiff was estopped by its words and acts from asserting any title to or ownership of the property as against Shaw Bros. and the defendant. At the close of the trial the court instructed the jury that there was no substantial evidence to sustain the first and second defenses and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

submitted the question of the estoppel to them for decision. They returned a verdict for the plaintiff.

The true construction of a certain contract of sale of property, of which that transported under the bills of lading was a part, determines the validity of the first defense to this action. If the effect of that contract was to transfer and vest in the vendees the title and ownership of the property it described at the time the contract was made, the defense may be sustained. If that was not the effect of the contract, the defense must fail. That contract was made on January 6, 1911, between the plaintiff, the owner of the property described therein, and the Jones Purchasing Agency, who sold and transferred all their right to and interest in the property to Shaw Bros. The provisions of the contract material to the question of title are that the parties to it agree that in consideration of \$39,000 to be paid to the plaintiff as therein provided the plaintiff hereby sells and conveys to the agency certain rails, fasteners, locomotives, engines, cars, and railway equipment constituting a logging railroad, that the agency would pay \$10,000 of the \$39,000 in ten days by depositing it in the St. Anthony Falls Bank, that this \$10,000 should be retained by the bank and paid to the plaintiff as the last payment on the purchase price of the property, that the agency should take possession of and remove the property from the right of way and load and ship it in the name of the plaintiff at the expense of the agency, that the plaintiff should draw drafts on the agency for the specified value of each shipment accompanied with bills of lading thereof, that the bank should collect and retain the proceeds of these drafts for the plaintiff until those proceeds and the \$10,000 deposited with the bank should aggregate \$39,000, and that upon the payment in this way of the entire \$39,000 "all the remaining property hereinbefore described shall thereupon and thereafter become and be the property of said Jones Purchasing Agency and subject to their orders."

[1] The parties to this contract had the right and the power to make such an agreement of sale that the title and ownership of this property should vest in the vendees the instant the parties signed the agreement, and they had the right and the power to make such an agreement of sale that the title and ownership of no part of the property would pass from the vendor until the vendees had paid in cash for that part of the property. Which of these agreements have they made? The intention of the parties at the time their minds met upon the terms of the agreement must answer this question, and that intention must be deduced from the written agreement, the evidence in this case, and these established rules of law.

Under a contract of sale of personal property on credit, the title and ownership of the property vests in the vendee when the contract is signed and delivered, in the absence of evidence to the contrary. *Leonard v. Davis*, 66 U. S. (1 Black) 476, 483, 17 L. Ed. 222; *Hatch v. Oil Co.*, 100 U. S. 124, 135, 136, 25 L. Ed. 554; *Nash v. Brewster*, 39 Minn. 530, 532, 41 N. W. 105, 2 L. R. A. 409; *Case Rail v. Little Falls Lumber Co.*, 47 Minn. 422, 424, 50 N. W. 471; *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 74, 9 Sup. Ct. 458, 32 L. Ed.

854. Under a contract of sale of personal property for cash the title and ownership of the property remains in the vendor until the purchase price is paid in cash. *National Bank of Commerce v. Burlington & N. R. Co.*, 44 Minn. 224, 231, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566.

[2] A bill of lading wherein the vendee is named as consignee, accompanied with a draft on him in favor of the vendor for the purchase price, is evidence that the parties intended the sale to be for cash and that the title and ownership of the property should not be transferred to or vested in the purchaser until the purchase price of it was paid. *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.*, 72 S. C. 450, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627, 5 Ann. Cas. 261. A bill of lading wherein the vendor is named as consignee accompanied with a draft in his favor for the purchase price of the property is almost conclusive evidence that the parties intended that the title and ownership of the property should remain in the vendor until the purchase price was paid, and, when the bill of lading is accompanied with an order that the property shall not be delivered without a surrender of the bill of lading, the proof of that intention becomes so convincing that compelling evidence is required to overcome it. *Dows v. National Exchange Bank*, 91 U. S. 618, 631, 632, 23 L. Ed. 214; *Portland Flouring Mills Co. v. British & F. M. Ins. Co.*, 130 Fed. 860, 864, 65 C. C. A. 344; *Freeman v. Kraemer*, 63 Minn. 242, 246, 247, 65 N. W. 455; *Greenwood Grocery Co. v. Canadian County Mill & Elev. Co.*, 72 S. C. 451, 454, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627, 5 Ann. Cas. 261; *Norfolk & Western Ry. Co. v. Sims*, 191 U. S. 441, 448, 24 Sup. Ct. 151, 48 L. Ed. 254.

[3] The provisions of the agreement between the vendor and vendee in this case that \$10,000 of the purchase price should be deposited within ten days as the last payment on the purchase price of the property, that the vendees should remove and ship the property at their expense in the name of the vendor, and that the vendor should draw drafts in its favor accompanied with the bills of lading in its name for the value of each shipment, made it impossible for the vendees, without a violation of the contract, to obtain the use or benefit of any of the property until they paid for it in cash, and present almost conclusive evidence of the intention of the parties that the sale should be for cash and that the title and ownership of every part of the property should remain in the vendor until the vendees paid for it in cash, and the concluding stipulation of the agreement on this subject to the effect that after the entire \$39,000 was paid, and not before, "all the remaining property hereinbefore described shall thereupon and thereafter become and be the property of said Jones Purchasing Agency and subject to their orders," removes every lingering doubt that such was their intention. If it had been their intention and the effect of their contract that the title to the property should pass to the vendees when the contract was made, the title to this remaining property would have passed at that time and this stipulation would have been idle. But every provision of an agreement should have effect rather than that part should perish by construction and the intention of the parties to a contract must be deduced, not from

specific provisions or fragmentary parts of the agreement, but from the entire contract, because the intent is not evidenced by any part or provision of it, nor by the contract without any part or provision, but by every part and term so construed as to be consistent with every other part and with the entire contract. *United States Fidelity & Guaranty Co. v. Board of Com'rs*, 145 Fed. 144, 148, 76 C. C. A. 114, 118; *Jacobs v. Spalding*, 71 Wis. 177, 189, 36 N. W. 608; *Boardman v. Reed*, 6 Pet. 328, 8 L. Ed. 415; *Canal Co. v. Hill*, 15 Wall. 94, 21 L. Ed. 64; *O'Brien v. Miller*, 168 U. S. 287, 297, 18 Sup. Ct. 140, 42 L. Ed. 469; *Pressed Steel Car Co. v. Eastern Ry. Co.*, 57 C. C. A. 635, 637, 121 Fed. 609, 611; *Uinta Tunnel, etc., Co. v. Ajax Gold Min. Co.*, 141 Fed. 563, 73 C. C. A. 35.

This contract, read and interpreted according to this rule, compels the conclusion that the intention of the parties to it and its legal effect were to make the sale one for cash and to retain the title and ownership of every part of the property in the vendor until it was paid for in cash. Nor is there anything in the evidence in this case dehors the contract to cast doubt upon or to shake this conclusion. The defendant concedes that the plaintiff owned the property when the contract was made, that the \$10,000 was never deposited, that the vendees had paid from time to time, as their shipments were made under the contract, all of the \$39,000 except \$3,193.50 which remained unpaid, and the evidence is conclusive that the shipments for which the order bills of lading in suit were issued were shipments of a part of the property described in the contract, that these shipments were made in the name of the plaintiff as consignee as provided by the agreement, that the plaintiff is the owner and holder of these bills, that the value of the property is more than \$3,193.50, the amount of the verdict, and that \$3,193.50 of the \$39,000 purchase price remains unpaid. There was evidence tending to show that the Jones Purchasing Agency sold the property to Shaw Bros., and that the property was removed and shipped in the name of the plaintiff to such destinations as the agency or Shaw Bros. directed. But the agency could not convey more than they had, they could not convey the title or the ownership of any part of the property before they paid for that part in cash and the possession of the agency and of Shaw Bros. before the shipment was, as against the plaintiff, a special possession, not as owners, but for the mere purpose of removing and shipping the property in the name of the plaintiff in accordance with the terms of the contract, and it did not affect the plaintiff's title. The result is that the title and ownership of the property described in the bills of lading in suit was in the plaintiff until the unpaid balance of the purchase price was paid, there was no substantial evidence that the title of Shaw Bros. was paramount to that of the plaintiff, and there was no error in the charge of the court to this effect.

There was no substantial evidence of any fraud in the issue of the bills of lading, but proof that they were issued in strict accordance with the terms of the contract and with the written instruction given by the agency to their agent at the shipping point before any shipments were made, to ship all the property purchased in the plaintiff's name, and there was no error in the charge of the court that this defense of fraud

in the bills of lading could not prevail, nor in its rulings on the evidence offered in the trial of that issue.

Counsel for the defendant did not claim that the defense of estoppel was conclusively established by the record, but expressed the opinion that the evidence concerning it presented a question for the jury. They specify as error, however, many rulings of the court in the trial of this issue.

[4, 5] On January 6, 1911, the plaintiff made its contract of sale to the Purchasing Agency under which the agency agreed to take up and remove the property sold at their expense and ship it in the name of the plaintiff and to pay for each shipment in cash before the title should pass from the plaintiff. On January 12, 1911, the plaintiff wrote a letter to Alvin Eastman, its agent at the place of shipment, to the effect that it had sold the property to the agency, and in the letter directed him to deliver the property to them, and one of the Shaw Bros., who purchased from the Purchasing Agency, testified that some time in January he saw this letter in the hands of Eastman. It is specified as error that the court charged the jury that the defense now under consideration was what is known in law as an estoppel and that it was spoken of by this court as "the familiar and salutary rule that one who, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such belief so that he would be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial," and that the letter to Eastman would not sustain a finding of an estoppel in favor of Shaw Bros. But there was no error in this part of the charge because the court below correctly quoted the statement made by this court of the law of estoppel (*H. Scherer & Co. v. Everest*, 168 Fed. 822, 829, 94 C. C. A. 346, 353), and no reason why that statement is erroneous has been presented or is perceived, and because the letter was written and sent by the plaintiff to its agent and not to Shaw Bros. or to the defendant. They were strangers to the plaintiff's contract of sale, and it owed them no duty to disclose in this letter the terms of that contract. There was therefore no breach of duty to them and no negligence toward them in its writing and sending of that letter to its own agent, and there was no evidence that the plaintiff intended that any of them should ever see it or be induced by it to act in any way.

On January 6, 1911, the Jones Purchasing Agency made a contract to sell to Shaw Bros. for \$60,000 a large lot of rails, fasteners and other railroad equipment, and in the subsequent performance of the contract Shaw Bros. obtained the property described in the bills of lading in this case which the plaintiff had contracted to sell to the Purchasing Agency. On January 23, 1911, the Shaw Bros. were dissatisfied with what they had done with the Purchasing Agency and with the slow delivery of the property by them and one of the Shaw Bros., accompanied by their attorney and another employé, went to the office of Mr. Chute, the agent of the plaintiff, and had an interview with him. The attorney for the Shaw Bros. did not testify regarding this interview, doubtless

because he was one of the attorneys for the defendant in this case and he deemed it unprofessional to act as a witness for his client. The witnesses who testified regarding that conversation agreed that Mr. Shaw asked Mr. Chute if they could buy the property of the plaintiff and that he replied that they could not, that they must deal with the Purchasing Agency, that he afterwards brought out the plaintiff's contract of January 6, 1911, with the Purchasing Agency and read portions of it to them. The remainder of the testimony regarding this interview is contradictory. The witnesses for the defendant testified that Mr. Chute told Mr. Shaw that the plaintiff had sold the property to the Purchasing Agency, that the agency owned it, that the plaintiff had no claim upon or interest in it, that Mr. Shaw did not ask Mr. Chute whether or not the sale was for cash, nor whether or not the agency had paid for the goods, nor what the terms of its contract were, and that Mr. Chute did not hand the plaintiff's contract of sale to the attorney for Shaw Bros. On the other hand, Mr. Chute testified that Mr. Shaw said that the Shaw Bros. had bought the property in controversy of the agency, and that the latter delayed shipping it, that Mr. Chute told Mr. Shaw that the plaintiff had sold the property according to the contract which he brought out and handed to the attorney of the Shaw Bros. who examined it, and that he (Mr. Chute) said nothing about claiming any interest in the property more than that shown by the contract.

[6] It is specified as error that the court instructed the jury that: (1) The burden of proof to establish the estoppel and to establish every essential element of it was upon the defendant; (2) that it was the duty of the jury to determine exactly what Mr. Chute said at the interview of January 23, 1911, and that, if all he said was that the plaintiff had sold the logging rails, that statement would not be sufficient to raise an estoppel because it was true that he had sold them; (3) that, if Mr. Chute was silent regarding the claim or interest of the plaintiff in the rails, that silence would not sustain a finding of an estoppel; (4) that the jury should take into consideration the probability that Mr. Chute would make a statement that the plaintiff had no interest in the rails, when, as a matter of fact it had not been paid anything for them and had the entire interest in them; (5) that if Mr. Chute handed the contract to the attorney for Shaw Bros., and he read it, the jury would not be justified in finding a verdict for the defendant because that fact would prove that whatever Mr. Chute said Shaw Bros. knew from the contract that the plaintiff had an interest in the rails and what that interest was so that they could not thereafter act in reliance upon what Mr. Chute said at the same time that he gave them the contract; and (6) that the jury could not find that the plaintiff was estopped until they first found that Shaw Bros. paid for the rails in reliance upon the statement of Mr. Chute that the plaintiff had no interest or claim upon the rails.

It is too plain for debate that the first, fourth, fifth, and sixth instructions here challenged were right and they will not be further considered. Shaw Bros. had made a written contract to purchase this property of the Purchasing Agency more than two weeks before their interview with Mr. Chute, and so far as appears they were then legally

bound by that contract to take the property and to pay for it. The plaintiff had no contract relation with them. They were strangers to its contract with the Purchasing Agency. Prior to the interview of January 23, 1911, the plaintiff owed no duty to them to notify them or any other parties who had bought or might buy of the Purchasing Agency, of the terms of its contract with that agency, or of its claim to or interest in the property. The rule of law primarily applicable to the relation of Shaw Bros. to the plaintiff was caveat emptor, the duty was on them, the purchasers from the vendees, to ascertain at their peril that the vendor's claim and interest had passed to the vendees from whom they were purchasing. No duty is imposed upon the original owner to inform the purchaser of his vendee that the title to the property which it has contracted to sell has not passed to the latter. Therefore the silence of a vendor in relation to the terms of his contract for a sale of personal property for cash under ordinary circumstances evidences no intention to deceive or mislead the purchaser from the vendee and shows no breach of duty or negligence toward him. Now the evidence in this case was undisputed that it was only before the interview of January 23, 1911, that Mr. Chute was silent regarding the claim and interest of the plaintiff. The defendant's witnesses testified that at that interview he told Mr. Shaw that the plaintiff sold the property to the Purchasing Agency and that the plaintiff had no claim to or interest in it, and Mr. Chute testified, on the other hand, that he told Mr. Shaw that the plaintiff had sold the property in accordance with its written contract with the Purchasing Agency and handed that contract to the attorney of the Shaw Bros. who took and examined it, and no one came to testify that Mr. Chute was silent on this subject, for his alleged act of handing the contract to the attorney spoke louder and more plainly than words. Hence the charge of the court regarding the silence of Mr. Chute was applicable, under the evidence in this case, to the time prior to the interview of January 23, 1911, only, and his silence during that time was clearly insufficient to sustain an estoppel.

Counsel say, however, that the plaintiff knew at the time of the interview that Shaw Bros. had bought or were buying the property of the Purchasing Agency and that its statement that it had sold it to them when it had in fact merely made a contract to sell it to them for cash, furnished a sound basis for the estoppel. Mr. Justice Field, in delivering the opinion of the Supreme Court in *Henshaw v. Bissell*, 18 Wall. 255, 271 (21 L. Ed. 835) declared that "there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud" to warrant the application of the doctrine of equitable estoppel and negligence which does not amount to a breach of duty, does not constitute constructive fraud, and is not sufficient to raise an estoppel. *Farmers' & Merchants' Bank v. Farwell*, 58 Fed. 633, 636, 639, 7 C. C. A. 391, 394, 397; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 66, 30 C. C. A. 532, 535. No one asked Mr. Chute what the terms of the sale of the property by the plaintiff to the Purchasing Agency were, or whether it was a sale for cash or on time, or whether all or any part of the purchase price had been paid. It is common knowledge that

traders and business men frequently and honestly call property sold when they have made a contract to sell it, although the purchase price has not been paid and the title has not passed to the vendee, and contracts to sell for cash and contracts to sell on time are often termed sales for cash and sales on time before they have been performed. And after careful deliberation upon the question the conclusion of this court is that under the record in this case the fact, if it were a fact, that Mr. Chute told Mr. Shaw that the plaintiff had sold the property when it had only made a contract to sell it for cash evidenced no such intention to deceive or culpable negligence toward the Shaw Bros. as would sustain an estoppel in pais in their favor. The parts of the instruction of the court which have been assailed were extracted from a clear, concise, and consistent charge that if the jury found the other essential elements of an estoppel, that Mr. Chute stated to Mr. Shaw on January 23, 1911, as Mr. Shaw and his witnesses testified, that the plaintiff had no interest in or claim upon the property, they must find for the defendant, but that if they failed so to find they must return a verdict for the plaintiff. Complaint is made that certain requested instructions were not given, but the views already expressed dispose of the questions suggested by that complaint, and the conclusion is that there was no error in the charge of the court or in its refusal to charge.

Counsel for the defendant have assigned 78 alleged errors in the trial of this case. The controlling questions of law which were discussed at the bar and in the brief have now been considered and decided, and their decision rules many of these 78 specifications of error. It would serve no useful purpose to review the others seriatim, for they relate to minor questions and are either ill-founded in law or are rendered immaterial or conclusively shown not to have been prejudicial to the defendant by the application of the rules and principles which have been declared. Suffice it to say that none of these 78 specifications of error has escaped examination and consideration, but the result is that there was in the opinion of the court no error in the trial of this case which the record does not clearly prove could not have been prejudicial to the defendant, and the judgment below must be affirmed.

It is so ordered.

In re CHURCHILL.

CHURCHILL et al. v. BESTUL.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1,955.

1. BANKRUPTCY (§ 396*)—EXEMPTIONS—LIFE POLICY—RIGHT OF BENEFICIARY.

Where a life insurance policy was payable, in case of insured's death, to his wife, or if the insured was living at the end of 20 years he might elect to receive certain specified valuable benefits, insured, on becoming a bankrupt before the end of such period, was without right or power either to deprive his wife of the life insurance provision then existing in her

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

favor or to obtain any benefits thereunder by surrender or by other arrangements to which she did not expressly assent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. § 396.*]

2. BANKRUPTCY (§ 396*)—LIFE POLICY—RIGHT OF BENEFICIARY.

Where a life insurance policy insured a husband for the benefit of his wife, her rights as beneficiary are exempt from interference or control by him, both under the general law and by St. Wis. 1898, § 2347.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. § 396.*]

3. BANKRUPTCY (§ 143*)—LIFE INSURANCE POLICY—RIGHTS OF TRUSTEE.

Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vests in the bankrupt's trustee property which prior to filing of the petition the bankrupt by any means could have transferred, or which might have been levied on and sold under judicial process against him, provided that when any bankrupt shall have any insurance policy, which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within 30 days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so stated and continue to carry the policy. *Held*, that such section only applied to policies held by the bankrupt which have a cash surrender value, and hence where a policy on the bankrupt's life was payable to his wife on death before the end of 20 years, but had no surrender value when insured was adjudged a bankrupt prior to the end of such period, the fact that it also provided certain valuable optional benefits, which the bankrupt might avail himself of in case he survived the period, did not confer on the bankrupt's trustee any rights in the policy under such section.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

Petition to Review and Revise Order of the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

Bankruptcy proceedings of Charles Churchill. On petition by the bankrupt and his wife to review and revise in matters of law an order (198 Fed. 711) adjudging rights in favor of R. J. Bestul, the bankrupt's trustee, under an insurance policy on the life of the bankrupt. Order reversed, with directions.

This is a petition by the bankrupt and his wife for review and revision of an order in bankruptcy of the United States District Court for the Eastern District of Wisconsin, adjudicating rights in favor of the trustee under an insurance policy upon the life of the bankrupt.

The instrument in controversy is written by New York Life Insurance Company, bearing date December 20, 1892, and is variously named therein "insurance policy," "guaranteed interest bond," and "bond policy." It provides for annual premiums of \$189.80 to be paid "every year until ten full years' premium shall have been paid," and thereupon the insurance company "promises and agrees" on the face of the policy:

"First. That upon receipt and approval of proofs of the death, during the continuance of this bond policy, of Charles Churchill of Waupaca, county of Waupaca, state of Wisconsin (hereinafter called the insured), it will pay the amount of two thousand dollars, at its office in the city of New York, to Ann E., wife of the insured, or, in the event of her prior death, to the insured's executors, administrators or assigns.

"Second. That if this bond policy shall become payable in consequence of such death, occurring before the eighth day of December, nineteen hundred and twelve, and if the total amount of annual premiums paid, with interest

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

compounded at the rate of four per cent. per annum from the date of each payment to the date of death, shall exceed the face amount of the bond policy, the company will pay the amount of the difference between the face of the bond policy and the said amount so computed, as a mortuary dividend.

"The benefits, provisions and requirements, placed by the company on the back hereof, are a part of this contract, as fully as if recited over the signature hereto affixed."

The provisions referred to "on the back" of the policy, in so far as involved in the controversy, read as follows:

"Optional Benefits.

"If the insured is living on the 8th day of December in the year nineteen hundred and twelve, and if this bond policy is then in force, the premiums having been paid in full to that date, the insured shall be entitled to one of the following benefits:

"1. The continuance of this bond policy, which then becomes a paid-up insurance, payable at the death of the insured: Together with an annual income during the life of the insured of eighty dollars and cents per annum (being equal to four per cent. of the total amount of annual premiums paid), the first payment of said income to be made to the said insured, if living, on the 8th day of December, nineteen hundred and thirteen, and an equal payment to be made annually thereafter, provided the said insured shall be living when such annual payment becomes due; and, in addition, the conversion of the surplus then apportioned by the company to this bond policy into a life annuity, payable together with the income above guaranteed.

"2. The continuance of this bond policy, guaranteeing a paid-up insurance and an annual income as specified in benefit '1,' and the withdrawal in cash of the above-defined surplus.

"3. The surrender of the bond policy to the company for its cash value, which is hereby guaranteed shall not be less than two thousand dollars, and which shall in addition to that amount include the above-defined surplus.

"4. The surrender of this bond policy, and the conversion of its cash value, as above defined, into an annual income during the life of the insured, payable in like manner as provided in benefit '1,' it being guaranteed that the annual amount of such income shall not be less than two hundred and forty-nine dollars and ten cents.

"Provided, however, that the insured shall notify the company, in writing, not less than three months before the first-named date above, which privilege is selected, and that in default of such notice, benefit '1' shall be considered selected.

"Dividends.

"No dividends of surplus shall be allowed or paid upon this bond policy prior to the date specified above, at which it becomes entitled to one of the above benefits. If this bond policy is continued under benefit '1,' or '2,' it shall participate annually thereafter in any dividend declared by the company on its paid-up policies, and the cash value allowed for any such dividends shall be payable together with the income payments hereinabove provided for."

On September 15, 1910, the insured, Charles Churchill, was adjudged a bankrupt, on his voluntary petition, all premiums on the above-mentioned policy having been paid up in conformity with its terms. Subsequently the bankrupt joined with his wife in a petition thereunder, for exemption of the above-mentioned policy from any claim asserted by the trustee in bankruptcy and to have established in such petitioners "all right, title and interest" therein. On hearing thereof, the referee ruled against the petitioners, in substance: That the trustee in bankruptcy was entitled thereto; that the policy had a cash surrender value of \$1,860, at the date of the bankruptcy adjudication; that unless such amount was paid by the bankrupt to the trustee within 30 days, the policy must be delivered over to the trustee for the benefit of the estate. The order made by the referee accordingly was affirmed by the District Court, on certification of the proceedings for review. 198 Fed. 711.

Peter Fisher, of Kenosha, Wis., for petitioners.

Lloyd D. Smith, of Waupaca, Wis., for respondent.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). In the bankruptcy proceeding below, the bankrupt and his wife claimed all benefits provided under the life insurance policy in controversy, free from property rights therein asserted on the part of the trustee in bankruptcy. Their petition to that end was denied by the District Court, through an adjudication (in effect) that the estate in bankruptcy was entitled to all the benefits of such policy, unless the bankrupt paid over to the trustee, within 30 days, the sum of \$1,860, stated in the order as "the cash surrender value of said insurance policy." Review and revision of such order is sought by the petitioners, under their original petition before this court, the trustee's answer, and the certified record.

The issue of law thus presented is whether the provisions of the Bankruptcy Act authorize the ruling below that the trustee became entitled to the benefits of the policy in evidence. However difficult of solution that inquiry may be, it is not only free from complications of fact, but it neither appears nor is asserted that any terms of the policy applicable to the issue are uncertain in their meaning.

The policy was issued to Charles Churchill, as the insured, in 1892. It required all the premiums to be paid during the first ten years ensuing, and they were so paid, making the contract one of "paid-up insurance" long prior to September 15, 1910, the date of adjudication of the insured as a bankrupt. Its provisions which were operative at the last-mentioned date and at all times up to December 8, 1912, were those contained on the face of the policy, whereby his wife, then living, was made sole beneficiary in the event of death of the insured; and while its subsequent terms, made operative only after the expiration of twenty years from its date—to be considered later—provide optional benefits in favor of the bankrupt, which include surrender of the policy "for its cash value" as one of the options, it is both obvious from examination of the entire policy and conceded by the parties, that neither surrender by the insured nor cash surrender value thereof, at any period prior to December 8, 1912, was provided by the contract terms. At the stage, therefore, when bankruptcy intervened, the wife was made the sole beneficiary, throughout the above-mentioned period, of the life insurance secured by the policy. Its subsequent provisions, however, confer in substance the following "optional benefits" in favor of the insured, if "living on the 8th of December," 1912, namely: (1) Continuance of the policy as "a paid-up insurance, payable at the death of the insured," together with an annual income of \$80 during his life, and further conversion of the surplus apportioned to the policy "into a life annuity." (2) Continuance of the policy, "guaranteeing a paid-up insurance and an annual income" as above specified, and "withdrawal in cash of the above-defined surplus." (3) Surrender of the policy "for its cash value," to be not less than \$2,000 and in addition thereto "include the above-defined surplus." (4) Surrender of the policy and conversion of its cash value "into an annual income during the life of the insured," payable as described, to be not less than \$249.10. The insured is required to give written notice to the company "not less than three months" prior to the above date "which privilege is selected," and in default thereof "benefit 1 shall be considered selected." No "dividends

of surplus shall be allowed or paid" on the policy, prior to the date "at which it becomes entitled to one of the above benefits." If the policy is continued under benefits 1 or 2, "it shall participate annually thereafter in any dividend declared" on paid-up policies, to be paid with the income payments.

[1] Valuable benefits are thus secured in favor of the bankrupt, contingent on his surviving the 20-year period; but we are of opinion that the bankrupt was without right or power, when the adjudication of bankruptcy occurred, either to deprive his wife of the life insurance provision then existing in her favor, or to obtain any benefits thereunder, through surrender or other arrangement not expressly authorized by the wife.

[2] In reference to such interest of the wife, the law is well settled that her rights as beneficiary of life insurance are exempt from interference or control on the part of the insured husband—both under the general rule (*Central Bank of Washington v. Hume*, 128 U. S. 195, 203, 206, 9 Sup. Ct. 41, 32 L. Ed. 370), and pursuant to the Wisconsin Statute (section 2347, Wis. Stat. 1898) applicable thereto.

[3] Thus the issue is presented whether the above-mentioned prospective "optional benefits" in favor of the bankrupt constitute property which passes to the trustee within the meaning of the Bankruptcy Act. It arises irrespective of the alleged error in overruling the petitioners' contention that all benefits under the policy were exempt by the statutes of Wisconsin (Wis. Stat. 1898, subdiv. 19, § 2982, and section 2347) from claim on the part of creditors—an issue discussed in the opinion below and in the arguments of counsel herein, which may not be free from difficulty, under the Wisconsin authorities called to attention, whenever its solution becomes needful.

The order of the referee, on the hearing before him, appears to treat the policy as falling within the proviso of section 70a of the Bankruptcy Act, as an insurance policy held by the bankrupt "which has a cash surrender value payable to himself, his estate or personal representatives." It undertakes to ascertain and fix such value, at the date of adjudication in bankruptcy, to be \$1,860, and that the "insurance policy belonged to and should be taken possession of by" the trustee in bankruptcy, unless the bankrupt paid to him "the cash surrender value" thereof thus stated. We understand, however, from the opinion filed by the District Judge, that this view was disapproved, and that the ruling against the petitioners, on the issue under consideration, rested on the proposition that the policy, having no cash surrender value, must nevertheless "be treated as property of the bankrupt passing to the trustee." In other words, that the trustee derives title under the terms of section 70a immediately preceding the proviso, which reads:

"Property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

We are impressed with no doubt that the ruling of the referee was erroneous in its application of the above-mentioned proviso to this policy. Not only was surrender thereof by the bankrupt unauthorized

and no cash surrender value provided by the policy terms, when bankruptcy intervened, but the letter on the part of the insurance company, which appears to have been accepted as proof of such authorization and surrender value, was plainly without force to that end, if assumed to be admissible for any purpose. It merely purports to state the view of the "Actuary's Department" that "if the company had allowed a cash surrender value for this policy on September 15, 1910, the amount of such cash value would have been \$1,860," without even an intimation that any sum was then available to the bankrupt under rule or custom of the insurer. Moreover, another letter on the part of the company (also in the record) expressly states:

"The company does not pay a cash surrender or loan value for any of its policies except for such policies as provide for those values."

Thus the order must be predicated alone on the further contention above mentioned that the policy, having no cash surrender value in favor of the bankrupt, passes to the trustee under the general clause of the act referred to.

Is that interpretation tenable, in the light of the recent decisions of the Supreme Court, in three cases—*Burlingham et al., Trustees, v. Crouse*, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920; *Everett, Trustee, v. Judson*, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927; *Andrews v. Partridge, Trustee*, 228 U. S. 479, 33 Sup. Ct. 570, 57 L. Ed. 929—handed down April 28, 1913? That sanction appeared therefor in the line of authorities cited in the opinion below—including the pertinent opinion of this court, speaking through Judge Jenkins, in *Re Welling*, 113 Fed. 189, 191, 51 C. C. A. 151—cannot be doubted; but, if these interpretations of the act are inconsistent with the above-mentioned decisions of the ultimate authority, it is obvious that neither of such citations lends support to the order in the present case.

In *Burlingham et al., Trustees, v. Crouse*, the ruling of the Circuit Court of Appeals for the Second Circuit (181 Fed. 479, 104 C. C. A. 227) against the claim of a trustee in bankruptcy that he was entitled to the benefits of two policies outstanding upon the life of one of the bankrupts was affirmed. The policies were written by the Equitable Life Assurance Society, April 10, 1902, upon the life of Thomas A. McIntyre, and are thus described in the opinion:

"They were known as 'guaranteed cash-value, limited-payment, life policies,' each providing that upon the death of the insured the company would pay to his executors, administrators or assigns the sum of \$100,000 in fifty annual installments, or the sum of \$53,000 in cash, a total of \$106,000 for the two policies."

On April 14, 1906, the policies were assigned by the insured to his firm, T. A. McIntyre & Co., subsequently adjudicated bankrupt, both individually and as a copartnership; and the firm assigned the policies to the insurer on April 24, 1907, "as collateral security for a loan of \$15,370." On February 25, 1908, two months prior to the proceedings in bankruptcy, the firm assigned the policies to one Crouse, subject to the prior assignment as security. On April 25, 1908, the proceedings in bankruptcy were instituted and the adjudication occurred May 21, 1908; the assignee Crouse having paid meantime the premiums ac-

crued on the policies, \$6,078.38. The trustees in bankruptcy were elected July 24, 1908, and the insured, McIntyre, died July 29, 1908, so that the policies then became payable, and the insurer paid into court the proceeds thereof, less the amount of its loan, making the payment \$90,698.32. It is stated in the opinion that the policies had a cash surrender value of \$15,370 "when the trustees qualified," which was the amount of the above-mentioned loan thereon; but their suit to recover the excess was predicated on the contention that the bankrupt firm was vested with a transferable property right in the policies, far in excess of the loan, and that the transfer to Crouse constituted an unlawful preference under the terms of the Bankruptcy Act. Conceding that a valuable and transferable property interest of the firm was thus assigned, the Circuit Court of Appeals "held that under the circumstances the policies did not pass to the trustees as assets," so that the action to set aside the transfer to Crouse as a preference "could not be maintained."

We believe the rulings of the Supreme Court upon the issue thus presented are decisive of the instant inquiry. The opinion of Mr. Justice Day remarks, that "the correctness of this decision depends primarily upon the construction of section 70a of the Bankruptcy Act," with subdivision 5 as the special provision involved for interpretation. It refers to the general terms of the subdivision vesting in the trustee transferable property, followed by "the proviso with reference to insurance policies which have a cash surrender value," and then states:

"Two constructions have been given this section, and the question, as presented in this case, has not been the subject of direct determination in this court. The one favors the view that only policies having a cash surrender value are intended to pass to the trustee for the benefit of creditors. The other, conceding that the proviso deals with this class of policies, maintains that policies of life insurance which have no surrender value pass to the trustee under the language of section 70a immediately preceding the proviso, which reads: 'Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.'"

The cases upholding these views respectively are cited, including *In re Welling*, supra, *In re Orear*, 178 Fed. 632, 102 C. C. A. 78, 30 L. R. A. (N. S.) 990, and other authorities for the last-mentioned view, and the opinion proceeds:

"To determine the congressional intent in this respect requires a brief consideration of the nature of the rights dealt with. Life insurance may be given in a contract providing simply for payment of premiums on a calculated basis which accumulates no surplus for the holder. Such insurance has no surrender value. Policies, whether payable at the end of a term of years or at death, may be issued upon a basis of calculation which accumulates a net reserve in favor of the policy holder and which forms a consequent basis for the surrender of the policy by the insured with advantage to the company upon the payment of a part of this accumulated reserve. This feature of surrender value was discussed by Judge Brown of the Southern district of New York, in *Re McKinney* [D. C.] 15 Fed. 535, 537," quoted thereupon.

After review of the earlier rulings in *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, and *Hiscock v. Mertens*, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, the opinion mentions the fact that in the *Hiscock Case* the surrender value of the policies appeared

to be less than \$6,000 at the date of bankruptcy, whereas, shortly thereafter "the maturity of one of the policies would give it a value of over \$11,000," but that it was held "that this circumstance made no difference in the right of the insured to pay the surrender value and hold the policy." Its interpretation of the act, which we believe applicable here, is then stated:

"True it is that life insurance policies are a species of property and might be held to pass under the general terms of subdivision 5, § 70a; but a proviso dealing with a class of this property was inserted and must be given its due weight in construing the statute. It is also true that a proviso may sometimes mean simply additional legislation, and not be intended to have the usual and primary office of a proviso which is to limit generalities and exclude from the scope of the statute that which would otherwise be within its terms.

"This proviso deals with explicitness with the subject of life insurance held by the bankrupt which has a surrender value. Originally life insurance policies were contracts in consideration of annual sums paid as premiums for the payment of a fixed sum on the death of the insured. It is true that such contracts have been very much varied in form since, and policies payable in a period of years so as to become investments and means of money saving are in common use. But most of these policies will be found to have either a stipulated surrender value or an established value, the amount of which the companies are willing to pay and which brings the policy within the terms of the proviso (*Hiscock v. Mertens*, supra) and makes its present value available to the bankrupt estate. While life insurance is property, it is peculiar property. Legislatures of some of the states have provided that policies of insurance shall be exempt from liability for debt, and in many states provision is made for the protection from such liability of policies in favor of those dependent upon the insured. See *Holden v. Stratton*, supra.

"Congress undoubtedly had the nature of insurance contracts in mind in passing section 70a with its proviso. Ordinarily the keeping up of insurance of either class would require the payment of premiums perhaps for a number of years. For this purpose the estate might or might not have funds, or the payments might be so deferred as to unduly embarrass the settlement of the estate. Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive. In passing this statute Congress intended, while exacting this much, that when that sum was realized to the estate the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the act must be construed. We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset, otherwise to leave the insured the benefit of his life insurance."

The opinion above described was attended by two others, involving like issues under the act and further exemplification of the construction there adopted: (1) In *Everett, Trustee v. Judson*, on certiorari to the same court, its ruling (192 Fed. 834, 113 C. C. A. 158) in favor of the executor of the estate of the insured bankrupt was affirmed. Involuntary proceedings in bankruptcy were pending against the insured and his copartners in business when the insured committed suicide; the adjudication of bankruptcy against the firm occurring, not only after the appearance of the insured therein, but five days subsequent to his death. He owned three life insurance policies aggregat-

ing \$16,000, made payable to his estate, having cash surrender values respectively, subject to loans thereon which left a small excess over such value, aggregating \$68.80, when the petition in bankruptcy was filed. After the death of the insured the insurance companies paid to the trustee (under agreement) \$8,675.14 upon the policies, and the issue arose over claim of the trustee to the entire proceeds and claim of title thereto by the executor of the deceased, less the above-mentioned residue of cash surrender value. The opinion thereupon, referring to the *Burlingham Case*, states that "the principles therein laid down are controlling," but that the instant case has a "feature not directly involved" in that case, as the death of the insured (by suicide) occurred prior to the adjudication of bankruptcy. Its interpretation, in that view, of the various provisions of the act as fixing the line of cleavage, so that "the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition," and ruling thereupon for affirmance of the order in favor of the executor's claim, leave no room, as we believe, for support of the order in favor of the trustee in the case at bar. (2) The other case of *Andrews, Executor, v. Partridge, Trustee*, reached the Supreme Court, through writ of certiorari to the Circuit Court of Appeals for the Third Circuit. It involved, in substance, like issue with that presented in the *Burlingham Case*, but the ruling of the Circuit Court of Appeals awarded the net proceeds of the insurance policies in controversy to the trustee in bankruptcy. 191 Fed. 325, 112 C. C. A. 69, 41 L. R. A. (N. S.) 123. This judgment was reversed as inconsistent with "the principles laid down" in each of the foregoing cases.

We are of opinion, therefore, that the order in the case at bar is inconsistent with the doctrine thus settled by the Supreme Court, and that the petitioners are entitled to the benefits of the policy in controversy. The contention that the policy is not one of life insurance, within the meaning and effect of the proviso as above construed, because of the several options open to the insured after the expiration of twenty years, we believe to be untenable. Not only were the operative terms, at the date of bankruptcy, purely life insurance for the benefit of the wife, but we understand the policy, as an entirety, to be well recognized—both generally and in the above quotations from the *Burlingham Case*—as within the class of property embraced in the benefits of the proviso. Policies providing like optional benefits were directly involved in *Holden v. Stratton*, ante, and *Hiscock v. Mertens* (cited with approval in the *Burlingham Case*), and in each the application of the proviso to such policies was expressly upheld. See *In re Welling*, wherein like form of policy was involved. In reference to the several Wisconsin authorities, cited for and against this contention on behalf of the trustee, it is sufficient to remark that their definitions of life insurance policies relate alone to exemptions thereof provided by the state statute, so that their import can have no bearing upon the present inquiry, although of undoubted importance whenever an issue arises of exemption within such statutes.

In conformity with the foregoing view of the interpretation thus adopted by the ultimate authority, the order of the District Court is reversed, with direction to grant the relief sought by the petitioners.

In re HARTZELL.

CENTURY SAVINGS BANK v. ROBT. MOODY & SON et al.

(Circuit Court of Appeals, Eighth Circuit. December 11, 1913.)

No. 3,793.

1. BANKRUPTCY (§ 455*)—ADMINISTRATION OF ESTATE—DEMAND AGAINST ESTATE—PRESENTATION FOR ALLOWANCE.

Presentation for allowance of a demand against a bankrupt's estate is a step in bankruptcy proceedings as to which an appeal is especially provided by Bankr. Act July 1, 1898, c. 541, § 25, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), and, if both a demand and a lien securing it be presented at the same time, the procedure for the former dominates, the lien being regarded as a mere incident, but the creditor may assert his lien alone so as to create a controversy appealable under section 24a.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 916; Dec. Dig. § 455.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 440*)—SALE OF REAL PROPERTY—MORTGAGES—MARSHALING ASSETS—APPEAL—"CONTROVERSY ARISING IN BANKRUPTCY PROCEEDING."

Where a proceeding for the sale of mortgaged real property belonging to a bankrupt and to determine the priority of the respective liens resolved itself ultimately into a controversy between the lienholders, the property not selling for enough to pay the liens, and the trial court proceeded as in a plenary, independent controversy and rendered a decree, it was properly regarded as a controversy arising in bankruptcy proceedings and reviewable by appeal and not by petition to revise.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

Appeal from the District Court of the United States for the Southern District of Iowa.

In the matter of bankruptcy proceedings of Oscar M. Hartzell. An order entered on issues joined between the Century Savings Bank, Robt. Moody & Son, and R. A. Crawford, administrator of the estate of Emma G. Johnson, deceased, having been reversed on the appeal of the bank (204 Fed. 963), and a decree having been vacated, a motion was made to dismiss the appeal, on the ground that the remedy was by petition to revise. Denied.

Horatio F. Dale and W. G. Harvison, both of Des Moines, Iowa, for appellant.

S. F. Prouty, of Des Moines, Iowa, N. P. Willis, of Canadian, Tex., and Geo. F. Haid, of St. Louis, Mo., for appellee Robt. Moody & Son.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. This is a motion to dismiss the appeal of the Century Savings Bank from a decree of a District Court as a court of bankruptcy upon the ground that the exclusive remedy was by petition to revise. The appeal had been argued, submitted, and decided without suggestion by any one that appellant should have come here

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by a different route. After our opinion had been handed down (*Century Savings Bank v. Robt. Moody & Son*, 204 Fed. 963, 123 C. C. A. 285), and a decree had been entered in favor of appellant reversing the decree of the District Court, the appellees requested us to set the decree aside and make findings of fact and conclusions of law according to General Order in Bankruptcy No. 36, subd. 3 (89 Fed. xiv, 32 C. C. A. xxxvi), to enable them to take the case to the Supreme Court. The general order provides that the findings and conclusions be made at or before the entering of the decree. It is our practice not to anticipate a further appeal, but to await request for findings and conclusions; and, if the decree has then been entered, to vacate it so that the order may be observed. Therefore, when appellees made their request the decree was vacated, but, that being done, they for the first time challenged the particular method by which this court had acquired cognizance and made the motion to dismiss.

Passing the matter of practice disclosed by the foregoing, the question presented depends upon the character of the proceeding below from which the appeal was taken. By section 2, p. 7, of the Bankruptcy Act, courts of bankruptcy have jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto." Section 24a gives Circuit Courts of Appeals jurisdiction by appeal of "controversies arising in bankruptcy proceedings." By 24b they have jurisdiction in equity to superintend and revise in matter of law proceedings in bankruptcy. Section 25a, which also relates to proceedings in bankruptcy or bankruptcy proceedings proper as distinguished from controversies, provides for appeals to the Circuit Court of Appeals in three classes of cases, the third being "a judgment allowing or rejecting a debt or claim of five hundred dollars or over"; but this case is not of that character.

[1] The following conclusions may be drawn from the decisions of the Supreme Court: The presentation for allowance of a demand against a bankrupt's estate is a step in bankruptcy proceedings as to which appeal is specially provided by section 25. If both a demand and a lien to secure it be presented at the same time, the procedure for the former dominates, the lien goes along as an incident, and the double presentation is also regarded as a step in the bankruptcy proceeding. To this effect are *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, and *In re Loving*, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725. Of *Hutchinson v. Otis*, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, sometimes carelessly cited, the court said in *Coder v. Arts*:

"The contest in the *Otis Case*, as in this, was over the claim presented, and, incidentally, to establish a lien upon the bankrupt's estate."

In none of the cases, however, has it been held that there cannot be an independent assertion of the lien alone so as to create a controversy appealable under section 24a. *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. 610, and *Houghton v. Burden*, 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. 780, are examples of controversies over liens. In the former, the trustee first petitioned for the sale of the bankrupt's property. A mortgagee then intervened

"and asked to have the lien of the mortgage established as the first lien on the property and satisfied out of the proceeds of the sale. The property was sold, and the question is as to the lien of these mortgages upon the fund." It was held this made an appealable controversy, not a bankruptcy proceeding. *Houghton v. Burden*, as explained by the report in the Court of Appeals, *In re Canfield*, 113 C. C. A. 562, 193 Fed. 934, also involved an independent assertion of a security or lien giving rise to a controversy appealable under section 24a. *Coder v. Arts and In re Loving*, on the one hand, and *Knapp v. Milwaukee Trust Co. and Houghton v. Burden*, on the other, are in entire harmony. Other instances of appeals in controversies over liens are *Hurley v. Railway*, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729, Id., 82 C. C. A. 453, 153 Fed. 503, and *Merchants' Nat. Bank v. Sexton*, 228 U. S. 634, 33 Sup. Ct. 725, 57 L. Ed. 998, sub nom. *In re Kessler*, 108 C. C. A. 239, 186 Fed. 127, without discussion, however, of the particular appellate remedy. The latter case went to the Court of Appeals by both appeal and petition to revise, and it does not appear which was entertained, but as section 25 did not apply, and as there was a further appeal to the Supreme Court, jurisdiction depended upon 24a, not 24b. Had it been a petition to revise under 24b, see *Holden v. Stratton*, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116. Whether there is a controversy for appeal or a mere bankruptcy proceeding for petition to revise does not necessarily depend upon who first brought it about. For example, in the *Knapp Case*, which was held to be a controversy, the trustee petitioned that the property be sold and then the mortgagee appeared for the assertion of his lien.

[2] Is this case a controversy arising in a bankruptcy proceeding within 24a, or is it a bankruptcy proceeding under 24b? If the former, appeal is the remedy; if the latter, petition to revise. In our former opinion only those facts were recited which were necessary to present the question decided. It is now necessary to go further to determine the character of the proceeding in the District Court. One Hartzell had been adjudged bankrupt. In his estate were 960 acres of land heavily incumbered with mortgage, judgment, attachment, and tax liens. His homestead was included in this land and was claimed as such in his schedule, but the exemption was afterwards waived by him and his wife. The trustees in bankruptcy filed a petition that the land be sold free of all incumbrances, that the liens be marshaled and transferred to the proceeds, that a prior sale under a foreclosure of a mechanics' lien and also an attachment be declared null and void, and "that these trustees have all other relief as may be necessary and proper in the premises." The appellant, the Century Savings Bank, had a valid mortgage upon all of the land including the homestead. *Moody & Son*, the appellees, had a mortgage upon all of the land including the homestead; but as to the latter the wife of the bankrupt had not joined. The appellant bank filed what it termed an answer, in which it asked relief against not only the trustees but also the appellees. It set out in this pleading the various incumbrances and liens in detail, admitted some as superior to its mortgage, claimed that others were inferior, denied that the appellees had any mortgage or interest in any

of the real estate, and alleged that their pretended mortgage on the homestead was null and void under the state statute because the bankrupt's wife had not joined. The appellant also denied the right of the trustees to the homestead and the jurisdiction of the court over it except to determine the boundaries and set it off to the bankrupt with leave to the creditors to prosecute their liens against it in the state courts; but said it did not object to the sale of the property provided its mortgage rights were protected and extended to the proceeds. It averred that it had filed its claim as a creditor of the bankrupt. The prayer was that, if the property was sold free from the liens, the proceeds be distributed in the order definitely specified by the appellant, those of the homestead to be kept separate, and that if there then remained a balance due appellant it should in respect thereof be allowed to participate with other creditors in the general assets and "for all such other and further relief as to equity may pertain." The pleading of the appellant, though styled an answer, was in substance an intervening petition claiming affirmative relief in respect of its lien against both the trustees and the appellees. The claim against the trustees, if it had any merit, which is doubtful, became immaterial, as will presently be seen, and the real controversy was between appellant and appellees over the validity of appellees' mortgage and the priority of their respective liens. It is important to note that appellant was not asserting its mortgage lien as an incident to the presentation for allowance of its claim against the general estate, as was the case in *Coder v. Arts and In re Loving*. So far as could be in the nature of things, there was a separate, independent assertion of its mortgage. The District Court ordered the sale of the lands and that the liens be transferred to the proceeds. The sale was made for a sum insufficient to pay the mortgages, all of which were prior to and unaffected by the bankruptcy proceedings. In other words, it became manifest nothing would be left for the general estate, and it could be of no interest to the trustees or the general estate whether a deficiency of claim after the application of the proceeds of the mortgaged realty should be that of appellant or that of the appellees; so there was then disclosed a controversy in which the trustees had no real interest but which was between individual lienholders. The District Court then proceeded to try the issues between the appellant and the appellees. The appellant filed exceptions to the proposed findings of fact, conclusions of law, and decree of the District Court; the exceptions were overruled; and a decree was entered in favor of the appellees upon the matter in difference between them and the appellant. The nature of this decree appears from our former opinion.

The case has the substantial aspects of an independent controversy. There is a distinct alignment of parties, and pleadings unconnected with the ordinary assertion for allowance of a demand against the estate. The marshaling of liens is a substantive head of equitable jurisdiction. Appellant's pleading was in substance and form an intervention in equity. The trial court proceeded as in a plenary, independent controversy and called its conclusion a decree. To be sure, the property belonged to the bankrupt and was in the control of the trus-

tees, but section 2, p. 7, and section 24a contemplate controversies over property so owned and situated. A controversy under 24a may be as to title (*Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986), or as to lien (*Knapp v. Milwaukee Trust Co.*, *supra*); but if the latter it should arise independently of the ordinary presentation for allowance of the claim it secures (*Coder v. Arts*, *supra*). This was a controversy under 24a, and appeal, not petition to revise, was the proper remedy.

The motion to dismiss is denied. The request for findings of fact and conclusions of law is also denied. General order 36 does not apply. *Knapp v. Milwaukee Trust Co.*, *supra*. The order setting aside the decree is vacated.

SMITH, Circuit Judge. I concur in the foregoing opinion, but in doing so attach weight to the fact that this was a controversy as to the proceeds of the homestead and so far as the matters here are concerned involved nothing else. The homestead was exempt under the laws of Iowa. Section 2972, Code of 1897. Under the circumstances, the title to it did not pass to the trustee. *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061; *Ingram v. Wilson*, 125 Fed. 913, 60 C. C. A. 618; *In re Nye*, 133 Fed. 33, 66 C. C. A. 139; *In re O'Rear*, 189 Fed. 888, 111 C. C. A. 150; *Gregory v. Bristol*, 191 Fed. 31, 111 C. C. A. 89; *Huntington v. Baskerville*, 192 Fed. 813, 113 C. C. A. 137.

The only jurisdiction the court had in the bankruptcy proceeding proper was to set apart the exemptions. True, the homestead was mortgaged with other property which was subject to the bankruptcy proceeding, but the entire property was mortgaged for more than it was worth. The general creditors had no claims against the homestead, and the District Court as a court of bankruptcy had no jurisdiction to take the homestead into its possession because the general creditors had and could have no claims against it. The court of bankruptcy as such therefore had nothing whatever to do with the homestead except to assign or set it off. If the homestead or its proceeds ever further came within the jurisdiction of the District Court, it was not in the bankruptcy case proper, but in a controversy which arose therein.

The opinion of Judge HOOK is exhaustive and is, I think, correct, but I prefer to put my concurrence chiefly upon the grounds just stated.

BEER et al. v. MOFFATT, Internal Revenue Collector.

(Circuit Court of Appeals, Third Circuit. December 19, 1913.)

No. 1687.

INTERNAL REVENUE (§ 8*)—LEGACY TAX—REFUNDMENT—STATUTES—VESTING OF LEGACY.

Testator bequeathed the residue of his estate, one-half to his widow and her heirs absolutely, in lieu of dower, and one-half to his executors, to divide into as many shares as testator had children surviving, and one share for the issue collectively of each child who might have died leaving

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

issue, the shares to be set apart, invested, and applied to the use of the children and the issue of deceased children according to specified provisions; that the income of one share to each son should be paid to him until he reached 21, when he was to be paid \$20,000 out of the principal of his share, and that the income of the residue should be paid to him until he reached 25, when he was to have the same absolutely; that in case a son should die before reaching 25 and leave issue, his share should go to the issue equally, and if he died leaving no issue, then to his surviving brothers and sisters and the issue of deceased brothers and sisters per stirpes; and that as to the shares set apart for testator's daughters he directed payment of the income of one share to each daughter until her marriage, then bequeathed of such share to her \$35,000, the income of the residue to be paid to the daughter for life, and on her death to her issue, if any, otherwise to her surviving brothers and sisters and their issue. One of testator's sons died in his lifetime, and he himself died July 18, 1901, at which time all the other sons were older than 25, and all the daughters were older than 21. *Held* that, notwithstanding under the state statutes of New Jersey the executors were not bound to pay the legacies until more than a year after testator's death, such fact did not affect the quality of the estates bequeathed, which vested absolutely in testator's children at the date of his death prior to the repeal of War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), by Act April 12, 1902, c. 500, § 7, 32 Stat. 96 (U. S. Comp. St. Supp. 1911, p. 980), and Act June 27, 1902, c. 1160, § 1, 32 Stat. 406 (U. S. Comp. St. Supp. 1911, p. 983), and hence, such legacies were taxable under such act.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. § 8.*]

Internal revenue tax on legacies, inheritances, and transfers, see note to *Ward v. Sage*, 108 C. C. A. 417.]

In Error to the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Action by Walter E. Beer and another, as executors of Julius Beer, deceased, against Isaac Moffatt, Collector of Internal Revenue, to recover certain legacy taxes paid under War Revenue Act June 13, 1898, c. 448, §§ 29, 30, 30 Stat. 464, 465 (U. S. Comp. St. 1901, pp. 2307, 2308). From a judgment in favor of defendant (192 Fed. 984), plaintiffs bring error. Affirmed.

John M. Enright, of Jersey City, N. J. (McDermott & Enright, of Jersey City, N. J., of counsel), for plaintiffs in error.

J. Warren Davis, U. S. Atty., of Camden, N. J., and Walter H. Bacon, Asst. U. S. Atty., of Bridgeton, N. J., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. On March 7, 1904, the executors of Julius Beer paid to the United States \$14,230.38, the amount of tax assessed by the Collector of Internal Revenue upon certain legacies given by the decedent's will. The executors made the proper claim for repayment, and brought the present suit after the claim was rejected. The parties agreed upon the facts, waived a jury, and tried the case before the late Judge Cross, who entered judgment in favor of the collector. *Beer et al. v. Moffatt* (D. C.) 192 Fed. 984. The tax was assessed under sections 29 and 30 of the War Revenue Act of 1898,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the question for decision is, Did the legacies vest before July 1, 1902? If the answer is in the affirmative, they were properly taxed; if in the negative, the judgment is wrong.

The relevant facts are as follows: Julius Beer, a resident of New Jersey, died on July 18, 1901. He and two of his sons (who afterwards became the executors of the will) composed the firm of Weil & Co. His interest in the personal property of the firm—consisting of tobacco in bonded and free warehouses, of stocks and bonds, accounts, bills receivable, and moneys in bank—was the sole source of the legacies in question. He owned and disposed of some other property, real and personal, but these facts have no bearing upon the present controversy. Clause 8 of the will provides as follows:

"8. I authorize and direct my executors, with the consent of my wife, to continue the business that may be carried on by me at the time of my death, to such a period and in such a manner as a majority of my executors, that may qualify, may direct, and subject to the provisions of this article.

"And in the event of my business being thus carried on by my executors they may, at their discretion, defer the division of my estate as directed by article fifth hereof, until fifteen years after my death, provided, however, that my wife and my youngest child living at my death shall survive until such date, but such division shall not be deferred beyond the life of the survivor of my wife and said youngest child.

"And in the meantime, while the business is to be carried on, I direct that the income thereof to the extent of thirty-eight thousand dollars a year, shall be paid to my wife at such time and in such proportions as she shall direct for her use and for the education and support of our children, and if in any year the income of said business shall be less than thirty-eight thousand dollars; then, in the discretion of my executors, they may apply to the use of my wife so much of the capital invested in said business as shall, with the income during said year, equal the sum of thirty-eight thousand dollars."

The executors contend, first, that this clause of the will made the legacies contingent, because to continue the business would necessarily defer the time for paying the legacies, and moreover (since the legacies were to be paid from the residue of the estate), because while the business was going on the amount of the residue could not possibly be ascertained. The argument has some other aspects, but none of them needs much consideration, because as a whole the argument cannot be given such weight as it might possess if it were supported by the necessary facts. Except the following passage from the schedule of the decedent's firm property, there is nothing before us to show what the executors actually did under the foregoing clause. The schedule was made by the collector in March, 1904, and recites, that:

"The business was continued by the survivors until January 1, 1902, when a balance sheet was struck, and the interest of the deceased was ascertained in the sum of \$2,411,526.53. The real estate was included in this amount, and was valued on the books at the sum of \$123,113.77, so that the total standing to the credit of the deceased exclusive of real estate was the sum of \$2,288,412.76."

Under this schedule and the assessment made thereon the tax was calculated and collected with no other objection than the insistence that there was no liability at all; and we must assume, therefore, that the firm business was not continued beyond January 1, 1902. Accordingly, even if clause 8 did defer the vesting of the legacies until the business

should be closed—we express no opinion on this subject—the date of vesting was in fact postponed for less than six months, namely, from July 18, 1901, until the first day of the following year. Obviously this postponement is too short to benefit the executors; any legacy that vested before July 1, 1902, was liable to the tax; and we therefore turn at once to the remaining question, Did clause 5 of the will vest the legacies at the testator's death? The clause is as follows:

"5. All the rest, residue and remainder of my estate, real and personal, I give, devise and bequeath as follows: One-half thereof to my beloved wife, Sophia, and to her heirs and assigns absolutely, this provision being in lieu of dower in my estate; one-half thereof to my executors, their survivors and successors, in trust, to divide the same into as many shares as shall make one share for each child me surviving, and one share for the issue collectively of any child who may have died before me leaving issue, which said shares are to be set apart, invested, and applied to the use of my said children and the issue of deceased children as follows:

"As to the shares set apart for my sons, I direct my executors to invest the same at their discretion and pay the income of one share to each son until he reaches the age of twenty-one years, whereupon, twenty thousand dollars out of the principal of said share is to be paid to him and of the residue thereof, the income is to be paid to such son until he reaches the age of twenty-five years, whereupon I bequeath and devise the entire residue of such share to him absolutely. Provided, however, that as to the share set apart for my son, Henry, I direct that the income of his share is to be paid to him until he attains the age of twenty-eight years, when I bequeath and devise the residue of the principal of his share to him absolutely. Should any son die before reaching the age of twenty-five years and leaving issue, or should my son Henry die before attaining the age of twenty-eight years, and leaving issue, the share of the son so dying, or so much thereof as shall not have been advanced pursuant to the provisions hereof, is to go to his issue equally, to whom I bequeath and devise the same. Should any son (other than my son Henry) die before attaining the age of twenty-five years, or should my son Henry die before attaining the age of twenty-eight years, and leaving no issue, his share or so much thereof as shall not have been advanced as aforesaid, is to go to the surviving brothers and sisters, and the issue of deceased brothers and sisters, equally per stirpes, to whom I devise and bequeath the same.

"As to the shares set apart for my daughters, I direct my executors to invest the same at their discretion, and to pay the income of one share to each daughter until her marriage, and I bequeath of the principal of such share thirty-five thousand dollars to such daughter, upon her marriage, and of the residue of such principal the income is to be paid to such daughter for life, and upon her death leaving issue, I bequeath the residue of such principal to her issue, to be divided equally, share and share alike. Should any one of my said daughters die without leaving issue, then the share set apart for her benefit, I bequeath and devise to her surviving brothers and sisters and to the issue of such as may have died, equally per stirpes.

"Should any child of mine die before me and leaving lawful issue, such issue are to take collectively the share in my estate that would have been given to their parent, had he or she been living at the time of my death.

"In the event that any of my daughters has married in my lifetime, then I direct that from her share of my estate, there be deducted the amount that my books will show has been advanced to her at the time of her marriage, and of the residue of the principal of her share, she is to receive the income thereof for life, and upon her death leaving issue, the residue of such principal is to be paid to the issue equally."

Apparently Henry died in the testator's lifetime; all the other sons were older than 25 years in July, 1901, and all the daughters were older than 21 years; two of them having already married at their

father's death, and the third marrying a few months thereafter. The collector appraised and assessed the interest of each son as absolute and vested, and the interest of each daughter as a vested life estate. Judge Cross assumed that the interests of the sons were absolute and vested, and discussed clause 5 merely in its effect upon the life estates of the daughters. We see no need to distinguish; it is not denied that the sons were given absolute estates; the only question is, When did such estates, as well as the daughters' life estates, vest in possession or enjoyment under the proper construction of clause 5? If all the legacies vested in July, 1901, the Acts of April 12, 1902, and of June 27, 1902, did not relieve them from liability to the tax. As is well known, these statutes repealed section 29 of the War Revenue Act, fixing July 1, 1902, as the date when the repeal should take effect, and providing also for the refund of tax upon "*contingent* beneficial interests which shall not have become vested prior to July 1, 1902." There is no dispute concerning the effect of the Acts of 1902. In the brief of counsel for the executors (page 11) it is conceded "that if the legacies were vested in possession or enjoyment prior to July 1, 1902, then the tax was legally paid, and cannot be recovered back, either under the refunding act or under the general practice permitting the recovery of a tax paid under compulsion or duress"—the position of counsel being that "the establishment of our contention that the tax was illegally assessed prior to the vesting of the legacy in possession or enjoyment necessarily brings us within the refunding act giving the right to recover."

The question therefore may be stated in these words: Under clause 5, were these legacies vested in possession or enjoyment before July 1, 1902? If it were not for the statutes of New Jersey concerning the administration of decedents' estates, an affirmative answer would be given without hesitation. We need not repeat what has already been said in several cases where the questions now involved have been elaborately discussed; it would merely burden the reports if we said again what has been sufficiently said in opinions of the highest authority. *Vanderbilt v. Eidman*, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563; *Herz v. Woodman*, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. Ed. 1001; *U. S. v. Fidelity Trust Co.*, 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed. 137. See, also, the following decisions in the Second and Ninth Circuits: *Title, etc., Co. v. Ward*, 184 Fed. 447, 107 C. C. A. 41; *Ward v. Sage*, 185 Fed. 7, 108 C. C. A. 413; *Muenter v. Trust Co.*, 185 Fed. 480, 115 C. C. A. 390. Our own case of *Herold v. Shanley* (C. C. A. 3d Circ.) 146 Fed. 20, 76 C. C. A. 478, is not at all in conflict with these decisions, and we do not think it needs explanation.

Turning then to the New Jersey statutes (which we shall not refer to in detail), we find nothing in their provisions that requires us to answer the question differently. The fact that executors in that state are ordinarily not obliged to pay legacies until after a year from the testator's death has no effect upon the quality of the estate given to a legatee by the will. This period of delay is granted for purposes of administration, and does not transform an estate that would otherwise

be vested into an estate that is contingent: *Baldwin v. Eidman* (D. C. N. Y.) 202 Fed. 968. The New Jersey decisions concerning interest on legacies do not modify the statement just made. *Welsh v. Brown*, 43 N. J. Law, 37; *Marsh v. Taylor*, 43 N. J. Eq. 1, 10 Atl. 486; *Davison v. Rake*, 45 N. J. Eq. 767, 18 Atl. 752.

The judgment is affirmed.

In re LOUISELL LUMBER CO.

ARMOUR & CO. v. MILLER et al.

(Circuit Court of Appeals, Fifth Circuit. December 26, 1913.)

No. 2,523.

1. BANKRUPTCY (§ 81*)—PETITION—REQUISITES.

A bankruptcy petition, which contained no statement that the alleged bankrupt had committed one of the statutory acts of bankruptcy, was fatally defective.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113–118, 125; Dec. Dig. § 81.*]

2. BANKRUPTCY (§ 81*)—PETITION—ACTS OF BANKRUPTCY.

A bankruptcy petition, alleging that the bankrupt had transferred, while insolvent, a portion of its property to one or more of its creditors with intent to prefer them over others, was fatally defective for failure to aver that the transfer was made within four months before the filing of the petition, as provided by Bankr. Act July 1, 1898, c. 541, § 3b, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113–118, 125; Dec. Dig. § 81.*]

3. BANKRUPTCY (§ 200*)—ADJUDICATION—DISSOLUTION OF LIENS.

Adjudication in bankruptcy dissolves liens obtained by proceedings at law or in equity only in case they are obtained under certain circumstances, and within four months of the filing of the bankruptcy petition, as provided by Bankr. Act July 1, 1898, c. 541, § 67c, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), which limitation protects and preserves liens so obtained more than four months prior to the filing of such petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296–300, 306–316; Dec. Dig. § 200.*]

4. BANKRUPTCY (§ 84*)—PETITION—AMENDMENT.

A bankruptcy petition is amendable as pleadings in other actions, if the amendment is properly allowed, and only goes to the greater elucidation of charges already made, and does not set up new matter, when the amended pleading will be regarded as a continuation of the original and will relate back so as to take effect as of the date the original was filed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. § 84.*]

5. BANKRUPTCY (§ 84*)—PETITION—AMENDMENT—LIENS.

Where an original bankruptcy petition filed within four months after the obtaining of an attachment against certain of the bankrupt's property was fatally defective, in that it charged no specific act of bankruptcy to have been committed by accused, an amendment filed after the four months' period had elapsed could not be held effective by relation as of the date of the filing of the original, to vacate the attachment lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. § 84.*]

Petition to Superintend and Revise Order, and Appeal from, the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

In the matter of bankruptcy proceedings of the Louisell Lumber Company. From an order dissolving the lien of attachment levied on certain of the bankrupt's property, Armour & Co. bring the case here by petition to superintend and revise and appeal. Petition to revise granted, and decree reversed.

T. C. Hannah and John T. Haney, both of Hattiesburg, Miss., for petitioner and appellant.

E. J. Bowers and V. A. Griffith, both of Gulfport, Miss. (Hanun Gardner, of Gulfport, Miss., on the brief), for respondents and appellees.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

SHELBY, Circuit Judge. [1] Armour & Co. brought an attachment suit in a Mississippi state court against the Louisell Lumber Company, a corporation, for \$2,835.51, and obtained by levy a lien on the company's property, including its general stock of merchandise. The levy on the merchandise occurred on June 24, 1911; other levies having been made before that date. Subsequently, these levies being deemed insufficient, the sheriff took into his possession by virtue of the attachment \$1,500 in cash, the property of the Louisell Lumber Company. On October 3, 1911, which was less than four months of the date of the levy of the attachment, three creditors of the corporation filed in the court below a petition to have the corporation adjudicated a bankrupt. This petition contains allegations of the company's indebtedness to the petitioners and an elaborate allegation of the company's insolvency, and prayed that it be adjudicated a bankrupt. The petition was fatally defective in this: It contained no statement whatever that the corporation had committed any one of the five acts of bankruptcy. Bankruptcy Act, § 3. It did not contain any attempt or defective effort to state any one of such acts of bankruptcy. It was an absolute blank so far as such allegations are concerned. On February 21, 1912, about eight months after the levy of the attachment and the fixing of the lien in favor of Armour & Co., the petitioning creditors were allowed by the court below to amend the petition by inserting the following:

(A) "The said Louisell Lumber Company has transferred while insolvent a portion of its property to one or more of its creditors with intent to prefer such creditors over its other creditors."

(B) "The said Louisell Lumber Company is not only insolvent and has wholly suspended payment for more than two months prior to the filing of said petition, but has admitted in writing its inability to pay its debts, and by the action of its board of directors taken on the — day of February, A. D. 1912, has confessed itself a bankrupt, signified its willingness to be adjudged a bankrupt, as will appear by copy of proceedings to be filed herein with reference to said matter."

[2] The amendment marked "A" is defective in not alleging that the transfer was made within four months before the petition was filed.

Bankruptcy Act, § 3b. The act of bankruptcy stated in amendment marked "B" is alleged to have been committed about four months after the petition was filed and about eight months after the levy of the attachment.

On February 3, 1912, the District Court appointed T. J. B. Kellier receiver of the Louisell Lumber Company. On February 21, 1912, the District Court ordered the sheriff to surrender to T. J. B. Kellier, receiver, all the assets held by him under the attachments issued by the state court. On the same day the Louisell Lumber Company was adjudicated a bankrupt. The assets so held by the sheriff were surrendered by him to the receiver.

Thereupon Armour & Co. filed their petition in the court below, alleging the foregoing facts, and others not material to be now stated, and asserted the prior lien of the attachment and levies. Their contention, in brief, is that, although the defective petition of the creditors seeking to have the Louisell Lumber Company adjudicated a bankrupt was filed within less than four months after the levy of the attachment, the amendments setting out acts of bankruptcy were not made till after the expiration of more than four months from the levy of the attachment and the fixing of the lien thereby, and that therefore the lien of the attachment was not dissolved by the proceedings in bankruptcy. The referee found, as matter of law, that the amendment filed and allowed February 21, 1912, related back to the filing of the original defective petition on October 3, 1911, and that therefore the levies of the attachment were within four months of the filing of a sufficient petition in bankruptcy, and that "said levies fell and were ousted" by the proceedings in bankruptcy. On petition for review, the District Court affirmed this finding, and Armour & Co. bring the case here both by appeal and by petition to revise.

From the foregoing statement, it appears that the question to be decided is: Did the amendment to the original petition in bankruptcy relate back to the date of the filing of the original petition so as to bring the proceeding within four months of the date of the levy of the attachment?

[3] Adjudication in bankruptcy dissolves liens obtained by proceedings at law or in equity, if obtained under certain circumstances and "within four months" of the filing of the petition in bankruptcy. Bankruptcy Act, § 67c. The limitation of four months protects and preserves liens so obtained four months before the filing of the petition. The petition which was filed within the four months of the date of the levies of the writs of attachment, as we have said, stated no one of the acts of bankruptcy prescribed by the statute. This is not a case, therefore, in which one act of bankruptcy is alleged and it is sought to amend by asserting another, or in which a defective statement of an act of bankruptcy is made and it is sought to amend the defect by a more accurate statement. On the contrary, no cause of action to have the debtor adjudicated a bankrupt is stated, or attempted to be stated, in the original petition. More than four months; in fact about eight months, after the levies, the amendment is made, and (treating the amendment as sufficient) it is then for the first time that there appears

on the record a cause of action authorizing the adjudication of the debtor to be a bankrupt.

[4] The amendment of a petition in bankruptcy is permissible as in the case of pleadings in other actions. And it is true that, when an amendment is properly allowed and is for the same cause of action asserted in the original pleading, giving greater precision to charges already made, and does not set up new matter or a new cause of action, the amended pleading will be regarded as a continuation of the original pleading, and will relate back so as to take effect as of the date when the latter is filed. *Bank v. Sherman*, 101 U. S. 403, 405, 25 L. Ed. 866; *Missouri, K. & T. R. Co. v. Bagley*, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259, and cases cited in note on page 268. This rule is, of course, applied to amendments of petitions in bankruptcy.

[5] But the doctrine of relation back is not applicable where the amendment sets up a new cause of action, or where to cause it to relate back would have the effect of depriving an adverse party of a substantial right on which no attack was made in the original pleading. When an amendment introduces a new cause of action, the statute of limitations will run against it to the time when it is filed. *Union Pacific Railway v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983; *Sicard v. Davis*, 6 Pet. 124, 140, 8 L. Ed. 342; *Cox v. Mortgage Co.*, 88 Miss. 88, 40 South. 739; *Missouri, K. & T. R. Co. v. Bagley*, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259, and note on pages 269 and 270, and cases there cited. This rule is as well settled as the one first stated, and is applicable to amendments to petitions in bankruptcy.

It would defeat the intention of the bankruptcy act if creditors could file a blank or skeleton petition against their debtor, alleging no act of bankruptcy, and, after a lapse of more than four months, amend it by filling up the blanks, alleging acts of bankruptcy, and have the amendment relate back in its effect for a period of over eight months to a time within four months before the filing of the blank petition, and dissolve valid liens then existing on the bankrupt's property. And it would clearly conflict with the act to permit such defective petition to be made effective by the debtor's acknowledgment of insolvency and willingness to be adjudicated a bankrupt, made by him over four months after such defective petition is filed, and cause such confession, when alleged by amendment, to relate back in its effect more than eight months so as to dissolve valid liens on the bankrupt's property then existing. If a petition alleging no act of bankruptcy may lie dormant for more than four months, and then by amendment be given retroactive vitality, canceling liens made secure by the four months' limitation, the same effect would be given the amendment of such a petition made twelve months after it was filed, thereby annulling liens that had attached sixteen months before the amendment. We cannot approve a procedure that leads to such results. It would be destructive of rights intended to be preserved by the four months' limitation.

The District Court, in the exercise of a sound discretion, might well have refused to allow these amendments (*In re Pure Milk Company of Mobile* [D. C.] 154 Fed. 682; *Walker v. Woodside*, 164 Fed. 680, 90 C. C. A. 644), and the creditors, if they chose, could have filed a new

petition; but, having allowed the amendments, we are of the opinion that they do not relate back to the time of the filing of the original petition so as to dissolve the lien of the attachment, and that the court erred in dismissing the petition of Armour & Co.

The petition for revision is granted, and the decree of the District Court is

Reversed.

BROWNING et al. v. BOSWELL et al.

(Circuit Court of Appeals, Fourth Circuit. November 12, 1913.)

No. 1,217.

1. APPEAL AND ERROR (§ 327*)—PARTIES—GENERAL CREDITORS.

In a suit to administer the assets of an insolvent corporation, and to determine the existence and priorities of an alleged lien, the general rule that all parties directly interested must be cited as parties to an appeal to the Circuit Court of Appeals extends to general creditors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795, 1814-1820, 1822-1835; Dec. Dig. § 327.*]

2. APPEAL AND ERROR (§ 329*)—PARTIES—JOINDER—DISCRETION.

Where appellees moved to dismiss the appeal because parties in interest were not made parties thereto, it was within the discretionary power of the Court of Appeals to grant appellant's motion for citation against such additional parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1836; Dec. Dig. § 329.*]

3. APPEAL AND ERROR (§ 329*)—ADDITIONAL PARTIES—JOINDER—MOTION FOR ADDITIONAL CITATION.

Where appellant omitted to join necessary parties because of no lack of diligence, but at most from a misapprehension by counsel as to a question of practice, and moved for an additional citation against such omitted parties to meet an objection of appellees that the appeal could not be prosecuted without citation to them, and appellees would not be delayed or otherwise prejudiced by their joinder, the court will grant the motion as a proper exercise of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1836; Dec. Dig. § 329.*]

Appeals from the District Court of the United States for the Western District of Virginia, at Lynchburg.

Suit by Ollie H. Browning and James S. Browning, Jr., an infant, suing by his next friend, James S. Browning, against Thomas T. Boswell and others. Decree for defendants, and plaintiffs appeal. On motion by appellants for a citation against additional parties. Granted.

W. J. Henson, of Roanoke, Va., and Richard B. Tippet, of Baltimore, Md., for appellants.

W. H. De C. Wright and E. P. Keech, Jr., both of Baltimore, Md., Geo. W. St. Clair, and J. Powell Royall, both of Tazewell, Va., and Charles H. Howard, of Dorchester, Mass., for appellees.

Before PRITCHARD, WOODS, and KNAPP, Circuit Judges.

WOODS, Circuit Judge. This motion to make Michael Sheehan and the other general creditors of the Big Vein Pocahontas Coal Com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany parties to this appeal by the issuance of citation to them arose out of the following proceedings: Suit was instituted in the Circuit Court for the Western District of Virginia on October 28, 1910, by the complainants, Thomas T. Boswell, Andrew C. Snyder, and Mer-ville H. Carter for the benefit of the complainants and other creditors of the company, the bill alleging that the company had acquired a lease of valuable coal lands in the county of Tazewell, in the state of Virginia, and had expended large sums of money in the effort to make the lands productive, and that in operating the property the company had become involved in large debts which it was unable to meet. Other allegations were made showing the necessity for the court to take charge of the property by the appointment of receivers who should continue to operate it while the court called in the creditors, marshaled the assets, and ascertained the indebtedness and liens and priorities. The court appointed receivers who have had charge of the property and revenues since October 28, 1910.

While the cause was pending Ollie H. Browning in her own right and as guardian for James S. Browning, Jr., and James S. Browning, by petition, asked that they be allowed to intervene in the suit, on the allegation that they were entitled to a first lien on the property for about \$140,000. The petition was granted, and they were made parties by order of the court. Allis-Chalmers Company, a corporation, was also allowed to intervene and be made a party on its petition, alleging that it had a first and prior lien on the property of the defendant company to the extent of \$2,500, with interest. A suit for foreclosure brought by the Colonial Trust Company, trustee under the mortgage executed by the Big Vein Pocahontas Coal Company, was consolidated with the suit brought by the complainants, Boswell and others. A special master was appointed for the purpose of ascertaining and reporting to the court the debts and liabilities of the corporation and the relative priorities of the different creditors. The special master filed his report, and found that Ollie H. Browning in her own right and as guardian for James S. Browning, Jr., had a first and prior lien on all of the real estate, property and equipment of the defendant company, for \$139,746.59; that there were a number of general creditors who held valid claims against the estate for various amounts, ranging from a few dollars to more than \$16,000; that Jeffrey Manufacturing Company was a creditor to the extent of \$7,848.86 and that it had a prior lien for that amount on a portion of the defendant company's property; that Roberts and Schaefer Company was also a creditor and had a lien prior to other creditors on a portion of the property for its claim.

The District Court entered a decree on the 10th day of April, 1913, in which the master's report was confirmed as to claims of the general creditors Jeffrey Manufacturing Company and Roberts and Schaefer Company; but Allis-Chalmers Company was declared to be a creditor, entitled to be paid before the general creditors, although it did not have a prior lien on any specific property, as claimed by it in its petition. It was further decreed that Ollie H. Browning did not have a prior lien, as reported by the master, for \$139,746.59, but, on the contrary,

that she was indebted in a large sum of money to the defendant company, and that the notes of the company held by her were void, and it was ordered that she deliver the notes, amounting to \$150,000, to the clerk of the court to be canceled, and that she pay over to the receivers of the court the amount held to be due from her to the defendant company. Mrs. Browning filed a petition for rehearing, which, after consideration by the court, was refused on the 28th day of May, 1913.

The decree adjudicated all the questions involved, and provided for a sale of the property of the defendant company. Nothing further remained to be done in the cause but the execution of the decree and a distribution of the assets of the defendant company among its creditors according to their rights as fixed by the court. From this decree Ollie H. Browning, James S. Browning, and Ollie H. Browning, guardian for James S. Browning, Jr., appealed and secured a writ of superseas. The Big Vein Pocahontas Coal Company, Merville H. Carter, Andrew C. Snyder, and the Colonial Trust Company gave notice of their motion to dismiss the appeal, assigning as one of the grounds that Allis-Chalmers Company and Michael Sheehan and the other general creditors were not made parties thereto by citation. Thereupon counsel for the appellants gave notice of this motion to be allowed to issue citations to Michael Sheehan and the other common creditors, and also to—

"Jeffrey Manufacturing Company, Allis-Chalmers Company, Roberts and Schaefer Company, E. P. Keech, and H. H. Heiner, receivers in said cause, W. B. Kegley and any other party to the said cause who either remotely or directly may be interested in the decrees complained of."

In disposing of the motion it may be well to say that possibly the interest of the general creditors of the Big Vein Pocahontas Coal Company would be concluded by the result of the appeal as to the claims of the defendant company and Mrs. Browning against each other, and that citation to bring them into the appeal is unnecessary. The interest of the creditors in the subject-matter of the decree was not direct, but only mediate through their debtor corporation. It is true that they were parties to the cause in which the Big Vein Pocahontas Coal Company and Mrs. Browning conducted their litigation, but the actual litigation was not with them, and though they have an indirect interest in increasing the assets of their debtor, no judgment was or could be rendered in their favor, against Mrs. Browning. Hence it might be argued that their presence was not essential to a review of a judgment in favor of their debtor, or against it for mere error such as is alleged here, involving no question of jurisdiction or fraud or collusion.

[1] The well known general rule that all parties to the suit directly interested in the result of the appeal must be cited has been stated in numerous cases in the federal courts, and the Circuit Court of Appeals for the Ninth Circuit has held that the rule extends to general creditors in a case like this. *Illinois Trust & Savings Bank v. Kilbourne*, 22 C. C. A. 599, 76 Fed. 883.

In the present aspect of the case, however, the court is not called upon to analyze and distinguish the cases or to decide whether it is necessary to issue citations to the unsecured creditors, because the ap-

pellants ask that they be allowed to issue the citations now, and the appellees insist that without the presence of the creditors the appeal is so defective as to entitle them to have it dismissed. In this condition the only questions presented for decision are whether the court has discretion to allow the citation to be issued, and, if the discretion exists, whether it should be exercised.

[2] The discretionary power of the court to make the order is now so firmly established by the following authorities that we think discussion of the point unnecessary: *Dodge v. Knowles*, 114 U. S. 430, 5 Sup. Ct. 1197, 29 L. Ed. 144; *Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 6 Sup. Ct. 74, 29 L. Ed. 432; *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; *Walton v. Marietta Chair Co.*, 157 U. S. 342, 15 Sup. Ct. 626, 39 L. Ed. 725; *Taylor v. Leesnitzer*, 220 U. S. 90, 31 Sup. Ct. 371, 55 L. Ed. 382; *Altenberg v. Grant*, 83 Fed. 980, 28 C. C. A. 244; *Thomas v. Green County*, 146 Fed. 969, 77 C. C. A. 487; *Martin v. Burford*, 176 Fed. 554, 100 C. C. A. 159; *Gilbert v. Hopkins*, 198 Fed. 849, 117 C. C. A. 491.

[3] It is equally clear that in the present instance the discretion ought to be exercised and the motion granted. There has been no lack of diligence, but at most a misapprehension by counsel as to a question of practice, and the motion is made to meet the objection urged by the appellees that the appeal cannot be prosecuted without citation of the creditors. The appellees will not be delayed or otherwise prejudiced and the bringing in of the creditors as parties to the appeal by issuing the citation to them will have the good effect of entirely eliminating from the record a serious technical question, and leaving the case to be decided on its merits.

The motion is granted.

NEW YORK ASSETS REALIZATION CO. v. McKINNON.

(Circuit Court of Appeals, Second Circuit. May 15, 1913. On Rehearing, December 8, 1913.)

No. 192.

1. CORPORATIONS (§ 123*)—REFUSAL TO SURRENDER PLEDGED STOCK—CONVERSION.

Where corporate stock belonging to H. was pledged by him to secure a debt, and the pledgee wrongfully repledged the stock certificates with a trust company for a debt of the pledgee, and on the maturity of this debt the pledgee tendered payment and demanded surrender of the certificates, the trust company's refusal to surrender the same was a conversion for which the original owner could sue, regardless of the fact that at the time of the trust company's refusal there were various claimants for the collateral.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.*]

2. CORPORATIONS (§ 123*)—REPLEDGE—TENDER.

Where a pledgee of stock certificates wrongfully repledged them for his own debt, and on the maturity thereof tendered payment, the fact

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that he demanded a return of the collaterals at the same time did not make the tender conditional.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.*]

In Error to the District Court of the United States for the Southern District of New York.

Action by the New York Assets Realization Company against John W. McKinnon, individually and as agent for the shareholders, etc., of the Bank of North America. From a judgment dismissing the complaint, plaintiff brings error. Reversed.

F. E. M. Bullowa, of New York City (Ferdinand E. M. Bullowa, Emilie M. Bullowa, and Richard S. Harvey, all of New York City, of counsel), for plaintiff in error.

Underwood, Van Vorst & Hoyt, of New York City (A. B. Siegel and J. Markham Marshall, both of New York City, of counsel), for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment dismissing the complaint in an action against the defendant individually and as agent of the stockholders of the Bank of North America for the wrongful conversion of 500 shares of Chase National Bank stock, belonging to Arthur P. Heinze, the plaintiff's assignor.

The plaintiff's case, taken most favorably to it, as the rule is, was that Heinze was the owner of five certificates for 100 shares each of the stock in question, which he had delivered to one Morse, together with other collateral, to secure payment of his note for \$150,000; that Morse separated these shares from Heinze's note, and used them, together with certificates for other 500 shares of the same stock as collateral for his own note to the Metropolitan Trust Company for \$150,000 maturing December 16, 1907, and that the Bank of North America, its receiver, and finally the defendant knew from the beginning that the 500 shares in question were the property of Heinze. Further, that Morse, when his note fell due, tendered payment in full to the trust company, and demanded the collateral, which the trust company, under advice of counsel, refused to deliver. Subsequently January 30, 1908, the Bank of North America, claiming to be the owner of the other 500 shares of Chase stock, tendered payment of the note, and demanded the collaterals, which the trust company refused. The receiver of the bank, for whom the defendant was subsequently substituted as plaintiff, brought an action against the trust company for the wrongful conversion of the 1,000 shares of Chase National Bank stock as collateral to Morse's note. The trial court directed a verdict in favor of the plaintiff for the amount claimed, but by virtue of a stipulation between the parties the judgment provided that upon payment of \$150,000 and interest to it, the defendant should return the 1,000 shares of the Chase National Bank stock to the plaintiff. This amount the defendant did

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pay, and received the collateral, which he subsequently sold without notice to Heinze. The District Judge dismissed the complaint, saying:

"It has been once decided in an action in which Mr. Heinze was a party that the other 500 shares, that is, other than the 500 furnished by Heinze, were not the property of Morse, but were the property of the National Bank of North America. We spent Friday here listening to evidence which tended to show that perhaps that did not belong to the National Bank of North America, but did belong to Morse. For the purposes of this motion I am satisfied to say that it did not belong to Morse, but if it did, I hold as a matter of law that when McKinnon got the note and the 1,000 shares he was entitled to pay the amount of that note out of all the collateral, and had a right under the note to sell the collateral for that purpose, so that under no conceivable circumstances is Mr. Heinze entitled to what he is suing for here, but I decline to go through the form of dismissing this complaint on the merits. The result is the complaint is dismissed."

[1] This overlooks the fact that the trust company's refusal to deliver the collaterals to Morse, the pledgor, when he offered to pay his note at maturity, discharged the lien on the collaterals, though not the debt. Morse had then, as pledgor, a clear cause of action in conversion. When the defendant paid the note, it certainly got no greater right over the collaterals (except as to the "other 500 shares," if they were its own) than the trust company had. In *Mitchell v. Roberts* (C. C.) 17 Fed. 776, 780, Caldwell, J., said:

"In the case at bar the question is whether a tender of the debt, after its maturity, extinguishes the lien on personal property pledged to secure its payment. Upon this question there is no conflict in the authorities. The rule is settled that a tender of the debt, for which the property is pledged as security, extinguishes the lien, and the pledgor may recover the pledge, or its value, in any proper form of action, without keeping the tender good or bringing the money into court, because, like a tender of the mortgage debt on the law day, the tender having once operated to discharge the lien, it is gone forever. This rule accords with justice and fair dealing. It would be an exceeding great hardship on the debtor if the creditor had the right to refuse to accept payment of the debt after it was due, and at the same time retain the debtor's property or a lien upon it for the debt. Advantageous sales would be prevented, collections delayed, and credit lost by the inability of the debtor to free his property. In many cases debtors would be ruined before they could obtain relief by the slow process of a bill in equity to redeem. And on a bill to redeem a debtor would have to pay interest and costs down to the decree, unless he had kept the tender good. Thus the debtor, in order to protect himself against interest and costs, would be deprived of both his property and the use of his money at the pleasure of his creditor, or until the end of a chancery suit could be reached. On the other hand, a creditor who refuses to receive payment of his debt when lawfully tendered cannot complain at the loss of his security for that debt, 'because it shall be accounted his own folly that he refused the money when a lawful tender of it was made unto him.'"

It is no excuse for the trust company's refusal that there were various conflicting claimants for the collaterals. *Miller, J.*, speaking for the Court of Appeals in *Cass v. Higenbotam*, 100 N. Y. 248, 255, 3 N. E. 189, 192, said:

"The plaintiff as bailee had no right to deny the title of the defendant as bailor, if he, the bailor, was the true owner of the property. If there were conflicting claims to the same, the plaintiff had a complete remedy by bringing an action in the nature of a bill of interpleader, making the claimants

parties thereto, and in that form of an action it could be determined who was the true owner of the property. In that way he could have avoided all risk or hazard. Having thus failed to assert his rights, he is in no position to claim that the action brought against him bars the right of the defendant to counterclaim his demand in this action. *Welch v. Sage*, 47 N. Y. 143 [7 Am. Rep. 423]."

[2] The demand for the collaterals did not make Morse's tender conditional, as the defendant contends. *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 177, 23 N. E. 482, 485.

"A debtor who has transferred securities as collateral to the debt has a legal right, upon payment of the debt, to have such collaterals reassigned to him, and a tender of the debt is not destroyed by making a condition of its acceptance that the creditor transfer the collaterals to him, because that condition is one the debtor has a right to insist upon and the creditor no right to refuse, so a mortgagor who pays a bond and mortgage has a legal right to have the mortgage satisfied on the record. In no way, except by a certificate of the holder of the mortgage, can that result be accomplished. It is within the terms of the contract between the parties, and is a thing which, on payment of the debt, the mortgagee is under an obligation to do, and one which a court of equity would compel him to do. It is a condition, therefore, which the mortgagor has a right to attach to the tender of the debt, and does not destroy its effect. The tender found by the trial court was therefore sufficient."

As neither Morse nor the plaintiff's assignor was a party to the case of *Hanna, Receiver, v. Metropolitan Trust Co.*, affirmed as *Metropolitan Trust Co. v. McKinnon, Agent for Stockholders*, 172 Fed. 846, 97 C. C. A. 194, it does no more than show that the receiver of the bank was, as against the Metropolitan Trust Company, entitled to the collaterals upon payment of the note. He certainly could get no greater rights in respect to Heinze's shares than the trust company had. Hand, J., said:

"Morse, however, pledged these certificates with the trust company along with Heinze's shares, for \$150,000, and the question then arises whether, upon tender, the bank could demand, not only its own shares, but Heinze's shares. Concededly the bank had no interest in Heinze's shares, except that it would not obtain its own without tender of the principal and interest of the whole loan, since the trust company had the right to retain possession of all the shares until the loan was paid. Must it, then, having paid the loan, leave with the bank Heinze's shares for the bank to turn over to Heinze? Or could it subrogate itself to the pledge of the bank as against Heinze's shares, in order to release its own? I think there can be no doubt that it could. In paying the loan the bank was not a mere intermeddler. It was protecting its own property, and that it could not do, except by releasing Heinze's shares. Being wrongfully put in this position by one of its own agents, it was not a volunteer, and it might demand of the trust company Heinze's shares, and hold them under the same pledge as the trust company itself enjoyed. If this be true, then, upon tender of the full amount it was entitled to the possession of all of the collateral; one half as owner, and the other as substituted pledgee."

Taking the testimony in the most favorable light for the plaintiff, we think it was error to dismiss the complaint. The jury might have found that the stock was Heinze's, had been wrongfully hypothecated by Morse, that the lien of the trust company had been discharged, and

that the defendant, knowing all these facts, was guilty of wrongful conversion when he sold it.

Judgment reversed.

On Rehearing.

PER CURIAM. We remain of the opinion that this case should not have been disposed of by the court as matter of law. A rehearing was granted for further consideration of the question whether the Metropolitan Trust Company's refusal to return the collateral to Morse when he tendered payment of his note would affect Heinze's rights as owner in a way different from the way it would affect Morse's rights as bailor. In other words, if the jury were to find that the stock belonged to Heinze, that Morse wrongfully pledged it with the trust company for payment of his own debt, tendered payment of the debt when due, and demanded the stock which the trust company refused to deliver, could Heinze say that the stock was his and not Morse's, and at the same time claim that the lien upon it was discharged because the trust company had refused to deliver it to Morse? It seems hard that Heinze should profit by the trust company's refusal to deliver his stock to Morse, who was not entitled to it as against him. If it had delivered the stock to Morse, it would have received payment of its loan, and would have been under no obligation to Heinze. Still, Heinze did not require the trust company to deliver the stock to him, nor authorize it to refuse delivery of it to Morse. He intervened in no way whatever. The trust company acted entirely of its own motion, without delivering the stock to Heinze, or even setting up Heinze's title. His position being twofold—first, that the stock was his and second, that Morse had no right to pledge it for his own debt—we think he is entitled to the benefit of the rule that the trust company's action in refusing to return it to Morse when he tendered payment of his debt discharged the lien. It can hardly be discharged as to Morse who created it, and yet continue as to Heinze who repudiates it. When the trust company thereafter delivered the stock to the defendant (not under the money judgment recovered against it, but by agreement), it was guilty of a conversion, and the defendant by selling it was also guilty of conversion, especially if he had notice of Heinze's rights.

WHEELING TERMINAL RY. CO. v. RUSSELL.

(Circuit Court of Appeals, Fourth Circuit. December 8, 1913.)

No. 1,144.

1. EXCEPTIONS, BILL OF (§ 14*)—EVIDENCE—INCORPORATING STENOGRAPHER'S NOTES.

Under Court of Appeals Rule 10, § 2 (193 Fed. vii, 112 C. C. A. vii), providing that only so much of the evidence shall be embraced in the bill of exceptions as may be necessary, to present clearly the questions of law involved in the rulings to which exceptions are reserved, and that such evidence shall be set forth in condensed and narrative form,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

save as a proper understanding of the questions presented may require that parts of it be set forth otherwise, a bill of exceptions consisting of a transcript of the reporter's notes is improper.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 14; Dec. Dig. § 14.*]

2. COMMERCE (§ 27*)—INJURIES TO SERVANT—SAFETY APPLIANCE ACT—INTERSTATE COMMERCE.

Defendant had transported certain cars in interstate commerce which had been delivered to the consignees after being weighed, and, when unloaded, defendant sent to remove the cars, it being necessary that they should be again weighed to determine the net weight of the contents, and, while this service was in process, plaintiff, a member of the train crew, was injured by failure of the automatic couplers to couple by impact. *Held*, that plaintiff was engaged in interstate commerce at the time of his injury and was entitled to the protection of the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

3. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—INTERSTATE COMMERCE—SAFETY APPLIANCE ACT—INSTRUCTIONS.

In an action for injuries to a trainman, while weighing certain interstate cars, by the failure of the automatic couplers to work properly, an instruction that plaintiff could not recover unless the jury found from a preponderance of the evidence that, at the time of the injury, the cars which he was assisting in coupling had either never been equipped with automatic couplers, or the couplers had become so broken, out of repair, and insufficient that they would not couple automatically by impact, and that such injury was directly caused either by a failure to so equip the cars or by the fact that the couplers were insufficient, was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.*]

Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

4. TRIAL (§ 253*)—REQUEST TO CHARGE—MISLEADING INSTRUCTIONS.

In an action for injuries to a trainman by being crushed between certain cars which failed to couple automatically, a request to charge that if the jury found that, while plaintiff was engaged in weighing the cars, the knuckles of one of them was closed to aid plaintiff in weighing the cars, that the knuckle was still so closed at the time of the injury, and that the closing of the knuckle prevented the coupler from coupling automatically by impact and was the direct cause of the injury, they should find for defendant was properly refused as misleading, in ignoring defendant's own evidence that the couplers, when in good order, could be opened without going between the cars.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

In Error to the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

Action by Samuel J. T. Russell against the Wheeling Terminal Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. B. Sommerville, of Wheeling, for plaintiff in error.

John J. P. O'Brien and John A. Howard, both of Wheeling, for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. [1] Section 2 of rule 10 of this court (193 Fed. vii, 112 C. C. A. vii) directs that:

"Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."

In this case the entire transcript of the stenographer's trial notes has been included in the bill of exceptions. No part of the evidence, no matter how formal or undisputed, has been reduced to narrative form. Every question and every answer is reproduced in full. Colloquies between counsel or with the court, statements that the jury retired from the court or returned to it, and such like matters are found in it, although in most, if not all, cases they have no bearing on any question which can be considered by us.

The rule which has been quoted above was adopted after full consideration. It is believed that compliance with it will not only save useless printing but will enable the court much more intelligently to pass upon the real issues involved. We know that counsel are usually busy. Some time may be saved by turning over the preparation of the bills of exception to stenographers and clerks. Such saving may not, after all, be worth what it costs. It is not impossible that some writs of error would not be sued out at all if counsel took the trouble to extract from the stenographer's notes the precise points upon which they must rely. In almost all cases such a preliminary analysis would make the work of brief making and of oral argument both easier and more effective. The court must require compliance with the rule.

[2] In the case at bar it will be well to designate the parties as they were in the trial court. That is, we will speak of the plaintiff in error here as the defendant; the defendant in error as the plaintiff.

The defendant is a West Virginia corporation. It is engaged in interstate commerce. It operates a switching or terminal railroad which extends from Martins Ferry, Ohio, to Benwood, W. Va. The plaintiff is a citizen of Ohio. He was employed by the defendant as a brakeman on freight trains. In the regular course of its business it had delivered to a consignee in West Virginia sundry loaded cars which had come from points outside of the latter state. These cars had been unloaded. The defendant sent a train to take them back. The plaintiff was one of the crew of such train. On the switch on which these cars were there were scales. The loaded cars had been weighed at the time of delivery. In order to determine the net weight of their contents, the cars had to be weighed after they had been emptied. Such weighing was habitually done by defendant's train crew. For this

purpose the engine backed one car after another upon the scales. The last car on the train was the first to go upon them. When it was placed in position upon them it was uncoupled. The engine moved slightly forward. When the car had been weighed, the engine backed the next car down upon it so as to push or kick it off the scales and to put the other in its place. In order that it should not be reunited to the train before the next car had been weighed, the practice was to close the knuckle on either the forward coupler of the first car weighed or on the rear coupler of the car next to it. Such closing of course prevented the automatic coupling which would otherwise have taken place. The process described was repeated until all the cars in the train, or as many of them as it was desired to weigh, had been weighed. The knuckles which had been closed were then reopened. The locomotive and tender, together with such cars, if any, as had not been uncoupled from them, were backed down upon the other cars. As they were pushed back one upon the other they coupled automatically by impact and the train was made up. On the occasion now in question, the train was composed of a locomotive and its tender, of three or four loaded cars placed next to the tender, and of six empty cars. The latter had been weighed. The process of recoupling had progressed to the point at which four of the empties had been recoupled. The train had been once or twice pushed down on the next to the last car. The latter moved along the track but did not couple. Plaintiff said he found the trouble was with the rear coupler on the third car from the end; that is, on the rear coupler of the last car which had up to that time been recoupled to the train. He tried to get the coupler to work by using the lever at the side of the car provided for the purpose. He did not succeed. He told the conductor not to move the train. He went between the cars which would not couple and began manipulating the coupler which had failed to work. He was so occupied for from three to five minutes, when he suddenly felt on his back the touch of the coupler on the forward end of the car immediately in his rear. From gravity, the slippery and soggy condition of the track, or from some other cause, the two rear cars had moved forward. Aided, as he supposes, by the circumstance that he was wearing a very greasy leather jacket, or perhaps because the movement of the detached cars came at that moment to an end, he managed to squeeze out without being cut in two and indeed without having his external skin broken at all. He was so injured that he had to be taken to a hospital. How serious, and how permanent these injuries were, were among the bitterly contested issues at the trial. Something has been said about them here, but we may not consider them. They were questions of fact which were necessarily for the jury, and its determination as to them may not be here reviewed.

Defendant claims that the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) had no application because at the time plaintiff was injured he was not engaged in interstate commerce. No assignment of error was made as to any ruling of the court below on this question. Had there been, it could not have been sustained, and that for two reasons: First. The cars were being

weighed to determine the net weight of the interstate load carried by them to the West Virginia consignee. Those who were engaged in ascertaining such weights were themselves employed in that commerce. *St. Louis & San Francisco Ry. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129. Second. The cars had been employed in interstate commerce. It was not shown that they had been withdrawn from its service. The reasonable presumption, therefore, is that they remained in it. In practice such presumption will not work injustice. The defendant carrier will usually have little difficulty in showing, when it wishes to do so, where the cars were to be taken and for what purpose. For the plaintiff to trace them may be difficult and expensive.

Much of the argument of the able and zealous counsel for the defendant was directed to the circumstances under which an interstate carrier by rail became responsible for the failure of a coupler to couple automatically.

[3] The court below told the jury that they could not find for the plaintiff unless, by a preponderance of the evidence, they were satisfied that at the time of the injury the cars which he was assisting in coupling had either never been equipped with couplers coupling automatically by impact, or that the couplers on said cars had become so broken, out of repair, defective, or insufficient that they would not couple automatically by impact, and that said injury was directly caused either by the failure to so equip said cars or by the fact that the couplers on said cars had become so broken, out of repair, or insufficient that they would not couple automatically by impact. This instruction gave the defendant the benefit of all the law to which it was entitled. *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; *Chicago, Burlington & Quincy Ry. Co. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; *Delk v. St. Louis & San Francisco Ry. Co.*, 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590.

[4] The defendant complains that the court refused to instruct the jury to find for the defendant if they believed that:

"While the *defendant* was engaged in weighing said cars, the knuckles of one of them was closed to aid the *defendant* in weighing said cars, that said knuckle was still so closed at the time of said injury, and that said closing of said knuckle prevented the coupler of said car from coupling automatically by impact and was the direct cause of said injury."

Quite obviously this instruction, in the form in which it appears in the record, could not have been properly given. Doubtless, however, the word "*defendant*," where we have italicized it, was intended to be "*plaintiff*" and was so understood by court and counsel. Even so it was misleading. It ignored the evidence offered by the defendant itself that, when the couplers were in order, they could be opened without going between the cars. The assignments of error to the rejection of testimony raise, although in a slightly different form, the questions already considered. We find no error in the rulings below concerning them.

Affirmed.

In re CONDON.

Appeal of BROADWAY TRUST CO.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 68.

1. BANKRUPTCY (§ 90*)—INVOLUNTARY PROCEEDING—ANSWER—VOLUNTARY PETITION.

Bankr. Act July 1, 1898, c. 541, § 1, subd. 20, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3419), provides that the word "petition," as used in the act, shall mean a paper filed in a bankruptcy court or with the clerk or deputy clerk, by a debtor, praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by the debtor therein named. *Held*, that where an involuntary petition was filed against an alleged bankrupt, and he answered that he could not truthfully deny that he was insolvent, and prayed for the protection of all his creditors and that they might all be treated alike and that he be adjudged a bankrupt, such answer did not constitute a voluntary petition so as to change the proceeding into a voluntary one and relieve the creditors from proving an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 124; Dec. Dig. § 90.*]

For other definitions, see Words and Phrases, vol. 6, p. 5368; vol. 8, p. 7753.]

2. BANKRUPTCY (§ 81*)—INVOLUNTARY PETITION—REQUISITES—ACT OF BANKRUPTCY—SPECIFICATION.

An involuntary bankruptcy petition, alleging in the language of the statute that the alleged bankrupt had made transfers to hinder, delay, or defraud creditors, and also transfers with the intent to prefer creditors, without any specification of any of the facts claimed as a basis for any of such charges, was insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113-118, 125; Dec. Dig. § 81.*]

3. BANKRUPTCY (§ 84*)—INVOLUNTARY PETITION—INSUFFICIENCY—AMENDMENT—EFFECT—FOUR MONTHS' PERIOD.

Where an involuntary bankruptcy petition was fatally defective prior to the amendment, the date of the amendment must be taken as the date from which the four months' period specified in Bankr. Act July 1, 1898, c. 541, § 3b, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), is to be calculated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126-129; Dec. Dig. § 84.*]

4. BANKRUPTCY (§ 58*)—ACTS OF BANKRUPTCY—PREFERENTIAL TRANSFER.

Where an alleged bankrupt, with knowledge of his hopelessly insolvent condition, made a payment to a creditor in settlement of an antecedent debt, such payment was a preference and an act of bankruptcy, though the insolvent did not have an actual, as distinguished from an imputed, intent to prefer such creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 72-79, 83; Dec. Dig. § 58.*]

Appeal from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

This cause comes here upon appeal from an adjudication of bankruptcy against Martin J. Condon. The appeal is not taken by Condon,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

who in his answer to the original petition stated that he could not "truthfully deny that he was insolvent," and that "his assets are far below the amount of his stated liabilities," and prayed that, "for the protection of all his creditors and that all may be treated alike," he be adjudged a bankrupt. The appellants are two creditors whose liens by way of judgment, etc., will be cut off, if the adjudication be sustained. The opinion of the District Court will be found in 198 Fed. 947.

F. E. M. Bullowa and Emilie M. Bullowa, both of New York City, for appellant.

Tompkins McIlvaine, Ernest W. Kelsey, and Earl C. Demoss, all of New York City, and Allen W. Ashburn, Jr., of Los Angeles, Cal., for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] Two preliminary questions may be first disposed of. It is contended that the concessions and prayer in Condon's answer (see quotations *supra*) turned this involuntary proceeding into a voluntary one, in which no specific act of bankruptcy need be proved. The argument in support of this proposition rests practically upon the language of section 1, subd. 20, which gives the following definition of the word "petition" as used in the act:

"'Petition' shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named."

It is argued that the answer being a "paper" which prays for the benefits of the act, such benefits including an adjudication, is to be treated as a "voluntary petition." We find no merit in the contention.

[2] The original petition, filed April 12, 1911, merely alleged, in the language of the statute, that Condon had made transfers to hinder, delay, or defraud creditors, and also transfers with intent to prefer creditors. There was no specification of any of these, nor were any facts in relation thereto set forth. This was insufficient under decisions of this court. *In re Rosenblatt*, 193 Fed. 638, 113 C. C. A. 506 (Jan. 29, 1912); and *In re Brocton Ideal Shoe Co.*, 202 Fed. 199, 120 C. C. A. 447 (Jan. 13th, 1913).

[3] Thereafter on May 25, 1911, the petition was amended by setting forth the details of twelve separate transactions of the kind charged in the original petition. Since the petition became a sufficient one only when it was fortified with this amendment, the date of the amendment must be taken as the date from which the four months' period of section 3b is to be calculated. This eliminates all of said alleged transactions except the last four. Since a single act of bankruptcy if proved will sustain an adjudication, it will be sufficient to consider only the twelfth of these alleged transfers.

[4] On April 5, 1911, Condon made a payment to B. Altman & Co. in settlement of an antecedent debt. It is charged that this was a preferential transfer. The special master and the district judge so held.

Condon, a business man of excellent reputation and considerable means, in 1909 and 1910 joined with William J. Cummins and others in a number of enterprises requiring large capital and credit. The associates acquired, or became largely interested in, the Carnegie Trust Company, Van Norden Trust Company (Madison Trust Company), the Nineteenth Ward Bank, the Twelfth Ward Bank in this city, and the Platt Iron Works at Dayton, Ohio. Condon put no cash into these enterprises, but joined with the others in guaranteeing payments in very large amounts. Among such guaranties was one to Andrew Carnegie of a loan of \$2,000,000 at par of 5 per cent. steel bonds, which were worth not less than par. This amount alone was about four times his total net assets, and there were other guaranties of large amount. The Carnegie Trust Company failed on January 7, 1911. On January 8th and 9th the Madison Trust Company, the Nineteenth Ward and the Twelfth Ward Banks had been subjected to heavy runs and were in failing condition. An arrangement of merger for liquidation of the Madison Trust Company with the Equitable Trust Company was made January 9, 1911, and all the associates' holdings in the banks were transferred to a trustee; Condon and the others jointly and severally agreeing to indemnify him against loss. The Platt Iron Works was also in failing circumstances.

The details of the testimony bearing on the financial situation are comprehensively set forth in the report of the special master, which contains an elaborate analysis of Condon's assets and liabilities. That long before the payment to Altman & Co. (April 5, 1911) he was insolvent is clearly demonstrated; indeed, we do not understand that it is seriously contended that he was then solvent. The payment to Altman & Co. was, therefore a preferential one. It is contended, however, that there was no intent to prefer. Of course, if Condon supposed at the time that he was insolvent, he will be presumed to intend the consequences which will result from selecting a particular creditor and paying him under such conditions. Quite probably he still hoped that, in some way or other, he would be relieved from his difficulties. But if every person, who may be hopelessly insolvent and yet is of an optimistic temperament, may pay selected creditors, persuading himself that some time or other he will be able to pay his other creditors, the provisions of the Bankruptcy Act as to "preferential payments" cannot be of much practical value.

Condon had not kept a list of all the obligations he had personally entered into to carry on the various enterprises on which he had embarked, but he did know that they were enormous, greatly in excess of the total amount of his individual resources. The Carnegie Trust Company had collapsed, quickly followed by the other associated enterprises. Judgments had been entered against himself and execution returned unsatisfied. He must have known, if he gave the matter any intelligent thought, that it would be a piece of rare good fortune, if some of the persons with whom he was jointly liable upon these guaranties, obligations in some cases past due, would pay them off and give him abundance of time to contribute his share or so much of it as he might be able to pay. There is one suggestive piece of evidence in the

record. On January 10, 1911, three days after the failure of the Carnegie Trust Company, and the day after the merger for liquidation of the other concerns coupled with the new agreement to indemnify the trustee against loss, he drew \$35,000 out of his personal account with his brokers and deposited it to his own account in the Second National Bank. Two days thereafter he paid out of this sum to a mining company in which he was interested \$20,000. He owed this mining company nothing; it was an advance to help the company along, and was made because he had got some friends interested in this mining enterprise and wished to help it along so as to save them from loss. It is a reasonable inference that he chose this time, when he was himself in straits, to help it along, because he appreciated that if he did not contribute the \$20,000 then he might later on be in such a financial condition that he could not contribute anything to that cause.

We are satisfied that the payment to Altman & Co. was made with the intent that they, who had the month previous furnished personal necessities and comforts for himself and his family, should be paid, whatever might be the result of the financial catastrophe in which he seemed to be involved. If so, it was as we think an act of bankruptcy under section 3a(2).

The adjudication of bankruptcy is affirmed.

COGGEY et al. v. BIRD.

(Circuit Court of Appeals, Second Circuit. December 10, 1913.)

No. 56.

1. CONSPIRACY (§ 21*)—FRAUD—EVIDENCE—QUESTION FOR JURY.

An action to recover damages for an alleged fraudulent conspiracy to defraud plaintiff by inducing her by false and fraudulent representations to purchase a quantity of books comprising so-called de luxe editions of various standard authors *held* to warrant a submission of the case to the jury as against all the defendants.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 28, 29; Dec. Dig. § 21.*]

2. CONSPIRACY (§ 13*)—CIVIL LIABILITY—FRAUD OF HUSBAND—LIABILITY OF WIFE.

Where a husband, who is general manager of a corporation, all of the stock of which was owned by the wife, concocted and carried out a fraudulent scheme to induce plaintiff to purchase a large quantity of alleged de luxe editions of standard authors, and the wife testified that her husband talked over all business with her in relation, among other things, to all sales, and she did not take the stand to deny or qualify such admission, the facts were sufficient to sustain a finding that she had knowledge of the fraudulent scheme and participated in it and was liable to plaintiff for the damages sustained.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 14; Dec. Dig. § 13.*]

3. APPEAL AND ERROR (§ 173*)—EXCEPTIONS IN TRIAL COURT—NECESSITY.

An objection that a trustee could not be sued for tort in his representative capacity, and that a judgment for such tort could not bind

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

the estate of which he is trustee, cannot be considered on a writ of error, where there was no exception raising that question in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079–1089, 1091–1093, 1095–1098, 1101–1120; Dec. Dig. § 173.*]

4. PLEADING (§ 397*)—ISSUES AND PROOF—VARIANCE—DAMAGES.

Where plaintiff, in an action for fraudulent conspiracy in selling her certain de luxe editions of standard authors, sought to recover the full purchase price, but the court held that she was only entitled to recover the difference between such price and the value of the books, which were shown to be worth \$4,009, there was no variance between the pleading and proof under the rule that no such variance exists, when the proof merely shows that plaintiff asserted that her damages were greater than she was able to prove.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1337; Dec. Dig. § 397.*]

5. COURTS (§ 323*)—FEDERAL COURTS—JURISDICTION—PARTIES.

Federal jurisdiction, in a case for fraudulent conspiracy, was not ousted because two of the defendants were never served and there was no proof of their citizenship, when it appeared that they were not necessary parties and without them there were at least three conspirators left whose citizenship was such as to give the court jurisdiction of the controversy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 885, 886; Dec. Dig. § 323.*]

6. EVIDENCE (§ 135*)—SIMILAR TRANSACTIONS—INTENT.

In an action for damages arising out of an alleged fraudulent conspiracy, evidence as to other similar transactions, where other persons have been swindled by like devices, was admissible on the question of defendant's intent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 392, 394, 404, 405; Dec. Dig. § 135.*]

7. EVIDENCE (§ 207*)—SWORN ADMISSIONS—OTHER PROCEEDING.

In an action for fraudulent conspiracy to defraud plaintiff by selling her a quantity of de luxe editions of standard authors, testimony of two of the defendants, taken in supplementary proceedings in the state court, tending to show ownership of stock in defendant corporation and the financial and business relations of the parties, was admissible as sworn admissions and relevant to the subject of the controversy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 707–712; Dec. Dig. § 207.*]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a judgment of the District Court, Southern District of New York, entered upon the verdict of a jury in favor of defendant in error against James J. Farmer, individually and as trustee for Clara G. Farmer (his wife), Clara G. Farmer, and the Anglo-American Authors' Association, Incorporated. The verdict was for \$42,977.66. The complaint charged a fraudulent conspiracy, contrivance, and plan entered into by the defendants whereby plaintiff was defrauded, being induced by false and fraudulent representations to purchase a large quantity of books comprising so-called editions de luxe of various standard authors. The price which she was induced to pay for them was enormously in excess of their real value; she yielded up \$47,650 for books which the evidence showed were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

worth at the utmost but \$4,009. The complaint charged that the Kellar-Farmer Company was a party to the fraud, and its receiver was made a defendant. In the course of the proceeding he was dropped from the case, although his name still appears in the title. The other parties charged with thus defrauding the plaintiff are the three against whom judgment was entered and also Glen A. Farmer (a son of John J. and Clara G.), Sam Warfield (who was represented and represented himself to plaintiff as one Thomas, the alleged representative of a mythical man in Connecticut who was said to be getting up a library), and Sam Rosenfeld. The last three were not served with process.

The details of the process by which the plaintiff, a lady living in Salt Lake City, was swindled out of this large sum of money need not be recited. The scheme was an ingenious one, carried out by a succession of the grossest falsehoods repeated to her by Glen Farmer, Warfield, and Rosenfeld. The contention of the plaintiff was that this scheme was concocted by or participated in by the defendants, who did not come into contact with herself, viz., John J. Farmer, Clara G. Farmer, and the Anglo-American corporation which furnished the books. Of this corporation Clara G. was substantially the sole stockholder, and John J. Farmer president and general manager.

Stanchfield & Levy, of New York City, for plaintiffs in error.

Herrick, Breckinridge & Carney, of New York City (Frank J. Gustin, of Salt Lake City, Utah, and P. W. Carney, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] The main contention of defendants is that the evidence did not warrant the submission of the case to the jury. Since there are three different defendants covered by the verdict, this contention is really threefold.

As to John J. Farmer. An important witness called by plaintiff had been office boy and stenographer with John J. when the latter was with the Kellar-Farmer Company and with the Anglo-American Company. It is contended that this witness was hostile; that he had made an affidavit (he explained the circumstances under which it was made) contradictory of his statements on the stand; and that he was wholly unworthy of credit. These contentions are not for our consideration. The jury was the one to pass upon his credibility. Manifestly they believed his narrative of what he had seen and heard. Accepting his narrative there is nothing left to J. J.'s exception to the refusal to direct a verdict in his favor. Without going into details it will be sufficient to refer to a part only of his testimony. He said that at J. J. Farmer's direction he wrote letters upon foreign letter heads, Paris, Vienna, Berlin, etc., addressed to some one in the office. These letters were taken abroad, mailed there, and upon receipt here were given by J. J. to some of the agents he sent out to be shown to the persons they might solicit to buy. He further testified to conversations which he heard between J. J. Farmer, Glen Farmer, and Sam

Warfield in the office of the Anglo-American Company, in one of which Glen Farmer, referring to the sales of some of these books to plaintiff, said to his father, "Sam worked the same old game and I got in under it." Taking the testimony of this witness, whom the jury have found truthful, in connection with all the other evidence in the case, the concoction and execution of the alleged scheme to defraud plaintiff was abundantly proved against John J., Glen Farmer, Warfield, and Rosenfeld.

As to Clara G. Farmer. The mere circumstance that she owned all the stock of the Anglo-American Company would not be sufficient to show her participation in fraudulent practices to effect sales of books. But there was evidence of her own sworn admission to the effect that her husband, who was the general manager, "talked over all business (with her) in relation (among other things to), all sales." She did not take the stand to deny or qualify this admission; there was evidence that she kept herself advised as to the business generally; and there was sufficient to warrant the jury in finding that such business was so rank a swindle that she could not have kept at all in touch with it without knowing of its crookedness. Whether she had such knowledge and participated in the fraud was a question for the jury.

As to the Anglo-American Company. Clara G. was the sole owner; John J. was the manager. Their knowledge was the knowledge of the corporation, which itself received the proceeds of the fraud.

As to these three defendants, plaintiff was entitled to go to the jury, and their finding is conclusive on the evidence.

[3] As to the verdict and judgment against "John J. Farmer, as trustee of Clara G. Farmer." It is contended that, although he cannot avail of his trusteeship to escape personal liability for his own tortious acts in administering the trust, he cannot under well-settled principles be sued for tort in his representative capacity, nor can a judgment for such tort bind the estate of which he is trustee. There is no exception however which raises the point. Defendant asked the court to charge that, before they could find for the plaintiff, they must find that the conspiracy included as one of the conspirators John J. Farmer individually and as trustee for Clara G. Farmer and as an officer of the Anglo-American Company. At the close of plaintiff's case defendant counsel made a general motion to dismiss; no grounds being stated. This was "overruled for the time"; no exception being taken and defendant's evidence put in. As the close of the case, the motion to dismiss (evidently the general motion) was denied; no exception was taken. Some special motions to dismiss on stated grounds as to all the defendants were then made and denied. Then defendant's counsel said, "I ask the complaint be dismissed as against J. J. Farmer personally and as against Clara G. Farmer." This motion to dismiss was denied and exception given. So far as the record shows, the point now relied on was not called to the court's attention and no motion to dismiss to J. J. Farmer as trustee was made.

Had the verdict not included Clara G. Farmer, the cestui que trust, the failure to make such motions and to except to its refusal might have been prejudicial to her interest; but as the judgment binds her,

who is the sole person interested in the estate to which J. J. holds the title, the question now presented is merely academic.

Some other propositions advanced in argument by defendants may be briefly disposed of.

[4] The recovery was for the excess price which plaintiff paid over and above the actual value of the goods. The complaint asked recovery for the full purchase price. It is insisted that there is a variance between pleading and proof; that the complaint was based on a disaffirmance of the contract, which would require tender of the books, while the proof showed an affirmance of the contract. We do not so construe the complaint nor find any variance. The complaint does not undertake to disaffirm the contract; it merely sets out the fraud and its result and asks recovery for the resulting damages. No doubt the damages claimed were manifestly excessive, being the whole amount paid for the books on the assumption that they were absolutely valueless. Presumably they were worth something as paper stock. When the proofs were taken it appeared that they were worth \$4,009, so that plaintiff's damages were shown to be only the difference between these two sums; for that amount only did she recover. There is no variance between pleading and proof when the proof merely shows that plaintiff asserted that her damages were greater than she was able to prove.

[5] We find no force in the point that there is no proof of the citizenship of Warfield and Rosenfeld, defendants, who were never served. They were not necessary parties. Without them there were at least three conspirators left, with citizenship such as gave the District Court jurisdiction of the controversy.

[6] Evidence as to prior similar transactions where other persons had been swindled by like devices was admissible on the question of intent.

[7] It is assigned as error that the testimony of John J. Farmer and of Clara G. Farmer, taken in supplementary proceedings in the city court, was read in evidence. Sworn admissions of a party relevant to any subject which is being judicially investigated are of course competent. Most of this testimony was relevant, showing, as it did, the ownership of the stock and the financial and business relations of the parties. The few irrelevant and immaterial statements which thus came in (e. g., the purchase of theater tickets, etc.) are trivial and unimportant.

The remaining assignments of error call for no discussion. We find them without merit. The judgment is affirmed as to all the defendants.

HYAMS v. OLD DOMINION CO.

(Circuit Court of Appeals, First Circuit. December 20, 1913.)

No. 1,030.

CORPORATIONS (§ 210*)—STOCKHOLDERS' SUIT—PARTIES.

Where a Maine corporation owned a very large majority of the stock of a New Jersey corporation, a minority stockholder of the latter cannot ordinarily maintain a bill to restrain the Maine company from voting its stock at an election of directors to manage a New Jersey company's affairs without making the New Jersey company a party defendant. *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499, applied.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 808-813; Dec. Dig. § 210.*]

Rights of minority stockholders as to management of corporate affairs, see note to *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 89 C. C. A. 482.]

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Suit by Godfrey M. Hyams against the Old Dominion Company. From a decree of dismissal (204 Fed. 681), complainant appeals. Modified and affirmed.

Edward M. Colie, of Newark, N. J., and Isaac W. Dyer, of Portland, Me., for appellant.

Edward F. McClennen, of Boston, Mass., and Maxwell Barus, of Boston, Mass. (Jacob J. Kaplan and Brandeis, Dunbar & Nutter, all of Boston, Mass., on the brief), for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. The case is fully stated in the opinion of the learned judge of the District Court passed down May 5, 1913, and needs but slight reference by us to either the facts or the principles involved, as we leave it to turn on one simple rule.

This is a bill in equity, brought by a stockholder in a corporation which for convenience we designate as the "New Jersey corporation," against a corporation which for convenience we designate as the "Maine corporation." The bill was brought in the District Court for the District of Maine. The New Jersey corporation was not made a party to the bill, and no process was prayed for against it by subpoena, or otherwise as called for by the rule governing proceedings of courts in equity when it is sought to make a person or a corporation out of the jurisdiction a party respondent. For all the purposes of this proceeding, the New Jersey corporation was not legally noticed as a party complainant or respondent; and the bill was dismissed substantially on the ground that the relief prayed for could not be granted, according to settled principles of equity, independently of any statute of the United States or rules of the Supreme Court, in the absence from the record of the New Jersey corporation.

The Maine corporation is described as holding a very large majority of the outstanding shares of stock of the New Jersey corporation, to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the extent, as stated in the brief, of 155,000 shares out of a total issue of 162,000 shares. This leaves an outstanding holding of 7,000 shares, of which the brief alleges that the complainant holds 3,056. The prayer in the bill is that the Maine corporation be enjoined from voting any of its shares in the New Jersey corporation, whether directly or indirectly, at the annual meeting of the New Jersey corporation which was to be held on the 2d day of April succeeding the filing of the bill, or at any adjournment thereof. So far as that particular meeting is concerned, the case is now, of course, a moot case, unless there has been some adjournment thereof of which we are not advised. There was also a prayer that the Maine corporation be enjoined from voting any shares for the election of any officer or director of the Maine corporation as a director of the New Jersey corporation, or from aiding in placing the Maine corporation in control of the New Jersey corporation, and also, in the alternative, that the Maine corporation be compelled to divest itself of its holdings in the New Jersey corporation.

On this showing, the fact that a court in equity should not proceed as prayed for in this bill in the absence of the New Jersey corporation is such an urgent proposition, and the substantial answer thereto so compelling, that it does not seem necessary to go into any long investigation of the principles or decisions relating thereto. It is said by the appellant that the interests of the New Jersey corporation are not "directly or adversely affected"; that the relief asked for does not seek to control the New Jersey corporation, but only to secure an independent board of directors for it, so that the New Jersey corporation shall be in no way hampered, nor can be, by any decree in this cause; that no decree granting the relief asked for can be injurious to the New Jersey corporation, for all that could happen to it would be a board of directors capable of acting independently and fairly in its affairs; that its business is not sought to be regulated or interfered with by this bill; and, finally, that the bill does not seek to meddle with its affairs, but only with the conduct of the Maine corporation in its capacity as a stockholder; and so forth, and so forth.

It is beyond the scope of legal intelligence to comprehend how it is that a bill which, if sustained, might put the affairs of a corporation in control of a very small minority of its stock, in this case of less than one-twentieth thereof, or, perhaps, disenable it, whether directly or indirectly, from the ability of securing a legal quorum, according to its local statutes or its by-laws, at any meeting of its shareholders, has no such operation as claimed by the appellant in the way we have stated. On the other hand, the position of the litigation is frankly stated by the opening of appellant's brief, to the effect that he seeks to have the New Jersey corporation "controlled by an independent board of directors." There is no doubt that the purpose of the bill is to control the management of a corporation not made a party to it, and therefore without its having any judicial hearing in reference thereto. The control sought for by the complainant may be for the good of the New Jersey corporation or it may not be; but whether, if the relief asked for is granted, it would be for its good or evil, is a matter which

cannot be disposed of without its being heard in reference thereto. The effect of the decree asked for might be to seize and maintain the control of the New Jersey corporation in violation of the fundamental rule in equity that the court must hear before it strikes.

Of course, there are, and must be, instances in which the interests of a corporation not made a party to a bill may be affected more or less fundamentally by a decree rendered in pending litigation; but those are unavoidable exceptions, where controlling the corporation is a secondary and incidental result, and not one which, in the eyes of the law, is directly sought for, although as a matter of fact it may be that the result is as effectual under the peculiar circumstances of one case as it would be in the other. For example, there may be litigation between individuals contesting in their own right, and without fraud or sinister purpose, for the ownership of possibly a major amount of shares outstanding in a particular corporation, when the result of that litigation might, and perhaps would, necessarily determine in whose hands the effectual control was left; but such a result would be one which the law could not avoid, and not one in which the courts were seeking to obtain it, as the court was asked to do here.

None of the cases cited by the complainant support a decree in its behalf under the particular circumstances, and for the purpose expressly asked here. Some of them might have the effect of working out a practically like result; but they are not so aimed in the eyes of the law. The rule as to parties applied in *Minnesota v. Northern Securities Company*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499, justifies the result we have reached here, and is nearer akin to the present case than any other decision brought to our attention. It is indeed more drastic in applying the rule than are we in the case at bar. There the state of Minnesota was involved, dealing with transactions within its own borders; and the result desired was clearly susceptible of being reached in some way, either by a receivership or in some other form. So, in the present case, no doubt the appellant is not left by us without remedy, because, at least, the federal courts in New Jersey would have full jurisdiction to grant him all the remedy which he needs, so far as on the merits he is entitled to it. This is especially so in view of the construction given by the courts to section 738 of the Revised Statutes, now section 57 of the Judicial Code of 1911. Act March 3, 1911, c. 231, 36 Stat. 1102 (U. S. Comp. St. Supp. 1911, p. 152).

It is to be, however, distinctly understood that our decision is limited to the precise conditions presented by the bill before us; and what to the eye of the layman might be only a slight deviation in the conditions, might require a different adjudication. It is also to be remembered that, especially in proceedings in equity, it is the substance which governs and not the form; and that a distinction cannot be sustained merely on the ground that the bill is against a stockholder, and does not in form affect the corporation, when, through the stockholder, the bill seeks to take practical control of it, as it does here.

We should observe that the appellant maintains that the rule requiring all parties to the controversy to be brought in is not a jurisdictional

requirement; and that it is a rule of the court, and should not be enforced where its enforcement will cause injustice, provided the court can proceed to a final decree between the parties before it. The last part of this is well enough, but the proposition that it involves a mere rule of court is erroneous. The condition is much better stated for the purposes of this appeal in the opinion of the learned judge of the Circuit Court, in *Taylor v. Southern Pac. Co.*, 122 Fed. 147, 152, as follows:

"We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever be their structure, as to jurisdiction."

In the light of such a proposition, it in no way affects the result whether it should or should not be said that we are dealing with "a jurisdictional requirement."

As the dismissal was for lack of proper parties, and did not touch the merits, the decree should be modified in accordance with the settled practice of the Supreme Court, as clearly shown in *Swan Company v. Frank*, 148 U. S. 603, 612, 13 Sup. Ct. 691, 37 L. Ed. 577.

The decree of the District Court is modified by adding that, as the dismissal was for want of parties, it is without prejudice; and, as so modified, it is affirmed; and the appellee recovers its costs of appeal.

CORBETT v. RIDDLE.

(Circuit Court of Appeals, Fourth Circuit. November 20, 1913.)

No. 1177.

1. BANKRUPTCY (§ 60*)—INSOLVENCY—ACTS OF BANKRUPTCY—ASSIGNMENT FOR BENEFIT OF CREDITORS.

Where the act of bankruptcy alleged was the making of a general assignment by the alleged bankrupt for the benefit of creditors, whether the bankrupt was insolvent was immaterial.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

2. BANKRUPTCY (§ 100*)—ADJUDICATION—COLLATERAL ATTACK.

A bankruptcy adjudication is a judgment in rem binding on all the world so far as it determines that the defendants therein are bankrupts, and that their property is subject to administration in bankruptcy, and cannot be collaterally attacked in proceedings by a claimant of property alleged to belong to the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. § 100.*]

3. SALES (§§ 456, 474*) — CONTRACT — CONSTRUCTION — CONDITIONAL SALE OR BAILMENT.

Claimant delivered to the bankrupts a steam shovel under a written agreement, designated a lease for six months, fixing the aggregate rent at \$5,600, \$3,000 of which was paid in cash and the remaining \$2,600 evidenced by five notes, each bearing interest, one maturing on the first of each month from September, 1912, to January, 1913, both inclusive, and provided that, if the bankrupts keep the agreement, they might within ten days after the expiration of the term purchase the shovel for \$10. Before the expiration of the alleged lease, the bankrupts made an assign-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment for the benefit of creditors, conveying the shovel with other property subject to the "claim" of claimant "for \$2,600 balance of purchase money." *Held*, that such contract was a conditional sale and not a lease, and void as to creditors under the Virginia law for want of record.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1327-1331, 1391-1402; Dec. Dig. §§ 456, 474.*]

4. SALES (§ 454*)—CONDITIONAL SALE—LEASE—CHARACTER OF PROPERTY.

In the federal courts, whether an agreement, under which one party obtains possession from another of a chattel, and in which the latter seeks to reserve some kind of title, shall be construed as a hiring, a conditional sale, or a mortgage depends entirely on its effect and not at all on what the parties have designated it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. § 454.*]

What constitutes a contract of conditional sale, see note to *Dunlop v. Mercer*, 86 C. C. A. 448.]

5. SALES (§ 465*)—CONDITIONAL SALES—NECESSITY OF RECORD.

The Virginia law, which requires the recording of conditional sales, cannot be avoided by calling the contract a lease and providing that the purchase price shall be rent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. § 465.*]

6. SALES (§ 451*)—CONDITIONAL SALE—NECESSITY OF RECORD—WHAT LAW GOVERNS.

Where a claimant in Pennsylvania sold a steam shovel to the bankrupts under a contract of conditional sale, and permitted them to remove the shovel to Virginia, claimant was bound by the Virginia law requiring such contracts to be recorded in order to be valid as against creditors of the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1323; Dec. Dig. § 451.*]

7. SALES (§ 474*)—RIGHTS OF ASSIGNEE—PURCHASER FOR VALUE.

Under the Virginia law, an assignee for creditors is a purchaser for value, within Pollard's Virginia Code 1904, § 2462, providing that unrecorded conditional sales of personal property are void as to creditors and purchasers.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391-1402; Dec. Dig. § 474.*]

8. BANKRUPTCY (§ 101*)—BANKRUPTCY PETITION—FILING—EFFECT—JURISDICTION OVER PROPERTY.

The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate and property of the bankrupt is regarded as in custodia legis from the date of the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 163; Dec. Dig. § 101.*]

9. BANKRUPTCY (§ 20*)—FEDERAL COURTS—JURISDICTION—BANKRUPTCY PROCEEDINGS—COMITY.

Where a bankruptcy court has acquired jurisdiction of the bankrupt's property by the filing of a bankruptcy petition, such jurisdiction so acquired is exclusive of the right of the state court to interfere with a portion of the property alleged to belong to the bankrupt's estate in defiance by a claimant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Western District of Virginia, at Abingdon; Henry Clay McDowell, Judge.

In the matter of bankruptcy proceedings of M. H. Keefe & Son. From an order directing S. P. Riddle, trustee, to sell a certain steam shovel alleged to have been rented by James H. Corbett to the bankrupt, and which the trustee contended was in their possession under contract of sale, claimant appeals. Affirmed.

S. H. Sutherland, of Clintwood, Va. (Sutherland & Sutherland, of Clintwood, Va., on the brief), for appellant.

George E. Walker, of Charlottesville, Va. (Perkins, Perkins & Walker, of Charlottesville, Va., on the brief), for appellee.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. In the summer of 1912 the bankrupts had a contract to construct a section of a railroad in Dickenson county, in the Western district of Virginia. They needed a steam shovel. The appellant had one. He was a citizen of Pennsylvania. On June 29, 1912, he agreed to let the bankrupts take it from Pennsylvania to Virginia. This agreement was in writing. In terms it professed to be a lease of the shovel for six months. The aggregate rent was fixed at \$5,600. Three thousand dollars of this was paid in cash. For the remaining \$2,600, five promissory notes were given. Each of these notes bore interest. One of them matured on the 1st of each month from September, 1912, to January, 1913, both inclusive. The bankrupts, if they kept the agreement, might, within ten days after the expiration of the six months' term, buy the shovel for \$10. The bankrupts were to keep it in order. Without the written consent of the appellant, they were not to remove the shovel from the vicinity to which it was to be originally shipped. If they did not buy it, they were to return it to Pennsylvania. Upon any breach of the agreement the appellant had the right to repossess himself of it. The shovel was taken to Dickenson county. On August 23, 1912, the bankrupts made an assignment for the benefit of creditors. It was duly recorded in Dickenson county. Among other property specifically conveyed by it was the shovel. The latter was assigned subject to a "claim" of the appellant "for \$2,600 balance of purchase money." The assignees took possession of it. Some six weeks later, and on October 11th, the appellant for the first time recorded the so-called rental contract. On October 17th an involuntary petition for adjudication was filed against the bankrupts. On October 29th the appellant, in the circuit court for the county, instituted an action of detinue to recover the shovel. Under that writ the sheriff made a constructive seizure of it. In fact, it remained in the possession of the assignee for creditors. On November 29th the bankrupts were adjudicated such. A trustee was subsequently appointed. He duly qualified. He peaceably took possession of the shovel. By order of the court he rented it to some third parties for \$5 a day. Subsequently the court ordered it sold. From this order the appeal was taken. The appellant then asked the court below to direct that the shovel be delivered to him. He said that for three reasons

there should have been no adjudication in bankruptcy. These reasons were as follows: (1) The bankrupts were not insolvent. (2) The petitioning creditors had received preferences. (3) The bankrupts had not resided or had their domicile or principal place of business in the district for the greater portion of the six months immediately preceding the filing of the petition.

[1, 2] As the act of bankruptcy alleged was the making of a general assignment for the benefit of creditors, insolvency was immaterial. Moreover, the appellant was not entitled thus collaterally to attack the adjudication on any of the grounds set up by him. It was a judgment in rem, binding against all the world, so far as it determined the defendants therein to be bankrupts, and that their property was subject to administration in bankruptcy. *Manson v. Williams*, 213 U. S. 455, 29 Sup. Ct. 519, 53 L. Ed. 869; *Cook v. Robinson* (C. C. A. 9th Cir.) 28 Am. Bankr. Rep. 182, 194 Fed. 785, 114 C. C. A. 505.

[3] The appellant contended that, even if the adjudication was valid, he was nevertheless entitled to the possession of the shovel as against the trustee in bankruptcy because the contract under which the bankrupts obtained possession of the shovel was not one of conditional sale, required by the law of Virginia to be recorded, but one of hiring, to which the recording statute had no application. By its terms the bankrupts bound themselves absolutely and in all events to pay more than 99.8 per cent. of the full value of the shovel ostensibly for its use for a period of six months, during which its deterioration in value would not have been great. More than half of this sum was to be paid in advance. For the balance they gave their negotiable interest-bearing notes. The requirement that if they should elect to purchase they should pay an additional \$10 was obviously a mere form. If the notes had been paid, of course the \$10 would have been. The shovel would have been worth more than that to sell as old iron. Moreover, if they did not pay the \$10 they bound themselves to return the shovel to Pennsylvania. That would have cost many times \$10.

With great industry and learning the counsel for the appellant has urged upon our attention many cases in which agreements, some of which it would be difficult to distinguish from this, have been held to have been bailments and not conditional sales. We deem it altogether unnecessary to review or analyze them. In Virginia the law is clearly settled. Where a somewhat similar contention to that here made was set up, the Supreme Court of Appeals said:

"It was in substance and effect a sale and must be so declared. It does not matter by what name the parties chose to designate it. That does not determine its character. The courts look beyond mere names and within to see the real nature of an agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties or from some isolated provision, its legal character and effect." *Arbuckle v. Gates*, 95 Va. 802, 30 S. E. 496.

To the same effect is a decision of the highest court of West Virginia (*Baldwin v. Van Wagner*, 33 W. Va. 293, 10 S. E. 716).

[4] In the federal courts, whether an agreement, under which one party obtains possession from another of a chattel in which the latter seeks to reserve some kind of title, shall be construed to be a hiring,

a conditional sale, or a mortgage, depends altogether upon its effect and not at all upon what the parties call it. *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003; *Herryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160; *Chicago Railway Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349.

[5] The law of Virginia, which requires the recording of conditional sales, cannot be evaded by any such transparent device as that which was here employed.

[6] The contention that the contract, because made in Pennsylvania, is not subject to the recording laws of Virginia is without merit. "Whoever sends property" to another state "impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides." *Hervey v. Rhode Island Locomotive Works*, supra.

Liability of property to be sold under execution must be determined by the law of the state where it is situated rather than by that of the state where its owner lives. *Green v. Van Buskirk*, 5 Wall. 307, 18 L. Ed. 599; *Hervey v. R. I. Locomotive Works*, supra.

[7] Under the law of Virginia (section 2462 of Pollard's Code 1904), unrecorded conditional sales of personal property are void as to creditors and purchasers. In that state an assignee for creditors is a purchaser for value. *Arbuckle v. Gates*, 95 Va. 802, 30 S. E. 496; *National Cash Register Co. v. Burrow*, 110 Va. 785, 67 S. E. 370.

As the court below expressly reserved all questions as to the disposition of the proceeds of the shovel, we refrain from intimating any opinion as to whether the appellant will or will not, in consequence of the statement in the assignment that the shovel is subject to appellant's claim for \$2,600, balance of purchase money, be entitled to be paid such amount out of the sum received from its sale. If he shall be, it is not easy to see how most of the questions which have been so elaborately argued can be of any practical importance. Under any construction of the contract, the trustee would doubtless be entitled to complete the purchase or to exercise the option as one may choose. A court of bankruptcy is a court of equity and has equal abhorrence of a forfeiture.

The action in detinue was instituted after the petition in bankruptcy had been filed. It could not affect any rights. Appellant argues that the property of a bankrupt is not in the custody of the court of bankruptcy until there has been either an adjudication or a seizure, and that consequently the state court could levy upon this shovel even after the filing of the petition. In some federal jurisdictions it was at one time so held.

[8] We are not called upon to comment upon the cases further than to say that the law is now well settled that "the filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition." *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 307,

32 Sup. Ct. 96, 56 L. Ed. 208; *Hebert v. Crawford*, 228 U. S. 204, 33 Sup. Ct. 484, 57 L. Ed. 800; *Everett v. Judson*, 228 U. S. 478, 33 Sup. Ct. 568, 57 L. Ed. 927; *State Bank of Chicago v. Cox*, 143 Fed. 91, 74 C. C. A. 285; *Board of County Com'rs v. Hurley*, 169 Fed. 92, 94 C. C. A. 362.

[9] For some purposes the bankruptcy jurisdiction of the federal courts is, of course, paramount to that of the state tribunals. Even, however, if it were merely concurrent in this case, the same result would follow. When in a federal court of competent jurisdiction a bill for a receiver is pending, no state court may, in a proceeding subsequently instituted, direct the seizure of any part of the property to which the bill relates. If the request for a receiver is first made in a state court, the same rule ties the hands of the federal. *Farmers' Loan & Trust Co. v. Lake Street Elevated R. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. This doctrine was applied by this court to the protection of the jurisdiction of a state court. *Frazier v. Southern Loan & Trust Co.*, 99 Fed. 707, 40 C. C. A. 76.

The filing of a petition in bankruptcy is tantamount to a prayer that the bankrupt court will take all of the debtor's nonexempt property into its custody. The shovel in question came in fact into the possession of the trustee in bankruptcy. That possession was not wrongfully acquired. The court of bankruptcy had jurisdiction to direct its sale, and such direction under the circumstances disclosed by the record was proper.

The order appealed from will therefore be affirmed.

O'BRIEN v. McCLAUGHRY, Warden.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1913.)

No. 3938.

1. CRIMINAL LAW (§ 1218*)—LEGALITY OF SENTENCE—IMPRISONMENT IN LEAVENWORTH PENITENTIARY.

The provision of Act March 3, 1891, c. 529, 26 Stat. 839 (U. S. Comp. St. 1901, p. 3725), authorizing the establishment of three government prisons "for the confinement of all persons convicted of any crime whose term of imprisonment is one year or more at hard labor," so far as it limited the use of such prisons to cases where the sentence included hard labor was repealed as to the prison at Leavenworth by Act March 2, 1895, c. 189, 28 Stat. 957 (U. S. Comp. St. 1901, p. 3728), directing the transfer of the military prison at Ft. Leavenworth to the Department of Justice to be used for the confinement of prisoners convicted in the United States courts and sentenced to imprisonment in a penitentiary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3320-3328; Dec. Dig. § 1218.*]

2. CRIMINAL LAW (§ 1216*)—CONTINUOUS OFFENSE—BURGLARY AND LARCENY.

A defendant cannot be convicted of breaking and entering a post office with intent to commit larceny, in violation of Cr. Code, § 190 (Act March 4, 1909, c. 321, 35 Stat. 1124 [U. S. Comp. St. Supp. 1911, p. 1644]), and also

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of committing the larceny therein, where both acts were committed at the same time and as a part of a continuous transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3310-3319; Dec. Dig. § 1216.*]

3. CRIMINAL LAW (§ 1216*) — PUNISHMENT — EXCESSIVE SENTENCE — RIGHT TO DISCHARGE.

A prisoner confined in a federal penitentiary under a sentence imposing two terms on different counts of the indictment to be served successively, the second of which terms is illegal, is entitled to be discharged on habeas corpus from such part of the sentence, although his first term has not expired, because of the effect which the illegal part of the sentence has on his right to petition for parole after he has "served one-third of the total of the term or terms for which he was sentenced," under Act June 25, 1910, c. 387, § 1, 36 Stat. 819 (U. S. Comp. St. Supp. 1911, p. 1702).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3310-3319; Dec. Dig. § 1216.*]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Habeas corpus by James E. O'Brien, on petition of T. W. Bell, against Robert W. McClaughry, Warden of the United States Penitentiary at Leavenworth, Kan. From an order denying the writ, petitioner appeals. Modified.

Turner W. Bell, of Leavenworth, Kan., for appellant.

H. J. Bone, U. S. Atty., and Charles S. Briggs and A. M. Harvey, Asst. U. S. Attys., all of Topeka, Kan., for appellee.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. The petitioner, James E. O'Brien, and others were indicted in the District Court of the United States for the District of South Dakota. The indictment was in two counts. In the first they were charged with breaking into the post office in the town of Stockholm with intent to commit larceny of the property of the United States; and in the second they were charged with larceny of the goods of the United States, within said post office, of the value of \$58.80. To the indictment the defendant O'Brien pleaded guilty, and the court on May 9, 1911, sentenced him to five years in the Leavenworth penitentiary upon the first count and three years at the same place on the second count to commence upon the conclusion of the former sentence. He was accordingly taken to the penitentiary at Leavenworth on May 15, 1911.

This was a proceeding in habeas corpus and was instituted in the United States District Court of Kansas against the warden of the Leavenworth penitentiary. It resulted in an order for the remanding of the petitioner and he appeals.

The indictment to which the petitioner pleaded guilty charged the commission of the offense on the 22d day of December, 1910, and was returned to the District Court on May 6, 1911.

The Penal Code was enacted March 4, 1909 (Act March 4, 1909, c. 321, 35 Stat. 1088 [U. S. Comp. St. Supp. 1911, p. 1588]), and by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 209 F.—52

its terms provided it should take effect and be in force on and after January 1, 1910. The case is therefore governed by sections 190 and 192 of the Penal Code. The petition seems to have been filed upon the supposition that the petitioner was convicted under Revised Statutes 5475 and 5478 (U. S. Comp. St. 1901, pp. 3694, 3696). Both of those sections required the sentence to be at hard labor, but the sections of the Penal Code, in existence when the offense was committed, the parties pleaded guilty and were sentenced, contained no such provision. True, section 338 of the Penal Code provides:

"The omission of the words 'hard labor' from the provisions prescribing the punishment in the various sections of this act, shall not be construed as depriving the court of the power to impose hard labor as a part of the punishment, in any case where such power now exists."

This simply gives the court the power to impose hard labor as a part of the punishment but does not make it obligatory. The question is therefore not involved as to what would be the effect if the court had sentenced the defendant to a punishment without specifying hard labor when that was an obligatory part of the statute on the subject.

[1] It is contended by the petitioner that he is illegally detained at the penitentiary at Leavenworth. He relies upon the fact that the first section of the act of Congress, which provides for creating this prison (Act March 3, 1891, c. 529, 26 Stats. 839 [U. S. Comp. St. 1901, p. 3725]), provides for its erection:

"For the confinement of all persons convicted of any crime whose term of imprisonment is one year or more at hard labor."

And it is insisted that, as the petitioner was not sentenced at hard labor, he could not be lawfully detained at the Leavenworth institution.

It was formerly the practice to use the state penitentiaries and county jails as places wherein to punish the violation of federal statutes. Numerous defects existed under this system because of varying rules and conditions in the different penitentiaries, and for other reasons, and on March 3, 1891, Congress passed a law that the Attorney General and Secretary of the Interior were authorized and directed to purchase three sites, two east of the Rocky Mountains and one west, and cause to be erected thereon three prisons "for the confinement of all persons convicted of any crime whose term of imprisonment is one year or more at hard labor." It made an appropriation for the fitting of work shops, provided that the prisoners be employed exclusively in the manufacture of supplies for the government, such as can be manufactured without the use of machinery, prohibited the prisoners working outside the prison inclosure, vested the control and management of such prisons in the Attorney General, authorized him to make rules for the government of the officers of the prisons and the prisoners as he might deem proper and necessary.

Four years later, on March 2, 1895, in the sundry civil bill (Act March 2, 1895, c. 189, 28 Stat. 957 [U. S. Comp. St. 1901, p. 3728]), the following provision was passed:

"The military prison at Fort Leavenworth, Kansas, including all the buildings, grounds, and other property connected therewith, is hereby transferred from the Department of War to the Department of Justice, to be known as

the United States penitentiary, and to be used for the confinement of persons convicted in the United States courts of crimes against the United States and sentenced to imprisonment in a penitentiary, or convicted by courts-martial of offenses now punishable by confinement in a penitentiary and sentenced to terms of imprisonment of more than one year; and the Attorney General is hereby directed to transfer to the said United States penitentiary such persons now undergoing sentences of confinement, imposed by the United States courts, in state prisons and penitentiaries, as can be conveniently accommodated at the same penitentiary: Provided, That the said United States penitentiary shall be carried on in accordance with the provisions of sections four, five, six, seven, eight, and nine of the act approved March third, eighteen hundred and ninety-one."

The military prison at Ft. Leavenworth had been erected at a time when it was advocated by the War Department and believed by Congress that such prison should exist. Subsequently the army officers became advocates of post prisons. They did not believe that the concentration of large numbers of military prisoners was desirable and with the approval of Congress began the erection of numerous prisons at the army posts of the United States. It was while this situation existed that this last law of Congress was passed. Subsequently the officers of the army changed their minds upon the subject and concluded the existence of a large number of prisoners at each army post was demoralizing to the army, and that the prisoners should be concentrated in military prisons. But for the time being the act of Congress in question made of the old military prison establishment a civil penitentiary, and it will be observed that the language of that law did not provide that the prisoners must have been sentenced to hard labor as did section 1 of the act of 1891. That act did provide that the penitentiary should be carried on in accordance with the provisions of sections 4, 5, 6, 7, 8, and 9 of the act approved March 3, 1891, but said nothing about limiting the prisoners to those described in section 1 of the act of 1891. It is true that, after the War Department had changed its opinion as to the wisdom of post prisons, Congress passed the act of June 10, 1896 (29 Stats. 380, c. 400 [U. S. Comp. St. 1901, p. 3729]), by which it provided for the selection of the site of the military reservation at Leavenworth for a civil penitentiary and provided that when it should be erected the buildings and grounds that had been transferred to the Department of Justice by the act of Congress approved March 2, 1895, should be restored to the control of the said Department of War, but the new civil penitentiary was not required to be for persons sentenced to hard labor, and this court is of the opinion that, if the provisions in the act of 1891 for the erection of three prisons "for the confinement of all persons convicted of any crime, whose term of imprisonment is one year or more at hard labor," should still be in existence as to the Atlanta penitentiary and the one at McNeill's Island, upon which question no opinion is ventured, it was repealed as to the Leavenworth penitentiary by the sundry civil bill of March 2, 1895, and has never been re-enacted. The sentence, therefore, to the penitentiary at Leavenworth without mentioning hard labor is not illegal.

[2] A question which is not specifically mentioned in the briefs, but was referred to in the oral argument, appears, however, upon the record.

In *Munson v. McClaughry*, 198 Fed. 72, 117 C. C. A. 180, there was before this court a case on all fours with this in many respects. There the prisoner was sentenced under the first count of the indictment for breaking into a post office with intent to commit larceny under Revised Statutes, § 5478, and under the second count of the same indictment for larceny of the property of the United States from the same building at the same time that he committed the offense of breaking into the building charged in the first count. This court held he could have been convicted of either offense but not of both; that both crimes were inspired by a single intent and that could be punished but once.

It thus clearly appears not only that the district Court of South Dakota erred, but it was expressly held by this court that it exceeded its jurisdiction by so much as its sentences exceeded the highest imprisonment imposed on either act. The sentence of the larceny charge, having been imposed at the same time with a greater sentence on the charge of breaking into the building, was void as against the petitioner.

[3] Ordinarily the law will on habeas corpus grant no relief to a prisoner under such circumstances until he has served the larger sentence imposed on the two counts, if that was within the power of the court to impose. In *re Swan*, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207. It was in effect so held by the Circuit Court of Appeals of the Sixth Circuit, when presided over by Ex-President Taft and by Judges Lurton and Day, now of the Supreme Bench. *De Bara v. United States*, 99 Fed. 942, 40 C. C. A. 194. While it was not so expressly stated by the court, this was doubtless in part upon the ground that, where a prisoner was held under a sentence lawfully imposed, the question as to whether he was lawfully or unlawfully held upon another sentence was a mere moot question. That case was decided in February, 1900, but on June 25, 1910, Congress passed an act to parole United States prisoners and for other purposes, which in the first section provides:

"That every prisoner who has been or may hereafter be convicted of any offense against the United States, and is confined in execution of the judgment of such conviction in any United States penitentiary or prison for a definite term or terms of over one year whose record of conduct shows he has observed the rules of such institution, and who has served one-third of the total of the term or terms for which he was sentenced, may be released on parole as hereinafter provided." Act June 25, 1910, c. 387, 36 Stat. 819 (U. S. Comp. St. Supp. 1911, p. 1702).

That law further provides for a board of parole for each prison and for application to such board for the benefit of the act.

The court is of the opinion that aside from this statute the petitioner would be entitled to no relief whatever in this case but the District Court of South Dakota had only authority to sentence him for five years. It sentenced him for five and three years, or a total of eight years, and he was committed accordingly. This sentence was void as to the three years but valid as to the five years; yet he is being held un-

der a sentence for eight years. The parole law does not permit him to apply for its benefits except by the aggregating of the sentences against him and then taking one-third of that amount. He thus has no right under the parole law to apply for a parole until the expiration of two years and eight months, whereas he is entitled under the statute, if he had been legally sentenced, to apply at any time after one year and eight months. The latter time has elapsed; the former has not.

We cannot conceive that the second sentence against the petitioner, utterly void as it was and is, should be used to defer his right to apply for a parole (*United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631), and, while fully convinced that the rule would be otherwise in the absence of the parole law, this case is reversed and remanded, with directions to the District Court to discharge the petitioner from the custody of the defendant as to the charge of larceny but to remand him upon the charge of breaking into a post office.

HOPKINS v. McCLAUGHRY, Warden.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1913.)

No. 3965.

1. HABEAS CORPUS (§ 30*)—DEFECTIVE INDICTMENT—COLLATERAL ATTACK.

Habeas corpus to secure petitioner's release from imprisonment on the ground that the indictment is fatally defective is a collateral, not a direct, attack on the indictment.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

2. HABEAS CORPUS (§ 4*)—JURISDICTION—DEFECTIVE INDICTMENT.

Where petitioner was accused in a federal court, having jurisdiction of his person, of embezzlement and the abstraction of funds from a national bank of which he was teller, such offense was within the jurisdiction of the federal court of the district in which the offense was committed, and hence, if the court erred in determining the sufficiency of the indictment, the error was one of law by a court acting within its jurisdiction and reviewable on a writ of error, and could not be reviewed on habeas corpus after conviction.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.*]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Habeas corpus, on petition of Julius W. Hopkins, against Robert W. McLaughry, Warden of the United States Penitentiary at Leavenworth, Kan. From an order denying the writ, and remanding the petitioner to custody, he appeals. Affirmed.

Turner W. Bell, of Leavenworth, Kan., for appellant.

H. J. Bone, U. S. Atty., and C. S. Briggs and A. M. Harvey, Asst. U. S. Attys., all of Topeka, Kan., for appellee.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SMITH, Circuit Judge. The petitioner, Julius W. Hopkins, was indicted by the grand jury of the District Court of the United States for the Northern District of Ohio, Eastern Division; the indictment being in eight counts. He plead guilty to the second count, which was as follows:

"And the grand jurors aforesaid, upon their oath aforesaid, do further find and present that the said Julius W. Hopkins heretofore, to wit, on February 9, 1910, at Cleveland, in the county of Cuyahoga, in the division and district aforesaid, and within the jurisdiction of this court, being then and there teller of a banking association organized and existing under and by virtue of the laws of the said United States, to wit, the First National Bank of Cleveland, did by virtue of his said office as teller, and while he was employed therein, have in his possession and custody divers notes of the national bank currency of the said United States to the amount and value of \$3,100 of the moneys and funds of the said banking association; and the said Julius W. Hopkins, then and there having in his possession, as teller of said National Bank association, the said moneys of said association, then and there unlawfully, knowingly, and feloniously did embezzle and abstract from the said banking association the said sum of \$3,100 in national bank notes, as aforesaid, with intent to injure and defraud the said banking association, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States."

He was ordered imprisoned in the United States penitentiary at Leavenworth, Kan., for a period of seven years. This habeas corpus proceeding was instituted before the United States District Court of Kansas and resulted in his being remanded, and he appeals to this court.

It is contended that the second count of the indictment above set out was defective in that: (1) It did not allege that such funds were in the hands of the petitioner and under his control. (2) It did not appear that the funds were withdrawn by the accused without the knowledge or consent of the association and converted to the use of petitioner or any one other than the association with the intent to injure and defraud the association.

[1] Without intimating that the indictment was in any wise defective, it must be remembered that this is a collateral rather than a direct attack. In *re Frederick*, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; *Savin, Petitioner*, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150; *United States v. Pidgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631. No objection was ever made to the indictment in any way in the District Court for the Northern District of Ohio, Eastern Division, when it was returned, the petitioner arraigned, pleaded guilty, and was sentenced. The indictment is first assailed on this collateral attack.

The first portion of Revised Statutes, § 5209 (U. S. Comp. St. 1901, p. 3497), contemplates and includes three distinct offenses: First, the embezzlement; second, the abstraction; and, third, the willful misapplication of the money, funds, or credits of the association. The count here in question charges two of these offenses, namely, that the petitioner did embezzle and abstract the funds in question. If the charge of abstracting the funds be regarded as surplusage, the indictment was probably sufficient as one for embezzlement.

In *United States v. Harper* (C. C.) 33 Fed. 472, cited by the peti-

tioner, Judge Jackson, afterwards on the Supreme Court of the United States, well points out the distinction between embezzlement and abstraction as used in this statute, as well as the essential elements of embezzlement, and they are all present in this indictment, but, were it otherwise it would not follow that the petitioner was entitled to any relief in this proceeding.

As distinction is sometimes made by the federal courts on habeas corpus between one who has been convicted in the state courts and one who has been convicted in the federal courts, we shall, without conceding that others are not in point, content ourselves with citing only cases where it has been sought to discharge one convicted in the federal court. If the District Court for the Northern District of Ohio, Eastern Division, had jurisdiction of the petitioner and of the offense for which he was tried and did not exceed its powers in the sentence which it pronounced, this court can proceed no further.

[2] It is not denied that the charge of embezzlement from the First National Bank of Cleveland was within the territorial jurisdiction of that court, and it had the petitioner in its custody upon that charge and was authorized to sentence him for not less than five years and not more than ten. It is true that in passing upon such cases the Supreme Court has often commented on its lack of jurisdiction of appeals in criminal cases, but it must be borne in mind that it has always laid stress upon the fact that a habeas corpus proceeding is collateral, and that the court cannot do in a collateral proceeding what it could not do on direct attack, but it has always assigned other reasons why the writ cannot be used to bring up mere defects in the indictment. *Ex parte Watkins*, 3 Pet. 191, 7 L. Ed. 650; *Ex parte Parks*, 93 U. S. 18, 23 L. Ed. 787.

In *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274, the court said:

"Whether the indictment sets forth, in comprehensive terms, the offense which the statute describes and forbids, and for which it prescribes a punishment, is in every case a question of law which must necessarily be decided by the court in which the case originates, and is therefore clearly within its jurisdiction. Its decision on the conformity of the indictment to the provisions of the statute may be erroneous, but, if so, it is an error of law, made by a court acting within its jurisdiction, which could be corrected on a writ of error if such writ was allowed, but which cannot be looked into on a writ of habeas corpus limited to an inquiry into the existence of jurisdiction on the part of that court."

In *Re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274, the court said:

"In all such cases, when the question of jurisdiction is raised, the point to be decided is whether the court has jurisdiction of that class of offenses. If the statute has invested the court, which tried the prisoner, with jurisdiction to punish a well-defined class of offenses, as forgery of its bonds or perjury in its courts, its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of habeas corpus."

In *Dimmick v. Tompkins*, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110, the court said:

"It is also objected that the facts charged in either the first or fourth count of the indictment did not constitute any offense under the statute, and that

the sentence was therefore without jurisdiction. We are not by any means prepared to adjudge that the indictment did not properly charge an offense in both the first and fourth counts. See *Dimmick v. United States*, 116 Fed. 825 [54 C. C. A. 329], involving this indictment, where it is set forth. It is not, however, necessary in this case to decide the point, for the indictment charged enough to show the general character of the crime, and that it was within the jurisdiction of the court to try and to punish for the offense sought to be set forth in the indictment. If it erroneously held that the indictment was sufficient to charge the offense, the decision was within the jurisdiction of the court to make, and could not be re-examined on habeas corpus. The writ cannot be made to do the office of a writ of error. Even though there were, therefore, a lack of technical precision in the indictment in failing to charge with sufficient certainty and fullness some particular fact, the holding by the trial court that the indictment was sufficient would be simply an error of law, and not one which could be re-examined on habeas corpus."

See *Hyde v. Shine*, 199 U. S. 62, 83, 84, 25*Sup. Ct. 760, 50 L. Ed. 90. Other questions have been raised but they have been determined adversely to the petitioner in *O'Brien v. McClaughry*, 209 Fed. 816, 126 C. C. A. 540, decided by this court. The judgment of the District Court must therefore stand.

Affirmed.

DONOHUE v. BOSTON & M. R. R.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 48.

1. APPEAL AND ERROR (§ 882*)—CAUSES OF ACTION—JOINER FOR TRIAL—RIGHT TO ALLEGE ERROR.

Where two actions for injuries to different individuals in the same accident were joined and tried with plaintiff's express consent, he could not successfully claim that he was prejudiced by such procedure on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

2. COURTS (§ 406*)—APPELLATE JURISDICTION—MOTION TO SET ASIDE VERDICT—INADEQUACY.

A writ of error does not lie to bring to the Circuit Court of Appeals for review the denial of a motion to set aside a verdict for plaintiff as inadequate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1103; Dec. Dig. § 406.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—PERSONAL INJURIES.

Where, in an action for injuries to a passenger, defendant conceded that the collision happened through the negligence of its servants and that it was liable for the consequences thereof but did not concede that plaintiff was in any way injured or that he had been thrown down by the collision, it was error for the court to charge that, under defendant's admissions, plaintiff was at least entitled to recover nominal damages.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

4. APPEAL AND ERROR (§ 1057*)—RULINGS ON EVIDENCE—PREJUDICE.

Where, in an action for injuries to a passenger, there was no dispute that at the time of the collision the speed of the train was sufficiently great to toss about and throw down some of the persons in the car in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which plaintiff was riding, he was not prejudiced by the exclusion of the testimony of a witness as to the speed of the train shortly before it reached the place of the accident.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.*]

5. APPEAL AND ERROR (§ 1048*)—RULINGS ON EVIDENCE—PREJUDICE.

Where plaintiff sued for injuries alleged to have been sustained in a railroad accident, and a witness had testified that he only remembered the crash, plaintiff was not prejudiced by the exclusion of a question asking the witness what he saw.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

6. APPEAL AND ERROR (§ 1052*)—RULINGS ON EVIDENCE—PREJUDICE.

Where, in an action for injuries to a passenger, the conductor subsequently testified from a memorandum made at the time that 15 passengers complained of injuries, plaintiff not being among them, he was not prejudiced by the admission of an answer of the conductor, over objection, that only one or two complained of slight bruises.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

7. APPEAL AND ERROR (§ 1050*)—RULINGS ON EVIDENCE—PREJUDICE.

Where, in an action for injuries to a passenger, it had already appeared without objection that one of the passengers was "fighting drunk," plaintiff was not prejudiced by a statement of a witness, who wrote a story of the accident, that he saw bottles on the floor of the car.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

8. APPEAL AND ERROR (§ 1029*)—RULINGS ON EVIDENCE—PREJUDICE.

Where, in an action for alleged injuries to a passenger, the jury must have found that he had not been injured at all, exceptions taken to the examination of expert physicians on the issue of damages would not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.*]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, in favor of plaintiff in error, who was plaintiff below. The action was to recover damages alleged to have been sustained while plaintiff was riding on a train on defendant's road; such train coming into what is called a "side-wipe" collision with a freight car. The jury rendered a verdict in favor of plaintiff for six cents damages.

Richard J. Donovan and Herbert D. Cohen, both of New York City, for the plaintiff in error.

Charles M. Sheafe, Jr., of New York City, for the defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] Several other persons, who were riding in the same car as plaintiff, brought similar actions. Two of these causes, plaintiff's and that of one Long were tried together be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fore the same jury. Not infrequently two actions for negligence resulting in injury to a single individual, one by the injured party a married woman for her pain and suffering, and the other by her husband for loss of services and expenses of treatment, are thus tried together. We think, however, that where, as here, there is question whether two independent individuals were each actually injured, the practice of trying both cases at the same time before the same jury is an unsatisfactory one. Plaintiff in error contends that he has been prejudiced by it, but he is in no position to raise such objection; that method of trial was adopted with his expressed consent; indeed, it could not have been adopted had he objected at the time.

[2] Plaintiff moved to set aside the verdict as inadequate, and his motion was denied. It is well settled that a writ of error does not bring to this court for review the denial of such a motion, or any question as to the adequacy of the amount awarded for damages in a cause like this.

[3] Incidentally we may note that apparently the trial judge was in error in charging the jury that they must, in any event, award the plaintiff six cents. This seems to have occurred through a misapprehension as to the scope of defendant's concessions. It did concede that the collision happened through the negligence of its servants, and that it was liable for the consequences of such collision. It did not concede that the plaintiff was in any way injured by the collision, or even that he was thrown down by it. Evidently, if they had not been instructed to bring in a verdict of six cents, the jury's verdict would have been for defendant.

Plaintiff testified that he was thrown down, received a severe blow on the back of his head, which made him unconscious and prevented his doing any work for a considerable period of time. He had a scar on the back of his head which he said was the result of such wound. The cut indicated by the scar would bleed profusely, but no one saw any blood on Donohue at the time or heard him complain of any injury. Witnesses who were corroborated by records and time cards testified that at the very time when, as plaintiff testified, he was laid up as a result of the injury he received at the time of the collision he was back at his job, passed by a doctor as fit to work (as the state statute required), doing full day's work and earning full day's pay. Apparently the jury were satisfied that he lied to them deliberately and intentionally as to the nature of his alleged injuries, and, having reached that conclusion, rejected his whole testimony as they had the right to do. If they rejected his testimony there was no evidence at all that he was cut, or thrown, or injured in any way at the time of collision.

[4] There are several exceptions to admission or rejection of testimony which are assigned as error. A witness was not allowed to testify to the speed of the train a little while before it reached the place of the accident. There was no dispute that at the time of collision it was fast enough to toss about and throw down some of the persons in the car.

[5] A witness McKeon, who was in the car, said that he "remembers the crash and that's all he remembers." A question, "what did you see?" was disallowed, but as he had no recollection of seeing Donohue on that day, and said that he remembers only the crash, there seems to be no harmful error in this exclusion.

[6] An answer of the conductor that only one or two complained of slight bruises was objected to, but need not be considered, because subsequently the same witness, testifying from a memorandum made at the time, said that 15 complained; Donohue not being among them.

[7] An objection to a statement of the witness Hughes, a newspaper man who wrote up a story of the accident, that he saw "bottles" on the floor of the car is trivial and unimportant. It had already appeared without objection that one of the party was "fighting drunk."

[8] The verdict makes it unnecessary to consider the exceptions noted on examination of the expert physicians. If the jury had found that plaintiff was injured at all, had struck his head and cut his scalp and lost consciousness as he claimed, and had given some sum appropriate to such an injury—\$100, or even \$50 or \$25—plaintiff might have been prejudiced if the answers to some of the questions excluded would be calculated to show that more serious consequences were likely to result from such a blow. But, since the jury evidently found that he had not received a blow which knocked him unconscious or cut his scalp, speculation as to what might have happened if he *had* received such a blow is unimportant.

The judgment is affirmed.

NORRIS v. TRENHOLM.

(Circuit Court of Appeals, Fifth Circuit. December 26, 1913.)

No. 2,576.

1. BANKRUPTCY (§ 191*)—LIENS—PERSONAL PROPERTY—ADJUDICATION—DISPLACEMENT.

Code Miss. 1906, § 3079, provides that the vendor of personal property shall have a lien thereon for the purchase money while the subject of the sale remains in the hands of the first purchaser or of one deriving title or possession through him with notice that the purchase money is unpaid. *Held* that, where a suit was brought to enforce such lien within four months prior to the filing of a bankruptcy petition against the purchaser, such lien was one created by statute and not one obtained by judicial proceedings, and was not affected by Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), providing that liens given or accepted in good faith and not in contemplation of or in fraud of the act, and for a present consideration, to the extent of such consideration only shall not be displaced.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 287, 290, 351; Dec. Dig. § 191.*]

2. BANKRUPTCY (§ 191*)—SELLER'S LIEN—ENFORCEMENT IN BANKRUPTCY BY ASSIGNEE.

Since the seller's lien for the price conferred by Code Miss. 1906, § 3079, is but a security for the price, the benefit of which follows the debt and is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

enforceable at least in equity by an assignee, it is enforceable by an assignee in bankruptcy proceedings against the debtor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 287, 290, 351; Dec. Dig. § 191.*]

Petition to Superintend and Revise Proceedings from the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

In the matter of bankruptcy proceedings of W. M. Phillips. A decree was entered displacing a lien on personal property claimed by petitioner, T. R. Norris, on objections of E. L. Trenholm, the bankrupt's trustee, and petitioner files a petition to superintend and revise. Petition granted, and decree reversed.

Marcellus Green and Garner W. Green, both of Jackson, Miss., for petitioner.

Robert H. Thompson and J. Harvey Thompson, both of Jackson, Miss., for respondent.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

SHELBY, Circuit Judge. Phillips, the bankrupt, was a druggist in business at Jackson, Miss. He purchased from the Columbus Showcase Company showcases for his drug store. The showcases, on his order, were by the showcase company manufactured for him and put up in his drug store. Phillips paid for them all except \$485, for which balance he gave his note due July 15, 1910. The showcase company, for value, transferred the note to T. R. Norris, the petitioner herein. The Mississippi statute giving vendors of personal property a lien for the purchase money is as follows:

"Lien on Personal Property for Purchase Money.—The vendor of personal property shall have a lien thereon for the purchase money while it remains in the hands of the first purchaser, or of one deriving title or possession through him, with notice that the purchase money was unpaid." Code Miss. 1906, § 3079.

On August 9, 1910, Norris, as the assignee of the note, sued in the proper Mississippi state court to collect the note and enforce the lien on the showcases. A writ of seizure was issued by the court, and the showcases were seized by the sheriff. While the property was so in the possession of the sheriff under the procedure to enforce the lien, the petition in bankruptcy was filed in the court below on September 8, 1910, and Phillips was adjudicated a bankrupt, and E. N. Trenholm was appointed trustee of his estate. Under an agreement of the parties in interest, the trustee sold the drug store and fixtures; the agreement providing that \$485 of the purchase money would be held by the trustee subject to the settlement of the question as to whether or not Morris was entitled to a lien on the showcases for the balance due on them. The referee held that the proceedings in bankruptcy nullified whatever lien Norris may have had. Pronouncing such judgment, he said:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"I am of the opinion that section 67 of the Bankruptcy Act nullifies the proceedings, and that whatever lien Norris may have had by the institution of said condemnation suit was avoided by the bankruptcy petition and adjudication. The fact that a judgment was formally taken against the bankrupt after adjudication does not affect the situation; as the judgment, if taken before the bankruptcy, and within the four months' period, during insolvency, would have fixed no lien that an adjudication would not have nullified; and certainly the taking of the judgment after adjudication did not strengthen the situation."

This order was approved by the District Court, and Norris, the assignee of the note given for the purchase money of the showcases, brings the case to this court on petition to superintend and revise.

[1] The order holding the lien to be avoided by the bankruptcy proceedings was made upon the theory that Norris was asserting a lien created by his suit in the state court. If such had been the case, the bankruptcy proceedings would have annulled the lien, the suit having been brought and the property seized in the state court within four months of the filing of the petition in bankruptcy. Bankruptcy Act, § 67c. But the suit in the state court was not one to establish a lien, but to enforce a lien already existing, created by the state statute—a lien which existed from the time of the sale of the showcases to Phillips. The bankruptcy act, after providing for the dissolution of liens created by suits at law or in equity within four months of the filing of the petition, refers to another class of liens that are not affected by the act. Section 67d is as follows:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary to impart notice, shall, to the extent of such present consideration only, not be affected by this act." Bankruptcy Act, § 67d.

It was not a claim necessary to be recorded, and no attack is made on it for fraud, so it is difficult to find any reason for saying that it is not a lien which is included in the class of liens "not to be affected by this act." Liens coming within section 67d are not dissolved by the proceedings in bankruptcy. It has been so decided by this court as to a landlord's lien created by statute, *Martin v. Orgain*, 174 Fed. 772, 778, 98 C. C. A. 246; and as to a contractor's or builder's lien for material furnished, the lien being given by statute. In *re Georgia Handle Co.*, 109 Fed. 632, 48 C. C. A. 571. A lien for wages, created by statute, is not dissolved by the bankruptcy of the employer. In *re Kerby-Dennis Co.*, 95 Fed. 116, 36 C. C. A. 677. And there are many cases cited in the text-books showing that liens like the one here considered—liens created by statute—are preserved by the act. *Collier on Bankruptcy* (8th Ed.) 769, 770; 1 *Remington on Bankruptcy*, §§ 1115-1160.

[2] But it is contended that the vendor's lien created by the Mississippi statute cannot be enforced in favor of Norris, the assignee, holding the claim; that such lien is not assignable.

By statute in Mississippi, the assignee of any chose in action may sue thereon in his own name. Code Miss. 1906, § 717. The vendor's lien established by section 3079, *supra*, being an express lien, and

contractual in the sense that it arises from the contract of sale, we can see no reason why it does not pass by the assignment of the obligation given for the purchase money. It is only a security for the payment of the price, and the benefit conferred by it should follow the debt when it is assigned. *Foundry Co. v. Pascagoula Ice Co.*, 72 Miss. 608, 615, 18 South. 364; *Powell v. Smith*, 74 Miss. 142, 151, 20 South. 872. But if this were not true in a court of law, it would be so in a court of equity (2 Story's Eq. Jur. §§ 1227-1231; *Westmoreland & Trousdale v. Foster*, 60 Ala. 448, 455), and "a court of bankruptcy is a court of equity" (*In re Moller*, 8 Ben. 526, 17 Fed. Cas. No. 9699; *In re Kane*, 127 Fed. 552, 553, 62 C. C. A. 616).

We are of the opinion that the District Court erred in holding that the proceedings in bankruptcy nullified the lien held by petitioner.

The petition to revise is granted, and the decree is
Reversed.

In re SAVARESE.

Appeal of STATE BANK.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 60.

1. BANKRUPTCY (§ 407*)—DISCHARGE—OBJECTIONS—"CREDIT."

Where a bank loaned money to the bankrupt on certain warehouse receipts as collateral, but only after a false financial statement had been presented, and it appears that the loan would not have been made without such statement, the loan was a credit within Bankr. Act July 1, 1898, c. 541, § 14 (3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1496), providing that a discharge shall not be granted if the bankrupt has obtained money or property on credit upon a materially false statement in writing made by him to any person or his representative to obtain credit from such person.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1711-1713; vol. 8, p. 7622.]

2. BANKRUPTCY (§ 407*) — DISCHARGE — OBJECTIONS — OBTAINING CREDIT — FALSE FINANCIAL STATEMENT.

Where a bankrupt knew that a financial statement was being prepared by his bookkeeper to be used as the basis of credit from a bank, as he was authorized to do, and copies of the statement, which was materially false with reference to matters concerning which the bankrupt was entirely familiar were called to his attention, though he testified that he left such work to the bookkeeper and other office clerks and relied implicitly on them, and thought the statement was correct such testimony was untrue, or he was recklessly negligent; and he, being bound by the acts of the bookkeeper in preparing and submitting such statement, was therefore not entitled to a discharge under Bankr. Act July 1, 1898, c. 541, § 14 (3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1496), providing that a bankrupt shall not be entitled to a discharge if he has obtained money on credit on a materially false statement in writing to the person from whom such credit is obtained.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Eastern District of New York; Van Vechten Veeder, Judge.

In the matter of the bankruptcy proceedings of Ferdinando Savarese, individually and as surviving partner of the firm of V. Savarese & Bro. An order having been entered overruling the specifications of objection to the discharge of the bankrupt filed by the State Bank, it appeals. Reversed.

W. T. Kohn, of New York City, for appellant.

Isadore Finkler, of New York City (Joseph M. Herzberg, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is the appeal of an objecting creditor from an order granting the bankrupt a discharge.

Ferdinando Savarese, as surviving partner of the firm of V. Savarese & Bro., having been adjudicated a bankrupt, applied for his discharge. The State Bank filed specifications of objection, only one of which need be considered.

"Third.—Upon information and belief that the said bankrupt has wrongfully, fraudulently, and knowingly and willfully obtained money and property from the State Bank and others of his creditors, on credit, upon materially false statements in writing, which statements were made to such creditors for the purpose of obtaining such money and property on credit."

This objection is founded on section 14 (3) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1911, p. 1496]) which provides that a discharge shall not be granted if the bankrupt has—

"obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

No exception is taken to the right of the State Bank to file specifications of objection, so that question is not before us for consideration.

Vincenzo Savarese, one of the partners, died some years before, and his interest in the firm was never settled up. His wife was administratrix of his estate, and his son Salvatore was a clerk in the employment of the firm on a weekly salary, and so remained down to the time of the adjudication. At that time he was about 22 years of age, while the bankrupt was 60 years of age, and had been in the business 40 years. The testimony is that Salvatore's very responsible duties were principally in the office, while Ferdinando's principal activities were outside, buying and selling.

[1] July 16, 1909, Salvatore presented a written, but unsigned, statement of the firm's condition as of December 31, 1908, to the State Bank, and on July 27, 1909, the bank advanced the firm \$10,000 against warehouse receipts for oil and cheese. We think the statement was made for the purpose of obtaining credit from the bank, and that the bank relied upon it in making the advance of \$10,000 to the firm. It is objected that this advance was not upon credit, because the bank

received the warehouse receipts as collateral. But the act does not say that the credit must be obtained solely on the written statement. We think it enough that the advance would not have been made without the statement. So treated, the loan was a credit within the meaning of the act.

[2] The statement was false in various particulars. It included premises 95 First Place, at a value of \$7,500, and 115 First Place, at a value of \$7,000. Neither of these premises was firm assets. The first belonged to the estate of Vincenzo Savarese, and the second to Ferdinando Savarese, who conveyed it to his wife in March, 1909. Moreover, the premises were included at full value, without deducting a mortgage of \$5,000 on 95 First Place and of \$5,500 on 115 First Place. An expert who examined the firm's books testified that the amount of notes payable was \$74,367.82 instead of \$50,302.36, and of accounts payable \$51,383.80 instead of \$34,590.78, as set out in the statement. In addition he found accounts payable to the amount of \$5,397.84 which were not on the ledger at all.

October 20, 1909, Salvatore Savarese presented a statement of the firm's affairs as of the same date (December 31, 1908) to one Dockendorff as a preliminary to an arrangement whereby all the firm's accounts receivable were to be assigned to him against advances of 75 per cent. of their face. This statement made the accounts receivable \$10,000 less, and the liabilities \$17,000 greater, than did the statement submitted to the State Bank. It furthermore appeared that a separate ledger known as the fake ledger was kept of accounts receivable assigned to Dockendorff, many of which, as we understand it, were fictitious, though the evidence upon this point is meager.

No question is made but what these fraudulent acts and practices would bar the bankrupt's right to a discharge if he knew of them. He admits that he knew Salvatore prepared such statements, was authorized to do so, and that copies were kept which he saw. As matter of law, these acts of Salvatore were his, but as matter of morals, he says he thought the statements correct, and that, his duties being outside the office, he relied implicitly on Salvatore, the bookkeeper and other office clerks, who were acting in the premises. The special commissioner was so favorably impressed by the appearance and manner of Ferdinando Savarese in testifying that he believed him. The district judge, with hesitation, confirmed the report.

Giving great weight, as we should, to these conclusions, we are still unable to believe that Ferdinando Savarese was without knowledge in the premises. He had been 40 years in the business, and was entirely familiar with the amount and value of goods on hand. He could hardly have overlooked the fact that his First Place premises were included in the statement as firm assets, and were grossly overvalued. At the least, he was recklessly negligent. If such accounts as his are to be adopted, it will be made very easy for embarrassed merchants to close their eyes to fraudulent acts of their servants by which they profit, and then, if bankruptcy ensues, obtain the discharge which is intended to enable the merely unfortunate debtors to start life anew.

The order is reversed.

BRADLEY et al. v. SULLIVAN et al. (two cases).

(Circuit Court of Appeals, Sixth Circuit. December 11, 1913.)

Nos. 2,383 and 2,384.

1. COLLISION (§ 70*)—VESSEL BREAKING FROM MOORINGS—BURDEN OF PROOF.

A vessel which broke from her moorings and injured other moored vessels by collision is liable therefor unless the owners affirmatively show the exercise of proper care and that the breaking away and drifting were the result of inevitable accident.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 91-100; Dec. Dig. § 70.*]

2. COLLISION (§ 74*) — VESSEL BREAKING FROM MOORINGS — INEVITABLE ACCIDENT.

Evidence considered, and *held* not sufficient to establish the claim that the breaking from her winter moorings of a vessel during high water, resulting in collisions and injury to other vessels, was due to inevitable accident.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 104; Dec. Dig. § 74.*]

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Suits in admiralty, by Lafayette S. Sullivan and George H. Breyman, and by Lafayette S. Sullivan and another, as owners of the steamer Rust and the schooner Barnes, respectively, against the steamer Alva; M. A. Bradley and others, claimants. Decree for libelants, and claimants appeal. Affirmed.

Goulder, Day, White, Garry & Duncan, of Cleveland, Ohio (H. D. Goulder and T. H. Garry, both of Cleveland, Ohio, of counsel), for appellants.

W. S. Thurstin, Jr., of Toledo, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. These appeals bring under review the facts and the applicable law touching the breaking away of the steamer Alva from her winter moorings in the Maumee river at Toledo, and drifting downstream until through collision with the steamer Rust and the schooner Barnes the three vessels were carried to points down the river where they stranded and sustained injuries. Two actions were brought in the court below against the Alva, one by the owners of the Rust, and the other by the owners of the Barnes; and answer was filed to each libel by the intervening owners of the Alva; but the cases were heard together and on the same evidence. The findings below were against the Alva, the damages in each case ascertained, and decrees entered. The owners of the Alva appealed in each case, the appeals were consolidated by stipulation, and will be disposed of here, as the two cases were below, in one opinion.

The three vessels in issue were moored on the west side of the river, the Alva at the Pennsylvania dock, and the Rust and Barnes

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
209 F.—53

at the Hocking Valley dock. The Alva was 324 feet long, 42 feet beam, 2,000 net tonnage, and had on board a cargo of about 70,000 bushels of flaxseed. The Rust was 201 feet long, 33 feet beam, 666 net tonnage; the Barnes was 460 net tonnage; and these two vessels were each without cargo. The Alva stood some 400 feet further up the river than the Rust, and the Barnes stood astern of the Rust; each vessel, it need not be said, having been moored with its bow upstream.

[1] The libels charge negligent mooring of the Alva. The answers deny this and aver inevitable accident due to an extraordinary flood with ice floating in the river. Thus collision and injury were admitted; and, since these were direct results of the breaking of her moorings and drifting downstream (*Slyfield v. Penfold*, 66 Fed. 362, 364, 13 C. C. A. 512 [C. C. A. 6th Cir.]), the Alva was liable unless her owners could show affirmatively that the drifting was the result of inevitable accident (*The Louisiana*, 3 Wall. 164, 173, 18 L. Ed. 85; *The William E. Reis*, 152 Fed. 673, 676, 82 C. C. A. 21 [C. C. A. 6th Cir.]; *The Olympia*, 61 Fed. 120, 122, 9 C. C. A. 393 [C. C. A. 6th Cir.]; *The Waterloo*, 100 Fed. 332, 40 C. C. A. 386 [C. C. A. 3d Cir.]; *Campbell v. Pennsylvania R. Co.*, 85 Fed. 462, 29 C. C. A. 268 [C. C. A. 2d Cir.]; *The Lincoln*, Fed. Cas. No. 8,354, opinion by Judge Lowell).

[2] Plainly the appellants have not shown that the accident was due to inevitable causes, unless the evidence proves that they exercised such care and prudence in mooring the Alva as the circumstances required. The Alva was driven from her moorings about 1 o'clock on the morning of January 23, 1904. The river was at the time about two feet above the normal, and the ice was in motion; but the crest of the flood was not reached until some hours after these boats had been set adrift and the substantial damages sustained. The evidence relating to the disruption of the moorings centered at last upon the size and condition of certain piles, two in number, to which the anchor chain, the mainstay of the Alva, was fastened. The chain had been passed from the starboard hawsepipe, and extended forward to and fastened about these piles. Although lines additional to those previously maintained on the Alva had, shortly before the accident, been put in place in anticipation of a rise and floating ice in the river (of which warning had been received by the owners), yet the stress due to the pressure upon the Alva came upon her anchor chain and the piles to which it was fastened as stated. The piles broke, the one nearest the boat first and then the other, when the remaining lines gave way. The Alva drifted downstream until she came into contact with the Rust. Four more lines were then put out to fasten the Alva to timbers lying back of the Hocking Valley dock. The pressure of the ice subsequently carried away both the Alva and the Rust, the anchor chain of the latter breaking, but not the piling to which it was fastened. This resulted, as stated, in striking and carrying away the Barnes. The relative dimensions of these vessels in connection with the cargo of the Alva easily account for such a result.

We shall not review the evidence, for this in effect would be to

repeat the discussion of the court below. Judge Killits' analysis of the facts pertinent to the lack of care and precaution alleged in respect of the mooring of the *Alva* and his conclusion in that behalf seem to us to be justified by the record. The strength of his opinion cannot be met by criticism of the undisclosed character of a witness, any more than it can by similar treatment of an immaterial mistake like that concerning the location of the *Barnes*. If the *Rust* and the *Barnes* had in fact been "lying side by side," the result, as also its cause, would have been the same.

From these considerations it is enough to conclude, as we do, that the owners of the *Alva* have not sustained the burden which the law imposes upon them. *The Edmund Moran*, 180 Fed. 700, 702, 104 C. C. A. 552 (C. C. A. 2d Cir.); *The Olympia*, supra, 61 Fed. at page 122, 9 C. C. A. 393). Further, even as respects the causes relied on as inevitable, the appellants failed to show that the flood and floating ice were unprecedented. Not only had the river in thawing seasons reached higher stages than the level attained by this flood (which occurred several hours after the accident now in question), but at the time the *Alva's* moorings gave way the stage of the river was well within not infrequent past experiences; and the conditions prevailing during both of these latter stages were anticipated and overcome by those in control of other vessels then moored in neighboring portions of the river and equally exposed. Certainly nothing more is needed to establish the fact that the accident was not inevitable.

The decree in each case is affirmed, with costs.

KERSHAW OIL MILL et al. v. NATIONAL BANK OF SAVANNAH.

(Circuit Court of Appeals, Fourth Circuit. December 4, 1913.)

No. 1,181.

APPEAL AND ERROR (§ 1195*)—PRIOR APPEAL—REVERSAL—DETERMINATION—EFFECT—LAW OF CASE.

A. & Son, having purchased cotton known as "linters" from defendants, procured them to ship the same as "cotton" on the pretense that they could insure the same during transportation at a higher valuation. Defendants with such knowledge procured bills of lading describing the material as "cotton," and *A. & Son* on presentation of drafts attached to the bills of lading paid the drafts, detached them, and pledged the bills to plaintiff bank for a loan on the theory that the material was "cotton" instead of "linters." *Held*, that the Court of Appeals, on a prior appeal, having held that since defendants might by reasonable care have discovered that the reason for *A. & Son's* request that the property be misdescribed was mere pretense and would enable them to perpetrate the fraud committed, they were liable to plaintiff, such determination was the law of the case on retrial, and, in the absence of different evidence, the trial court properly held that defendants were liable and that the only issue for trial was the question of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. Middleton Smith, Judge.

Action by the National Bank of Savannah against the Kershaw Oil Mill and the Lancaster Cotton Oil Company. Judgment for plaintiff, and defendants bring error. Affirmed.

E. D. Blakeney, of Kershaw, S. C., and Thos. J. Kirkland, of Camden, S. C., for plaintiffs in error.

William Garrard, of Savannah, Ga. (Garrard & Gazan, of Savannah, Ga., and McCullough, Martin & Blythe, of Greenville, S. C., on briefs), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The issues of law involved in this case will be made evident by the following statement:

All & Son, cotton buyers of Savannah, Ga., through their agent, R. M. Kennedy, purchased from the defendant Kershaw Oil Mill 362 bales of "linters" and from the defendant Lancaster Cotton Oil Company 300 bales, at the average price of about 4½ cents a pound. "Linters" is a fiber which cotton oil mills obtain by reginning cotton seed before extracting the oil. It is well known as a distinct mercantile commodity of much shorter fiber than lint cotton, and the price paid for it in these transactions was far below the market price of a medium grade of lint cotton. The defendants shipped to All & Son the linters purchased from them, and had the bills of lading made out for cotton instead of linters, relying on the false statement of All & Son that if the bales were shipped as linters the railroad company in case of loss would not be liable for more than 2 cents a pound, and that for that reason they, as purchasers, preferred to pay the higher freight rate charged for cotton. The agents of the railroad company issued the bills of lading with full knowledge that the consignments called cotton were linters. Upon presentation through a bank of the bills of lading with drafts attached for the purchase money of the linters, All & Son paid the amounts called for, and after detaching the drafts obtained a large sum of money from the plaintiff bank, by indorsing the bills of lading, on the faith that they had been issued for shipment of 662 bales of cotton.

The bank, after discovering the fraud and ascertaining its loss, brought separate actions against the defendant cotton oil mills, asserting their liability on the ground that by procuring the false description of the goods in the bills of lading issued to them, and thus enabling All & Son to perpetrate the fraud, the defendants had made themselves participants therein.

The two causes were heard together, and the district judge on the first trial instructed the jury that there was no evidence that the defendants had intended to participate in the corrupt scheme of All & Son or that they had any knowledge of it, and that although it was clear from the evidence that the defendants by the exercise of ordinary intelligence and through the ordinary avenues of information

could have discovered the falsity of the pretensive reason of the consignee for desiring the linters shipped as cotton, yet, in the absence of actual fraud on their part, the defendants were not liable to a third person who had acquired the bills of lading by indorsement and had advanced money on them.

This court in reversing the judgment of the District Court held that the defendants' knowledge of the obvious difference between linters and cotton as commercial commodities, their knowledge of the custom of indorsing bills of lading to obtain money on the faith of the property described, their failure to make the inquiry which would have made evident the pretensive character of the reason assigned by All & Son for requesting the false description—all taken together led to the conclusion that the defendants were liable to the plaintiffs as if they had been intentional participants in the fraud of the consignees, though there might be no evidence of any actual fraudulent intent on their part.

On the second trial the district judge construed the decision of this court to require a direction to the jury to find for the plaintiff, leaving nothing to them but the amount of the damages. The defendants sued out a writ of error, insisting that the evidence on the second trial required that the question of liability should be left to the jury. The following is a summary of the evidence on behalf of the defendant offered on the second trial, taken from the record:

"Defendants below offered testimony to show that linters were a product of cotton, being the short lint taken off the seed by the oil mills after the seed had been ginned at the regular ginneries and was physically a product of the cotton plant of the same nature as the longer lint ginned at the ginneries; that the defendants below did not know the bank, the plaintiff below, and had no intention of defrauding it; that although they knew of the misdescription of linters as cotton in the bills of lading, and assented to it, they had done so only at the request of All & Son, under the pretense of obtaining higher insurance, if the bales were destroyed in transit, and they had in no way known of or participated in the fruits of the fraud on the bank practiced by All & Son, it being however admitted by the witnesses for the defense below that the defendants were aware that there was a well-known commercial difference between linters and cotton, and that the reason for which All & Son requested the description as cotton and not as linters could by reasonable diligence have been ascertained by the defendants below to have been merely pretentious."

From this statement it is apparent that the facts presented on the second trial did not differ substantially from those on which this court in its former judgment held the defendants to be liable.

It follows that the interesting questions raised on this writ of error must be regarded as settled by the former opinion, and that the judgment of the District Court must be affirmed, although the evidence on the second trial left no room to doubt that the defendants were free from any actual fraudulent intention.

Affirmed.

In re DANDRIDGE & PUGH.

COONEY et al. v. DANDRIDGE et al.

• (Circuit Court of Appeals, Seventh Circuit. October 7, 1913.)

No. 1,929.

BANKRUPTCY (§ 460*)—APPEALS—NECESSARY PARTIES—INTERVENING CREDITORS.

The general rule that parties against whom a joint judgment is rendered must unite in an appeal is applicable to appeals in bankruptcy proceedings, and, on an appeal from a decree refusing to adjudge a defendant bankrupt, creditors other than original petitioners who have intervened and joined in the petition must join in or be severed from the appeal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 919; Dec. Dig. § 460.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

In the matter of John B. Dandridge and Spencer B. Pugh, alleged bankrupts. From a decree dismissing the petition, Hattie O. Cooney and the Illinois Fuel & Mining Company appeal. Appeal dismissed.

Appellants are two of the three petitioning creditors who sought an adjudication of bankruptcy against appellees. The appeal is from a decree denying adjudication and dismissing the petition.

While the petition was pending, 19 creditors intervened and joined in the petition pursuant to section 59f of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]). The third original petitioner refused to join in the appeal, and as to him the District Court made an order of severance. But the 19 intervening creditors neither joined in the appeal, nor as to them was any order of severance made.

Julius Moses and Sherman M. Booth, both of Chicago, Ill., for appellants.

Charles M. Haft, of Chicago, Ill., for appellees.

Before BAKER and KOHLSAAT, Circuit Judges, and GEIGER, District Judge.

GEIGER, District Judge. The general rule that parties against whom a joint judgment or order is rendered must unite in an appeal is applicable to appeals in bankruptcy proceedings; and Mr. Loveland, in his work on bankruptcy, volume 2, pages 1465 to 1469, after noting instances where such rule has been applied—the particular question before us not appearing to have been reviewed—observes:

“Where an appeal is taken from a judgment refusing to adjudge a defendant bankrupt, * * * all the petitioning creditors at least, and probably also such as may have appeared to join in the petition under section 59f, should unite in the appeal.”

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Section 59f of the Bankruptcy Act reads as follows:

"Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

The question is directly presented respecting the standing, as parties, of the 19 creditors who intervened. The undoubted purpose of this section is to enable creditors, other than original petitioners, to acquire a standing in the proceedings such as would, with respect to those desiring to join in the prayer for an adjudication, prevent a dismissal in case it developed that original petitioners were disqualified; and to grant to those desiring to oppose an adjudication, the right to join the alleged bankrupt therein, or to assert his right in opposition in case of his failure to do so. Whatever other object the section may have, this is true: That it was designed to furnish to creditors a summary method whereby they could make themselves parties petitioner or respondent, giving to them respectively all the rights and privileges with regard to the maintenance or defense of, the proceedings, which the law gives to original petitioners who instituted, or to the bankrupt resisting, them. It is capable of no other interpretation save that it gives to creditors so coming in by appearance and joinder in the petition or answer a definite status or standing from which they cannot be eliminated except upon a hearing which, under the law, must be accorded to original parties. If this is true, then any determination by the bankruptcy court of the matter committed to it must affect them just as it affects original parties. In other words, they have a definite status as parties. When the trial court in the present case refused an adjudication, its refusal was directed, not only to the three original petitioning creditors, but, by the force of the statute, to all those who had appeared and joined in the prayer of such petition. They cannot be subordinated to the original petitioners without frustrating the very purpose and the very benefit designed to be accomplished or conferred by the statute. It may be that original petitioners have a preferential position in the actual conduct of the proceedings; but they do not represent the interveners.

In the present matter the intervening creditors, having become parties below, were and are directly affected by the judgment; and as such were and are entitled to be heard upon review thereof. It has been urged by the two appellants who perfected this appeal, that even if appellant Cooney is no longer a competent petitioning creditor, the 19 intervening petitioners are sufficient under the law to authorize an adjudication. This, as we have indicated, was the situation in the lower court; but this suggestion conclusively demonstrates the necessity of joining the 19 interveners in, or severing them from, this appeal. Otherwise, this situation can well arise: The bankruptcy court may hold that original petitioners have not the requisite status as creditors; they alone may appeal and the appellate court may concur, but still be obliged to entertain their appeal for the benefit of other creditors who were parties below but did not join in, or were not severed from, the appeal. The result would be a determination in favor of or against appellants, who concededly bore no relation to the controversy

which was the subject-matter of the appeal—plainly a moot situation. We therefore hold that the failure to join the 19 interveners, or by appropriate proceedings to sever them from this appeal, is fatal to our jurisdiction; and the errors assigned for reversal of the decree cannot, and other grounds for the dismissal of the appeal need not, be considered.

An order may be entered dismissing the appeal.

THOMPSON et al. v. SLOSS-SHEFFIELD STEEL & IRON CO.

BISHOP et al. v. SAME.

3
12 (Circuit Court of Appeals, Fifth Circuit. January 5, 1914.)

Nos. 2443, 2445.

1. COURTS (§ 359*)—FEDERAL COURTS—RULES OF DECISION.

Federal courts, in cases involving the title to land, will enforce the law of the state in which the land is situated in so far as it governs descent and alienation and the construction of conveyances.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939-949; Dec. Dig. § 359.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. COURTS (§ 366*)—FEDERAL COURTS—RULES OF DECISION—STATE STATUTES—CONSTRUCTION.

Federal courts will follow the decisions of the state court of last resort with reference to the construction of state statutes.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

Appeals from the District Court of the United States for the Northern District of Alabama; Thomas G. Jones, Judge.

Actions by Mabel Clare Bishop and by Lulu G. Thompson and others against the Sloss-Sheffield Steel & Iron Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

John M. Chilton and W. A. Gunter, both of Montgomery, Ala., for appellants.

John P. Tillman, of Birmingham, Ala. (Tillman, Bradley & Morrow, of Birmingham, Ala., of counsel), for appellee.

Before PARDEE and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. [1, 2] The principle is firmly established that the federal courts will look to the law of the state in which the land is situated for the rules which govern its descent and alienation and for the construction of conveyances and leases. *Clarke v. Clarke*, 178 U. S. 186, 191, 20 Sup. Ct. 873, 44 L. Ed. 1028; *Burgess v. Seligman*, 107 U. S. 33, 2 Sup. Ct. 10, 27 L. Ed. 359. And it is equally well settled that the federal courts will follow the construction given to the statutes of a state by the court of last resort of such state. *Leffingwell v. Warren*, 2 Black, 599, 603, 17 L. Ed. 261.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The instant cases involve the construction of conveyances of interest in real estate situated in Alabama, and of Alabama statutes relating to the limitation of actions and to real estate titles. Two cases have reached the Alabama Supreme Court involving contracts and conveyances almost identical with those involved here, and incidentally involving the construction of the same Alabama statutes that are cited in the briefs in these cases. The decision in both of these cases was adverse to the contention of the appellants here. *Smith, Receiver, etc., et al. v. Gordon*, 136 Ala. 495, 34 South. 838; *Lady Ensley Coal Iron & R. R. Co. et al. v. Gordon et al.*, 155 Ala. 528, 46 South. 983. There can be no doubt that, if the cases before us had been brought in an Alabama state court, such court would have followed the decisions last cited. It would be intolerable to have one rule prevailing in the state courts and another in the federal courts as to the construction of state statutes and the conveyances of real estate within the state, so that a plaintiff suing in the state court would lose, but would win on the same title in the federal court. *Simpson County v. Wisner-Cox Lumber & Mfg. Co.*, 170 Fed. 52, 95 C. C. A. 227. If we differed from the reasoning of the Alabama Supreme Court (and it is entirely useless to say whether we do or not), we would be constrained by well-established rules to be governed by the decisions of that court as to the construction of the contracts and statutes involved here. *Dickson v. Wildman*, 183 Fed. 398, 399, 105 C. C. A. 618.

The decree in each case is
Affirmed.

In re PEDLOW.

Petition of BERTINI.

(Circuit Court of Appeals, Second Circuit. December 9, 1913.)

No. 19.

BANKRUPTCY (§ 117*)—ASSETS—PRIVATE SALE—"PERISHABLE PROPERTY."

The term "perishable property," as used in General Bankruptcy Order 18 (89 Fed. viii, 32 C. C. A. xx), authorizing the bankruptcy court in its discretion to sell perishable property at private sale, is not limited to property which may deteriorate physically, but includes that which is liable to deteriorate in price and value; and hence the court had power to direct the bankrupt's receiver to sell the bankrupt's stock, consisting of handkerchiefs, linens, and merchandise, at private sale, where it appeared that the Christmas sales by retailers had commenced, and that the sale of handkerchiefs, etc., depreciated greatly after the holidays.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 167, 624; Dec. Dig. § 117.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5303-5305.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy proceedings of James Pedlow. Petition of Amedeo A. Bertini to revise an order directing the receiver in bankruptcy to sell at private sale the bankrupt's stock, con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sisting of handkerchiefs, linens, and merchandise, and a further order denying a petition to vacate the original order. Affirmed.

Milton M. Goldsmith, of New York City (Harold Remington, of New York City, of counsel), for appellant.

Isaac Lowenthal, of New York City, for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The question here presented is whether the court transcended its powers in ordering a sale of the bankrupt's property at private sale. There can be no question that the receiver, according to his best judgment, acted in the interests of the creditors and we are convinced that he acted wisely. After sending notices to twenty-four department stores offering the merchandise for sale, the receiver obtained three bids, one for \$6,500 from Bloomingdale Bros., one from Siegel & Co. for \$10,500 and a third for \$10,612.50 from Edward Fillmore. Subsequently Siegel & Co. withdrew their bid.

Appraisers were appointed, who found the value of the merchandise to be \$8,984.65. Fillmore's being the highest bid offered, the court ordered its acceptance and the amount, \$10,612.50, was paid November 30, 1912. After this all parties appeared before Judge Mayer, and, upon full hearing and consideration, he ordered the sale confirmed. As the amount thus received was \$1,627.85 above the appraised value and \$4,112.50 above the next highest bid, it is obvious that an unusually good price, considering the bankruptcy, was received for the merchandise. Especially is this true in view of the fact that the Christmas sales had commenced and that the sale of handkerchiefs depreciates greatly after the holidays. Not only were the creditors not injured, but, in all probability, were greatly benefited by this sale. The only remedy suggested by the appellant in case the action of the District Judge is disapproved, is a suit against the receiver for damages for misconduct, which would seem to be an abortive proceeding. It is clear, therefore, that the sale should not be disturbed unless the law peremptorily requires it. General Order No. 18 (89 Fed. viii, 32 C. C. A. xx) permits the court, in its discretion, to sell perishable property at private sale and it seems to us that this provision must include property which is liable to deteriorate in value and price, as well as property which deteriorates physically. Unquestionably a cargo of bananas would be perishable, but assume that we are dealing with a cargo of rifles for which belligerents will pay an increased price if immediate delivery can be made, but which will be practically valueless if delivery be delayed. It seems to us that "perishable" fairly construed, means property which, for any reason, will deteriorate in value and that what is and what is not perishable may be safely left to the discretion of the court.

We are convinced that the order was for the best interests of the creditors and should be affirmed.

ROBERTSON v. COCKRELL.

(Circuit Court of Appeals, Fifth Circuit. December 23, 1913. On Application for Rehearing, January 20, 1914.)

No. 2,493.

APPEAL AND ERROR (§ 554*)—BILL OF EXCEPTIONS—NECESSITY.

Where no bill of exceptions has been seasonably allowed, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2472-2477; Dec. Dig. § 554.*]

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action between M. E. Robertson, trustee, etc., and N. L. Cockrell. Judgment in favor of the latter, and the former brings error. Affirmed.

Wm. H. Watkins, of Jackson, Miss., for plaintiff in error.

Edw. Mayes, of Jackson, Miss., for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

PER CURIAM. The judgment is affirmed, for want of bill of exceptions seasonably allowed, upon the authority of *Muller v. Ehlers*, 91 U. S. 249, 23 L. Ed. 319; *Jones v. Grover & Baker Sewing Machine Co.*, 131 U. S. cl, appendix 24 L. Ed. 925; *Michigan Insurance Bank v. Eldred*, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162; *Glaspell v. Northern Pacific*, 144 U. S. 211, 12 Sup. Ct. 593, 36 L. Ed. 409; *Hume v. Bowie*, 148 U. S. 245, 13 Sup. Ct. 582, 37 L. Ed. 438; *United States v. Jones*, 149 U. S. 263, 13 Sup. Ct. 840, 37 L. Ed. 726; *Morse v. Anderson*, 150 U. S. 156, 14 Sup. Ct. 43, 37 L. Ed. 1037.

On Application for Rehearing.

The record in this case shows that judgment was rendered in the District Court May 10, 1912, that a new trial was refused, making the judgment final, May 15, 1912, and that on May 15, 1912, the court granted 60 days from that date to prepare and present for approval a bill of exceptions. The time granted within which to prepare and present a bill of exceptions expired July 15, 1912, and the record shows no further time granted. The bill of exceptions found in the transcript was signed November 25, 1912. Writ of error was allowed January 25, 1913, conditioned upon giving a bond in the sum of \$150. Bond was given and approved March 12, 1913. Citation in error was issued and service accepted March 15, 1913.

Thus the record shows, not only that the bill of exceptions was not seasonably allowed in the case, but that the writ of error was not sued out within 6 months after the entry of final judgment, as required by the eleventh section of the act of 1891 creating Circuit Courts of Appeals.

Rehearing refused.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BAKER ICE MACH. CO. v. BAILEY.

In re GRANT BROS.

(Circuit Court of Appeals, Eighth Circuit. December 11, 1913.)

No. 3,991.

BANKRUPTCY (§ 468*)—APPELLATE PROCEEDINGS—CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.

General Order in Bankruptcy No. 36 (89 Fed. xiv, 32 C. C. A. xxxvi), requiring findings of fact and conclusions of law to be stated by the Circuit Court of Appeals on appeals to the Supreme Court in bankruptcy cases, does not apply to appeals from the decision on a petition of intervention by an adverse claimant to property, which is a controversy arising in a bankruptcy proceeding, within Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), as to which appeals are governed by the general statutes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 930; Dec. Dig. § 468.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

In the matter of Grant Bros., bankrupts. The Baker Ice Machine Company appealed from an order denying its petition to recover property. On reversal of the order, J. F. Bailey, trustee, requests findings of fact and conclusions of law. Denied.

See, also, 209 Fed. 603.

H. C. Brome and Clinton Brome, both of Omaha, Neb., for appellant.

W. S. McClintock and A. L. Quant, both of Topeka, Kan., for appellee.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. This was an intervention by the machine company in a bankruptcy proceeding, asserting title and asking possession of machinery sold the bankrupt under a contract of conditional sale. It was a controversy arising in a bankruptcy proceeding, within section 24a of the Bankruptcy Act. *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986. The trustee having prevailed below, the machine company came here by appeal. We recently decided the cause for the appellant, and the appellee, desiring to appeal to the Supreme Court, now requests findings of fact and conclusions of law according to General Order in Bankruptcy 36 (89 Fed. xiv, 32 C. C. A. xxxvi). The request is denied. The general order does not apply to appeals under section 24a. *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. 610; *Houghton v. Burden*, 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. 780.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

AMERICAN BANK PROTECTION CO. v. ELECTRIC PROTECTION
CO. et al.

(Circuit Court of Appeals, Eighth Circuit. December 11, 1913.)

No. 3,762.

1. PATENTS (§ 328*)—INVENTION—BURGLAR ALARM.

The Coleman reissue patent, No. 11,626 (original No. 570,906), for an electric burglar alarm, claim 6, *held* void for lack of invention in view of the prior art.

2. PATENTS (§ 328*)—INFRINGEMENT—BURGLAR ALARM.

The Coleman patent, No. 626,670, for an electric burglar alarm, claim 1, narrowly construed as it must be to avoid anticipation in the prior art, *held* not infringed.

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BURGLAR ALARMS.

The Robins & Jacoby patent, No. 771,749, for burglar alarm devices, claims 1, 3, 4, 6, 15, and 22, if conceded validity, narrowly construed, *held* not infringed.

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BURGLAR ALARM.

The Grass patent, No. 880,020, for a vault lining for use in connection with an electrical alarm circuit, construed, and *held* not infringed.

Sanborn, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Suit in equity by the American Bank Protection Company against the Electric Protection Company and others. From portions of the decree in favor of defendants, complainant appeals. Affirmed.

For opinion below, see 181 Fed. 350.

A. C. Paul, of Minneapolis, Minn., for appellant.

John E. Stryker, of St. Paul, Minn., for appellees.

Before SANBORN and HOOK, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. The American Bank Protection Company, the owner of various patents for improvements in electrical burglar alarms, sued the Electric Protection Company and others for infringement. A part of the controversy was disposed of by this court on an appeal from an interlocutory order. 107 C. C. A. 238, 184 Fed. 916. The remainder now arises on complainant's appeal from the final decree. The various claims involved at this time will be stated in their order.

[1] Claim 6 of reissue patent No. 11,626, to C. Coleman, as follows:

"The combination with a structure to be guarded and a housing of an electrical alarm system having its parts so disposed as to protect both the structure to be guarded and the housing and cause an alarm to be sounded if either of them is entered, the alarm proper being arranged within the protected housing and all other parts of the system that may be manipulated or injured so as to cripple the system being arranged within either the structure to be guarded or the protected housing, substantially as set forth."

This claim is in the precise words of claim 20 of the same patent, except the latter has the additional element, "time mechanism inclosed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

within the guarded structure for throwing off the alarm to permit access to the guarded structure." Claim 20 was held void on the first appeal for reasons we still approve, and that conclusion was in no wise due to the words above quoted which do not appear in claim 6. In all that concerns the question of their validity the claims are alike.

[2] Claim 1 of patent No. 626,670, to Coleman: The combination here claimed includes as the novel feature means for switching the electric current from the door of the vault or other structure to permit authorized entrance and use, leaving the protection operative in the remainder of the system. If this claim is broadly regarded, it is anticipated by patent No. 246,211 to Rousseau and suggested by No. 20,970 to Whiting. If the claim be limited to the particular means described, defendant does not infringe; its device is altogether different.

[3] Claims 1, 3, 4, 6, 15, and 22 of patent No. 771,749 to Robins & Jacoby: These claims are for combinations of devices operating in connection with the bolts of a door and with tumblers of a combination lock to give general alarms and test signals under certain conditions. The prior art is shown in patents No. 262,393 to Freeman, No. 351,408 to Stern, No. 429,817 to Shubert, No. 492,478 to Sturts, No. 754,391 to Robinson & Green, No. 490,870 to Carr, Nos. 626,684 and 667,123 to Freed, and a number of others. They show many combinations and devices for connecting the operation of the knobs and bolts of doors and lock tumblers with gongs and other alarms. It is conceded those of defendant are not like complainants, but it is contended the differences were slight mechanical variations; and the rule as to equivalents is invoked. No useful purpose will be served by describing the differences. We think the measure of comparison which complainant seeks to apply to defendant would, in view of the prior art, defeat the claims in suit. It is doubtful they show an advance more than what an ordinary person having skill in the work and knowledge of the prior patents would have contrived. Ordinarily it is not invention to hitch old combinations together without change in action or results.

[4] All the claims except the fifth and seventh in patent No. 880,020 to Grass: These cover a circuit closer to be operated in connection with vault linings normally insulated. Witnesses for complainant differed as to the means by which electrical connection between the lining plates would be established by unauthorized assault and the alarm sounded. Upon the evidence of both parties, the trial court held the claims limited to certain contact points designated as "16" and found that defendant did not use them. We think the court was right.

The decree is affirmed.

SANBORN, Circuit Judge, dissents from the views expressed and the result reached in reference to claim 6 of the Coleman reissue patent No. 11,626, and claims 1, 3, 4, 6, and 15 of the Robins & Jacoby patent No. 771,749.

O'BRIEN-WORTHEN CO. v. STEMPEL.

(Circuit Court of Appeals, Eighth Circuit. December 11, 1913.)

No. 3,908.

*(Syllabus by the Court.)***1. PATENTS (§ 163*)—CLAIMS—ESTOPPEL BY ACQUIESCENCE IN REJECTION AND AMENDMENT.**

The patentee in letters patent No. 688,446, who described and claimed in his original petition for a patent on improvements in gum plasters an elastic medicated suction cup, a suction cup adapted to contain a medicament in the forms of a pasty composition, a medicated piece of raw cotton and in any other form, and a rubber suction cup combined with an absorbent material for holding and retaining the medicament and who acquiesced in the rejection of all these claims on Rosell's patent, No. 624,545, and Kusnik's patent, No. 647,003, amended his petition and accepted a claim for an elastic cup to whose inner surface an absorbent lining for holding and retaining a medicament is securely fixed, is estopped from maintaining that this claim is infringed by the manufacture and sale of an elastic cup to whose inner surface a pasty composition consisting of dextrine, water, and the medicament oleoresin of capsicum, is applied and permitted to dry into a solid adhesive lining before its sale or use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 238; Dec. Dig. § 163.*]

2. PATENTS (§ 163*)—CLAIMS—ESTOPPEL BY ACQUIESCENCE IN REJECTION AND AMENDMENT.

If a patentee acquiesces in the rejection of his claims on references cited in the Patent Office and accepts a patent on an amended or substituted claim, he is thereby estopped from maintaining that the amended or substituted claim covers the devices or combinations shown in the references, and from successfully claiming that it has the breadth of the claims that were rejected, but he is not estopped from claiming and securing by his amended claim every known and useful improvement which he has invented and which is not disclosed by the references.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 238; Dec. Dig. § 163.*]

3. PATENTS (§ 27*)—CLAIM—LIMITATION BY OLD USE—"INVENTION."

The application of an old device to a new use is not always or generally even patentable. It is only when the new use is so recondite and remote from that to which the old device has been applied, or for which it was conceived, that its application to the new use would not occur to the mind of the ordinary mechanic skilled in the art, that there is invention in the conception of its application to the new use and the old use fails to limit the claim of such an application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3749-3754.]

4. PATENTS (§ 173*)—RIGHTS OF PRIOR PATENTEE—KNOWLEDGE OF USES.

A prior patentee who has plainly described and claimed his device or combination has the right to every use to which it can be applied and to every way in which it can be utilized to perform its function, whether he was aware of all these uses or not.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 248; Dec. Dig. § 173.*]

5. PATENTS (§ 167*)—SPECIFICATION AND CLAIMS—CONSTRUCTION.

The specification and claims of a patent constitute a contract between the United States and the patentee, and they must be read and construed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

together in the same way and by the same rules by which other contracts are interpreted.

The specification which forms a part of the same petition or application as the claims must be read and interpreted with them, not for the purpose of limiting or of contracting, or of expanding the latter, but for the purpose of ascertaining from the entire agreement, of which the specification and the claims are alike a part, the actual intention of the parties.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Bill by Herman F. Stempel, Jr., against the O'Brien-Worthen Company, a corporation. From an interlocutory decree for an injunction against infringement and for an accounting, defendant appeals. Reversed and remanded, with directions.

Paul Bakewell, of St. Louis, Mo., for appellant.

J. D. Rippey, of St. Louis, Mo. (L. C. Kingsland, of St. Louis, Mo., and Omar E. Herminghausen, of Ft. Madison, Iowa, on the brief), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

SANBORN, Circuit Judge. [1] On December 10, 1901, letters patent No. 688,446 were issued to the appellee, Herman F. Stempel, Jr., for improvements in gum plasters. This is an appeal from an interlocutory decree against the appellant for an injunction against infringement and for an accounting. As usual, the finding of the validity of the patent and the finding of its infringement are challenged.

The object of the invention, its character, and extent, are portrayed by the following excerpts from the specification:

"The object of the present invention is to provide a plaster which will securely hold itself in the position in which it is applied whether the gum be moist or not. In fact, if moist the plaster will have a greater retaining or adhesive power.

"With this object in view, the invention consists in a plaster for applying medicaments to the gum consisting of an elastic cup having a convex inner surface, to which inner surface is securely fixed an absorbent lining for holding and retaining the medicament, the device being of a size easily covered by the lips of the wearer. * * * In the drawings *A* denotes a cup, made preferably of rubber, and *B* denotes a piece of absorbent material secured within the cup. The medicament is placed in the cup and the cup forced against that part of the gum to which it is desired to apply it and will be securely retained in position by the suction due to the forcing of the air from out of the cup in the act of pressing it against the gum. The medicament may be applied to the cup in other ways than by providing the cup with a piece of absorbent material. For instance, a piece of raw cotton made up into a little sphere may be supplied with the medicine, packed into the cup, and the cup then applied to the gum."

The claim is:

"A plaster for applying medicaments to the gum consisting of an elastic cup having a convex inner surface, to which inner surface is securely fixed an ab-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sorbent lining for holding and retaining the medicament, the device being of a size easily covered by the lips of the wearer, substantially as described."

The alleged infringing device is such an elastic rubber cup as is described in the foregoing specification, in which a medicated absorbent lining, made substantially as follows, is secured to the inner surface of the cup by adhesion. Dextrine is the adhesive substance used upon postage stamps and envelopes. Powdered dextrine and water are mixed to the consistency of a light syrupy paste. To this mixture is added an equal quantity of the medicament oleoresin of capsicum in a liquid form, and about two drops of the paste thus formed are placed in each cup and permitted to dry so that they make a solid lining fastened by adhesion to the inner surface of the cup. Cups made and lined in this way have been manufactured and sold by the appellee under this patent to the value of \$46,000; in other words, this cup has gone into general commercial use. For many years the appellant bought these cups of the appellee to the number of 10,000 boxes, but in the later years it has declined to buy and has manufactured in the same way cups of the same character and sold them to its customers.

The specification and claim of this patent demonstrate that the primary object of the invention was the securing of the cup and its lining to the gum, and this was accomplished by the partial vacuum made by the act of pressing it upon the gum. That method of securing a cup to parts of the human body, however, was old and had been often used and described so that the controversy about infringement in this suit rages over the lining of the cup and its fastening within it. The specification plainly indicates that the inventor's preferred method of making and using his cup was to secure within it a piece of absorbent material, such as a piece of muslin, thereafter to saturate this material with the medicament and apply the cup thus medicated to the gum. But the specification does not confine his invention or the monopoly of his patent to that method, but expressly declares that the medicament may be applied to the cup "in other ways than by providing the cup with a piece of absorbent material," so that in the absence of limitation of the claim by the prior state of the art, or by a disclaimer or estoppel of the patentee, the cups of the defendant which are elastic and which have absorbent linings securely fixed to their inner surfaces would fall within the terms of the claim and the specification and would constitute infringements of the patent.

But counsel for the appellant insists that the prior state of the art and the acquiescence of the appellee in the rejection of certain claims in his original application by the examiner in the Patent Office so limit the effect of the claim finally allowed to him that the cups of the appellant fall without its legal scope and meaning. Let us turn to the prior state of the art, the file wrapper and its contents.

Letters patent No. 335,799, issued February 9, 1886, to Frank B. Darby, described a dental capsicum plaster consisting of a compound of powdered capsicum, ginger, flavoring spice, and a solution of rubber forming a paste which is spread upon a piece of muslin or cloth to the back of which a gum or rubber tissue or disk is applied. Here was a

piece of absorbent material secured to the rubber holder, but the holder was not cup shaped, but flat, and when placed upon the gum it was held in its position solely by the pressure of the lip or cheek upon a cushion upon the back of the rubber disk and not by suction.

On July 22, 1890, letters patent No. 432,798, were issued to Charles S. Hirst, for a cup or receptacle to hold a poultice or other material. In his specification Hirst declared that his cup was preferably made of soft rubber or other pliable elastic or flexible material in the shape of a hemisphere, and that upon the application of the cup with the poultice or other remedial preparation to the affected part the material would be confined within the cup and the latter would retain its hold by suction and would exclude the air. Here was the elastic cup of the appellee and the medicament within it, but there was no absorbent lining to it.

Letters patent No. 624,545, issued May 6, 1899, to Claude A. O. Rosell, disclosed an elastic cup made preferably of pure Para rubber for the primary purpose of increasing the flow of blood to the scalp and the growth of hair thereon by means of the suction caused by the partial vacuum produced by compressing the cup upon the treated part of the scalp. But Rosell declared in his specification that "besides the special action upon the scalp, the elastic cupping device has numerous and important therapeutic applications in the development of tissue, where needed, in the treatment of atrophied conditions in the various parts of the body, etc.," and that "in general therapeutics the pneumatic cup or disk is of the greatest value." His specification also contained this paragraph:

"In some cases the cup may be made to fit air-tight by adhesion merely. Generally, however, it is necessary to prevent the air from entering at the edge or periphery. This result is readily attained by internally coating or covering the cup either throughout or merely at the periphery, as shown in Figure II, with a coating of suitable lute or ointment, such as cold cream, petroleum or beeswax, or preferably by a lute possessing desirable medicinal or nutrient properties, in which case the lute serves the double purpose of securing a tight joint and of conveying medicinal or nutrient agencies to the scalp."

And his fifth claim was:

"A surgical cupping device in the form of an elastic cup or dish with a flaring rim adapted to have a lute or ointment applied to the interior surface thereof."

In this specification and claim are found the elastic cup and the medicated lining securely fastened to its inner surface by adhesion.

In the original petition or application of the appellee in the Patent Office for the allowance of his patent, the paragraph of his specification quoted at the opening of this opinion which commences with the words, "With this object in view the invention consists," appeared in this form:

"With this object in view the invention consists broadly of a medicated suction cup and, specifically, in an elastic suction cup provided with an absorbent material for holding or retaining a medicant."

The last-quoted sentence of the specification preceding the claim read in this way:

"For instance, a piece of raw cotton made up into a little sphere may be supplied with the medicine packed into the cup and the cup applied to the gum, or, if the medicament be of a pasty composition, this composition may be placed in the cup and the cup applied to the gum."

And the petition contained five claims, the first for a medicated and the second for an elastic medicated suction cup, the third and fourth for a suction cup adapted to contain a medicament, and the fifth for a rubber suction cup in combination with absorbent material adapted to contain a medicament. The examiner rejected all these claims on Rosell's patent and wrote:

"Particular attention is called to the specification of this patent which refers to the use of medicinal agents in connection with the suction cup."

The appellee acquiesced in the rejection and amended his petition by striking out the words "or if the medicament be of a pasty composition, this composition may be placed in the cup and the cup applied directly to the gum" and his first four claims, and added a claim for "an elastic suction cup provided with an absorbent lining adapted to contain a medicament." The examiner thereupon rejected both claims on the patent to Kuznik, No. 647,003, which shows absorbent cotton in a rubber sack. The appellee acquiesced in this rejection and so amended his petition as to put it in the form of the present specification and claim of his patent.

[2] It is an indisputable principle of the law of patents that, if a patentee acquiesces in the rejection of his claims on references cited in the Patent Office and accepts a patent on an amended or substituted claim, he is thereby estopped from maintaining that the amended or substituted claim covers the combinations or devices shown in the references and from successfully claiming that the substituted claim has the breadth of the claims that were rejected. But he is not estopped from claiming and securing by his amended claim every known and useful improvement which he has invented and which is not disclosed by the references. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 106 Fed. 693, 714, 45 C. C. A. 544, 565, and the cases there cited; *J. L. Owens Co. v. Twin City Separator Co.*, 168 Fed. 259, 268, 93 C. C. A. 561, 570; *Brill v. St. Louis Car Co.*, 90 Fed. 666, 668, 33 C. C. A. 213, 215; *Hubbell v. United States*, 179 U. S. 77, 83, 84, 21 Sup. Ct. 24, 45 L. Ed. 95. Counsel for the appellee contend that the cups with the dried dextrine-capsicum lining were not disclosed by the Rosell patent, so that the appellee was not estopped from maintaining that they were within the scope and meaning of the substituted claim finally allowed to him. In support of this position, they argue that the Rosell patent related to an art too remote, and the device it described was too large, and the function it was used to perform, the increase by suction of the flow of the blood to the affected part of the scalp, was too dissimilar to the function of the appellee's cup, the receiving and holding of medicament to be applied to the gum, to limit the scope of the final claim of appellee's patent or to estop him from maintaining a monopoly of the right to make and use the dextrine-capsicum cups which have been described.

[3] But the application of an old device to a new use is not always or generally even patentable. It is only when the new use is so recon-dite and remote from that to which the old device has been applied or for which it was conceived that its application to the new use would not occur to the mind of the ordinary mechanic skilled in the art, that there is invention in the conception of its application to the new use, and the old use fails to limit the claim of such an application. *Potts v. Creager*, 155 U. S. 597, 608, 15 Sup. Ct. 194, 39 L. Ed. 275; *Hobbs v. Beach*, 180 U. S. 383, 388, 390, 21 Sup. Ct. 409, 45 L. Ed. 586; *Adams Electric Ry. Co. v. Lindell Ry. Co.*, 77 Fed. 432, 447, 23 C. C. A. 233, 248.

[4] A prior patentee who has plainly described and claimed his device or combination has the right to every use to which it can be applied and to every way in which it can be utilized to perform its function, whether he was aware of all of these uses or not. *Roberts v. Ryer*, 91 U. S. 150, 157, 23 L. Ed. 267; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 201, 14 Sup. Ct. 310, 38 L. Ed. 121; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 106 Fed. 693, 709, 45 C. C. A. 544, 560. Rosell described and claimed, among other things, an elastic cup a lining for holding and a lining holding a medicament secured by adhesion to the inner surface of the cup, for the purpose of applying the medicament to the scalp, or to any other part of the body. The mere change of the size of a patented device, while it still performs the same function by the use of the same principle, does not withdraw the modified device from the protection of the patent, and there is no logical way of escape from the conclusion that the large elastic rubber cup of Rosell with its pasty lining of lute for holding a medicament and in another form with its pasty lining of lute holding a medicament secured by adhesion to the inner surface of the cup for the purpose of treating a portion of the scalp, or any other part of the body, was not so remote from the small elastic rubber cup of the appellee with its absorbent lining on its inner surface fastened by adhesion for holding a medicament for the purpose of applying it to the gum, that a patent for the former did not limit or affect the scope and extent of a subsequent patent for the latter. Why then was not the appellee estopped from maintaining that these dextrine-capsicum cups were within the scope of the claim of his patent by his acquiescence in the rejection based on the Rosell patent of the broader claims he made? Counsel for the appellee answer because Rosell's lining of his cup is not absorbent, and because the appellee's withdrawal of his claim for a cup containing a medicated pasty composition was a withdrawal of a claim for a cup containing a gum only. The sufficiency of these answers must be determined by the specifications and claims of the patents to Rosell and the appellee and by the action of the latter in the Patent Office.

[5] The specification and claims of a patent constitute a contract between the United States and the patentee, and they are to be read and construed together in the same way and by the same rules by which other contracts are interpreted. The specification which forms a part of the same petition or application as the claims must be read and

interpreted with them, not for the purpose of limiting, or of contracting, or of expanding, the latter, but for the purpose of ascertaining from the entire agreement, of which each is a part, the actual intention of the parties. *Century Electric Co. v. Westinghouse Mfg. Co.*, 191 Fed. 350, 354, 112 C. C. A. 8, 12; *Seymour v. Osborne*, 11 Wall. 516, 547, 20 L. Ed. 33; *National Hollow Brake Beam Co. v. Interchangeable B. B. Co.*, 106 Fed. 693, 701, 45 C. C. A. 544, 552; *O. H. Jewell Filter Co. v. Jackson*, 140 Fed. 340, 344, 72 C. C. A. 304, 308; *Louden Machinery Co. v. Janesville Hay Tool Co.*, 148 Fed. 686, 690, 78 C. C. A. 548, 552; *Electric Machine Co. v. Morris (C. C.)* 156 Fed. 972, 974; *Lewis Blind Stitch Machine Co. v. Premium Mfg. Co.*, 163 Fed. 950, 955, 90 C. C. A. 310, 315; *Fullerton Walnut Growers' Ass'n v. Anderson-Barngrover Mfg. Co.*, 166 Fed. 443, 461, 92 C. C. A. 295, 313. When the material parts of the record are read by this rule, these facts are conclusively established. The appellee described and claimed in his original application or petition: (1) An elastic medicated suction cup; (2) a suction cup adapted to contain a medicament in the forms of a pasty composition or of a medicated piece of raw cotton, or in any other form; and (3) a rubber suction cup combined with an absorbent material for holding and retaining the medicament. The examiner rejected all these claims because Rosell's patent disclosed an elastic medicated suction cup and a suction cup adapted to contain a medicament in the forms of a pasty composition, or of a medicated piece of raw cotton, or in any other form, and Kuznik's patent disclosed a rubber sack in combination with absorbent material adapted to contain a medicament. The appellee acquiesced in this rejection, struck out of his petition all reference to the medicated suction cup and to the use of a medicated pasty composition in the cup, and reduced his claim to an elastic cup to whose inner surface an absorbent lining for holding and retaining the medicament is securely fixed. Do the dextrine-capsicum cups fall within the part of the claims rejected by the examiner, or within the part allowed and embraced in the final claim? Conceding that the linings of these cups are fixed therein and are capable of absorbing liquids, their absorbent characteristic has nothing to do with the performance of the function of the patent, so that they are not absorbent in the sense of the patent and its claim, because they already contain the medicament and are not adapted or intended to perform the function of absorbing it, and the only patentable sense of the word absorbent in the specification and claim is that the lining is capable of absorbing, and intended to absorb, a medicament, and thus to aid in the performance of the function of the device. Moreover, "lute," the term used in Rosell's patent to describe the material with which his cup is lined, is a broad word which signifies any tenacious substance, and there are many tenacious substances which are absorbent. The truth is, however, that the linings of these dextrine-capsicum cups are not linings to be medicated, but are medicated linings. They are not linings for the purpose of absorbing medicaments, but they are linings which have absorbed medicaments. The cups, therefore, are medicated cups, and they fall directly within the description by Rosell of his cup lined with medicated lute and fastened to the cup by adhesion and within

the appellee's claims for a medicated suction cup and an elastic medicated suction cup which were rejected by the examiner and were not allowed in the subsequent patent.

Again, the linings to these cups were made by placing a medicament in the form of a pasty composition in the cups and permitting it to dry. A cup so lined was claimed in the original petition of the appellee, for the clause of the petition which is the basis of that claim is not limited, as counsel for the appellee argues, to a medicated pasty composition placed in the cup immediately before its application to the gum, and the appellee's withdrawal of that claim by his amendment of his specification estopped him from successfully sustaining a claim for a cup so lined. And the conclusion of the whole matter is that, conceding that the patent of the appellee is valid, he is estopped by his acquiescence in the rejection of his claims in the Patent Office on the Rosell patent and the Kuznik patent from maintaining that the narrower claim that was subsequently allowed to him includes the cups made and sold by the defendant, and upon that ground the decree below must be reversed, and the case must be remanded to the District Court, with instructions to enter a decree dismissing the bill on the ground that the defendant has not infringed the patent.

DRUM v. TURNER.

(District Court, D. Minnesota, F. D. December 17, 1913.)

1. PATENTS (§ 163*)—CONSTRUCTION—ESTOPPEL BY ACQUIESCENCE IN REJECTION OF CLAIMS.

Where a patentee acquiesced in the rejection of claims in his application on the ground that they were anticipated by a prior patent, he is estopped to claim that the patent as granted covers the construction shown by such prior patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 238; Dec. Dig. § 163.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CONCRETE FLOORING.

The Norcross patent, No. 698,542, for a reinforced concrete flooring, claim 2, *held* void for anticipation or as for a function; and claims 1, 3, and 4 not infringed.

In Equity. Suit by John L. Drum against Claude A. P. Turner. On final hearing. Decree for defendant.

Paul & Paul, of Minneapolis, Minn., for plaintiff.

C. J. Williamson, of Washington, D. C., for defendant.

WILLARD, District Judge. [1] Norcross' specification shows that the only form of metallic network which he had in mind was that made by strips of suitable wire netting. This appears in several places. Page 2, lines 12, 96, 125; page 3, lines 17, 73. It perhaps is not important, save as it shows why Norcross yielded so readily to the contention of the examiner that the original claims 1, 2, and 3 of his patent were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

anticipated by the patent to Seely. That the examiner did hold that they were so anticipated admits of no doubt. He could not have rejected them, except on the theory that the iron beams of Seely constituted metallic network. Whether they did or not is not now material. If the examiner so contended and Norcross accepted that contention, he is estopped from now claiming that his patent covers the devices disclosed in the reference cited by the examiner which *the latter believed* were within the limits of the claims first presented. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 106 Fed. 693, 714, 45 C. C. A. 544. That the examiner was wrong in his contention is not important. *Johnson Furnace & Engineering Co. v. Western Furnace Co.*, 178 Fed. 819, 102 C. C. A. 267.

It has been frequently said that the general rules for the interpretation of a contract govern the construction of a patent. If this case were cast into the form of a contract by letter between two individuals, the correspondence would take this shape: Norcross writes to a manufacturer saying that he wishes to make a contract by which the manufacturer will be obliged to furnish him all the metallic network which Norcross' factory requires for the coming year. The manufacturer writes that he cannot furnish I-beams for that purpose. Norcross thereupon says that he does not want rolled iron in any form; he wants metallic network formed by strips of wire netting. The manufacturer accepts the proposition so modified. Later Norcross sues the manufacturer for refusing to deliver to him rolled iron rods under the contract. Although Curtis says (page 231, Plff.'s Rec.) that iron rods do not correspond to the material which Norcross had in mind when he used the term "any class of rolled iron work," yet it seems apparent that Norcross would fail in his suit.

The question is not whether Norcross, after limiting his claim as he did, is entitled to the equivalents of the claim so limited. It is rather whether or not a certain equivalent has been by him expressly abandoned to the public. His acquiescence in the rejection of his claim, coupled with his express statement that "one special object of the applicant's invention is to dispense with the use of rolled iron of all forms, and to employ wire netting in place thereof," can indicate nothing less than that he gave up to the public the right to use any form of rolled iron in concrete flooring. In other words, his own statement indicates that his *invention* consists in part of a substitution of wire netting for all forms of rolled iron. Having so limited it, and the patent having been secured, the claim cannot now resume its original expansiveness. *Hennebique Const. Co. v. Urban Const. Co.*, 182 Fed. 496, 105 C. C. A. 257.

I have examined all the cases cited by the plaintiff in his additional brief. In no one of them do I find the same combination of elements of estoppel as appear in the case at bar. The latest case in the Circuit Court of Appeals in this circuit is *O'Brien-Worthen Co. v. Stempel*, 209 Fed. 847, December 11, 1913.

[2] The first claim of the Norcross patent is therefore not infringed. Claims 3 and 4 must follow the fortunes of claim 1.

Claim 2 is as follows:

"A flooring resting on separated supports and consisting of concrete with metallic network so arranged therein that the amount of metal will be greatest at the points where the greatest tensile and shearing strains are to be supported."

I have seen no testimony in the plaintiff's record relating to this claim, except that found in the cross-examination of his witness Carter. The plaintiff's brief of 193 pages devotes less than a page to this claim. Carter said (page 38):

"Claim 2 appears to be, in effect, a broad claim on a flat slab construction of reinforced concrete flooring that is limited only by the requirement as to the arrangement of the reinforcement, that it shall be such as to provide the greatest amount of metal at the points where the greatest tensile and shearing strains are to be supported."

And again on page 42:

"XQ96. Has not Norcross in claim 2 set forth the placing of the metal at the points which in practice would be the natural ones to place it for the resistance of the greatest tensile and greatest shearing strains? A. I think so, assuming a knowledge on the part of the designer of what these points are. They are certainly the proper points."

What was said in *Hildreth v. Lauer & Suter Co.* (D. C.) 204 Fed. 792, at page 797, applies here:

"Plaintiff's fourth claim appears to be for any way of accomplishing a particular result. If it is, it would appear to be a claim for a function or an operation of a machine."

If this claim is intended to be limited to the massing of the material at the center of the span, as may be inferred from the specification, page 2, line 124, page 3, line 84, and figure 4, it is anticipated by the patent to Ransome. In either event it is void.

Let the bill be dismissed, with costs.

NATIONAL ELECTRIC SIGNALING CO. et al. v. TELEFUNKEN WIRELESS TELEGRAPH CO. OF THE UNITED STATES.

(District Court, S. D. New York. June 12, 1913.)

1. PATENTS (§ 328*) — VALIDITY — INFRINGEMENT — APPARATUS FOR WIRELESS TELEGRAPHY.

The Fessenden patent, No. 706,736, for apparatus for wireless telegraphy, as limited by the prior art, *held not infringed*.

2. WORDS AND PHRASES—"TUNE"—"TUNING."

A receiving system of a wireless telegraph is in "tune" if the period of the induced pulses is exactly the same as the interval between the waves themselves, so that the return of the first pulse to the receiving antenna and from the other end would be exactly synchronous with the reception of the second wave by the antenna itself, and the controlling of this result by varying inductance and the capacity of the receiving system so as to be exactly the same as that of the transmitter is "tuning."

In Equity. Suit by the National Electric Signaling Company and others against the Telefunken Wireless Telegraph Company of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

United States for infringement of letters patent No. 706,736 for apparatus for wireless telegraphy granted to R. A. Fessenden, August 12, 1902. On final hearing. Decree for defendant.

See, also, 194 Fed. 893; *United Wireless Tel. Co. v. National Electric Signaling Co.*, 117 C. C. A. 262, 198 Fed. 386, 119 C. C. A. 71, 200 Fed. 591.

F. W. H. Clay, of Pittsburgh, Pa., for complainants.

Hector T. Fenton, of Philadelphia, Pa., for defendant.

HAND, District Judge. I group the 14 claims here in suit into three classes: First, the claims for the direct transformation of the current into motion, 1, 4, 22, 23, and 34; second, the claims for "tuning," 6, 10, 13, 28, 29, 30, 33 and 35; and, third, claim 15, the "low-resistance" claim, with which also belong claims 22 and 23. Some of the "tuning" claims are also claims for direct transformation, but they need no separate consideration from the direct transformation claims themselves.

[1] First, I will consider the "transformation" claims, some of which I quite agree, as mere matter of wording cover the defendant's apparatus. A question may be raised about claims 22 and 23, which are "low-resistance" claims like claim 15, but all are broadly based upon the fundamental idea I have mentioned. It is perhaps a little strange that every claim concludes with the phrase "substantially as set forth" except Nos. 31, 32, 33, 34, and 35. While these words have as matter of law no real effect at all upon the claim, still they sometimes signify the draughtsman's sense that his terms, while very broad, are to be read upon the actual disclosure made. The question in this case is whether, in spite of their broad language, the claims must not be limited in interpretation to the disclosure actually set forth, or to some derivative of it which shall owe some suggestion to the disclosure. If the claims require no such limitation, then Fessenden can claim a valid monopoly upon every wireless receiver which directly transforms the energy of the wave-train into the energy of motion, that is, without the intervention of some relay battery, and the defendant is certainly an infringer.

At the outset it will be clearest to see how much similarity there is between the two devices and how much difference. Each system has a completely closed receiving wire from antenna to ground, including the detecting devices. This applies as well when the detecting apparatus is in the secondary of a transformer as when it is in conductively connected series. In each the only energy which moves the object that sensibly affects the eye or ear is the oscillatory current; in short, the electromotive force is transformed into motion. With this it seems to me the resemblance absolutely stops, because neither is the current operative in the same way, nor is the apparatus in the least alike, nor does one give the faintest clue to the discovery of the other.

To justify these assertions I had best take up the operation of each. Fessenden makes in his receiving wire two loops, between which the oscillating pulses create a magnetic field of one sign when the oscillation moves in one way, and of another when it moves in the opposite. Within this field he hangs a metal ring by a fine filament, which interposes but the slightest impediment to any torque which the ring may re-

ceive. The magnetic field between the loops or coils sets up voltages in the ring, which in turn create in it a current. If the ring be hung at a given angle to the coils, the interaction of the field with the current in the ring, as the current oscillates, creates a constant torque upon the ring, enough to overcome its inertia. Mr. Clay says that the result is a rectification of the magnetic field analogous to the rectification of the current itself by defendant's "rectifier," but I can find no evidence of the sort. The explanation I have given is Fessenden's own explanation in his paper of November 28, 1899, and I find nothing further in the testimony of either Stone or Kennelly. It is true that Stone describes the torque as the product of the reaction of the two fields, one produced by the current in the coils, and the other produced by the induced current in the ring; but I think it can make no difference whether field of the coils operates upon an induced current or upon an induced field. In either case there is no mention of rectification of the field, and the phenomenon is nowhere explained. I cannot assume that the field is changed in character, and I do not, of course, understand the phenomenon, which is confessedly complicated.

In the defendant's apparatus there is interposed in the circuit which receives the oscillating current a substance of very high resistance indeed, called the "detector." The functional characteristic of this mechanism, whose structure I need not explain in detail, is that, while it offers a high resistance to oscillations in both directions, it offers more to those in one than to those in the other. As a consequence, a greater quantity of current passes through the detector when the oscillation is in one direction than when it is in the other, and indeed the part which does not pass through is turned back so as to flow in the opposite direction. There is thus created in an ingeniously associated circuit containing a telephone a series of current differentials always in one direction, which are operatively precisely the equivalent of a direct current in the circuit itself, and which can therefore be made to energize the coils of the telephone magnet, thus making the diaphragm respond.

It seems clear to me from this explanation that the defendant's method of operation owes nothing to Fessenden. It proceeds by modifying the current itself, turning back a part of it, and sending it the other way. It creates out of an oscillating current a direct current, and, after it has done that, it interposes the very obvious appliance for detecting a current, the telephone. But Fessenden did not modify the current at all; he is not even shown to have modified the magnetic fields. He did take advantage of the reaction of these fields upon the ring to move the ring, but it was that motion which was the first unidirectional movement of either current or mass. The defendant, it is true, for each whole wave-train produces a movement in the diaphragm of the telephone, but even this is not detectable by the senses, because it is only the vibration of the diaphragm produced by a succession of wave-trains which gives the note that the ear receives. Perhaps it would, however, be fair to allow that in this latter respect the two are analogous, for the succession of wave-trains amplifies the motion of Fessenden's ring, and in the microphonic adaptation pro-

duces the telephone note by variations in the battery current. Nevertheless, the fact remains that the apparatus and its operation is quite different in each case.

Furthermore, when we consider what the defendant owed to Fessenden, we see that it was nothing but the idea of transforming the energy of the oscillating current into motion. All that Fessenden did was to apply to the detection of these particular oscillations a detector theretofore known for alternating currents generally, which, as Dr. Kennelly concedes, "was recognized at the date of the appearance of Northrup's article" as "capable of indicating the presence of Hertzian waves." He discovered nothing about the current or its nature; he discovered nothing about the galvanometer which he used. What he did do was to make a very handy adaptation of Northrup's galvanometer to this particular instance, and no one ought, I think, to question his title to a patent for just what he did. The defendant, however, made no use of anything shown in that patent at all; this galvanometer was perfectly useless in helping his discovery, because he was seeking to change the current itself, after which the path was open to any electrician; it was only the detection of a very minute direct current of electricity.

Therefore the question comes down to this: Granting that the defendant has borrowed not a thing in detail from Fessenden and owes no suggestion whatever in method or device, is it enough that each transforms the electric energy into motion? That any one should claim such an idea as original merely as such would *a priori* seem unlikely, for the idea was a scientific commonplace long before Fessenden made his invention, or indeed was even born, and it was a known way to measure electricity, as in the electroscope itself. Furthermore, this very form of transformation was actually practiced experimentally by Hertz, as described, as early as 1891 in Wiedmann's *Annalen*, No. 42, page 407. The translation appears as chapter 7 of Hertz's book, "Electric Waves," and is entitled "Mechanical Action of Electric Waves in Wires." Hertz used two forms of apparatus for measuring the oscillations by the movement of suspended bodies. One of these was a horizontal cylinder hung in a plane at 45 degrees to the plane of the wire which received the oscillation; and the other was an aluminum ring. In view of the fact that the receiving wire was not itself coiled, there may have been some difference in operation between this and Fessenden's galvanometer, as to which I am not competent to say; but certainly the following language seems to describe the present theory of the operation admirably (page 192):

"The rapidly alternating magnetic oscillation must induce in the closed hoop a current alternating rhythmically with it, and the reaction between these causes the deflection of the loop."

I am not in the least concerned here with whether this was exactly the same thing as what Fessenden afterwards discovered, because no one wishes to declare his patent invalid, but only to ascertain its limits. Nor does it make any difference whether Hertz was here dealing with the effects of magnetic induction without knowing it. He supposed in any case that he was measuring the oscillations of radiated waves, and

whether his experiments misled him as to the actual phenomena he was observing, he at least gathered from them an exactly accurate understanding of the action of radiated waves, and discovered, if it needed a discoverer at all, the fact that they could in just this way produce motion.

Next the Northrup device was in substance the very identical instrument afterwards used by Fessenden, but used here to detect the results of magnetic induction. That the step from this use of the Thomson galvanometer to Fessenden's did not take time, or inventive genius, appears from the immediate suggestion by the editor of the magazine in which the article appeared. Dr. Kennelly, in the phrase I have quoted just above, admits that the application of the instrument was at once recognized. As for the damping magnet of Northrup, I may pass it over as a mere detail of organization. The phenomena of magnetic induction themselves are no doubt in some respects quite different from those of radiated ether waves, and, as before, I have no disposition to declare these experiments of Northrup good anticipations of Fessenden's disclosures, which were the first practical application of them to radiated waves, yet the fact certainly remains that all Fessenden did was to adapt Northrup's galvanometer to a new use, and that also to a use which was in a closely kindred art.

In the face of this showing, it seems to me extravagant to claim this as a great pioneer invention. Let us see what the inventor himself thought of it after he had discovered it. It is true that he claimed broadly, though, as I have noted, he somewhat significantly added a reference to the disclosure even in the claims; but he stated the object of his invention (page 1, lines 33-41), and then he said that the "object" of his invention was to induce currents in a secondary ring and thus produce motion. In the summer of 1899, he obviously had no idea of this mere idea of such a transformation as itself an epoch making invention, the mere conception of which was revolutionary, although he now asserts that it was wholly perfected at that time. In his first publication, July 29th, he was still speaking of improvements in coherers. On August 12th he says that for some work the coherer is not necessary at all, but one may use his own device. "All these methods, though tried on a small scale, seem to be improvements." In his paper before the Institute, he describes only a "nice galvanometer to work with," not mentioning his discovery of the direct transformation of energy as a new way of facing the difficulty. Of course, I do not mean to complain that an inventor should be modest at the outset, but I do say that no one reading these statements intelligently can fail to miss all indication that he thought the fundamental idea a new discovery. I am quite sure that such a claim would have greatly surprised his audience. Clearly he regarded his devices as good alternatives to those in use, as they admitted quantitative measurement which the others did not.

As to the Tietz bolometer, it hardly seems to me relevant broadly, because the actual detection of the waves is made by means of a Wheatstone Bridge, and the recording galvanometer operates by means of a voltaic battery. A very slight current in one arm of the bridge,

if it be a very fine wire, will cause it to become heated and so change its resistance. This upsets the balance of the bridge, and a galvanometer records the battery flow. However, I agree that it was a device within claim 34. Whether it was a valid anticipation or not, I do not think it necessary to decide. It is true that these seem to have been experiments only, but then Fessenden's actual disclosure has had almost no practical application. At least, this gave quantitative responses and did not raise the question which always seems to have existed in the case of coherers, whether a real resonance was possible.

We must remember that the patent law gives no domination merely to the first comer, nor any claim by right of occupation only. A patent is designed only to protect the inventor from those who would use his ideas and who really owe him something. The mere fact that he may be the first to embody an abstract principle does not give him the right to monopolize it, unless the mere conception is new and requires his inventive originality, which is not the case here. It is true that the mere discovery of a problem may require a touch of genius, but this problem was well known. Hertz at the very outset had grasped it, and had given an answer almost identical with this. Fessenden's claim now seems to me to be as though the Wright brothers who assert that they were the first to fly, should claim a patent on all flying machines, regardless of whether or not they use the warping of the planes. I cannot see that the art owes him anything but a handy device for testing out wireless apparatus, which is the only commercial use it has had.

The next question is of the "tuning" claims, to understand which it is necessary to describe more fully the phenomena of the waves. As has been said, these come in the form of oscillations; each being a half cycle of a wave. When the spark discharges across the terminals, it sets up in the transmitter a current which passes first to one end of the circuit and then surges back to the other. A properly grounded antenna may be compared with a closed circuit having a condenser, in which the antenna proper is on one capacity and the earth the other. Hertz, who did not ground his transmitter but had two areas of relatively large capacity, recognized this, and regarded the ether separating the capacities as the analogue of the dielectric of a true condenser. This conception is necessary to an understanding of the kind of "tuning" here in question. When the pulses reach the antenna, it throws off into the ether disturbances which are true waves, similar to light waves, or the air waves of sound. If the pulses can rush back through the circuit to earth and then back to the antenna, a second wave will be thrown off, and the capacity of the system to send off these "echo" waves as it were determines the persistence of the wave-train. If the "echo" pulses are feeble, and the greater part of the energy goes off at the first pulse, the train is said to be quickly "damped" and comes to the receiver in the form of a mere "splash" in the ether. If, on the other hand, the system can conserve a large part of the energy, it will be radiated in successive waves, whose rate of decrease will be much less. Now, the first kind of "tuning" was practically developed by Sir Oliver Lodge for the purpose of what he called "selectivity." By this he meant that the oscillations should be prolonged as much as

possible; a less proportion of the spark's energy being thrown off at each pulse, and the subsequent pulses being of greater intensity and the wave-train of greater persistence. Moreover, as the period of the pulses in the transmitter was of known frequency, the period of the waves making up the train was fixed and constant. When the first wave reached the receiver, it set up voltages in it which resulted in currents passing through that system.

[2] If the period of the induced pulses in that system was exactly the same as the interval between the waves themselves, the consequence would be that the return of the first pulse to the receiving antenna and from the other end, whether it was plate or ground, would be exactly synchronous with the reception of the second wave by the antenna itself. When a receiving system was in "tune" with the transmitter, this occurred, and this result could be controlled by varying the inductance and the capacity of the receiving system so as to be exactly the same as that of the transmitter. Now the result of this would be, thought Sir Oliver Lodge, that the second wave would be amplified by the "echo" of the first, and so more of the energy of the wave-train could be developed in the succession of current pulses oscillating in the receiving antenna. This cumulation of energy would increase the electrostatic charges in the terminal plates and would finally "spit off," so that with a given total amount of energy received from the train the coherer would "break down" more readily than if only the first wave of that train was used. Since, however, this depended wholly upon the synchronism of the oscillations in the receiving circuit with the periodicity of the waves themselves, a receiving circuit not in "tune," that is, not constructed with precisely the same inductance and capacity, would not respond. In such a receiver the "echo" pulse would reach the top of the antenna at the time, for instance, when the trough of the next wave was reaching it, and would therefore by so much neutralize the energy of the second wave itself. The resulting second oscillation would not go to increase the potential at the terminal plates, and so to break down the coherer.

It followed from this very beautiful conception that only those receivers would respond to a transmitter which were attuned to it. At one time Sir Oliver Lodge seems to have supposed that a tuned transmitter was more limited in distance, because the first great "splash" will have a greater radiating power; but in his British patent 11,575, of 1897, he seems to have corrected that opinion, because he says at the end of his provisional specification:

"Although the radiation becomes less powerful, the total number of swings is so much increased that it may be made as ultimately effective at a distance as a single powerful swing."

This is perhaps not strictly relevant here, except that it seems to contradict the assertion of the complainant, that while coherers were in use, it was only the first pulse or "whip-crack," to use Sir Oliver Lodge's phrase, which counts. Indeed, I cannot understand how his theory could be borne out at all except upon the assumption that there is a summation of the pulses somewhere, he thought at the terminal

plates, cumulatively building up a potential sufficient to break down the coherer.

Such was the "tuning" of Sir Oliver Lodge; but there seems to have been some doubt whether with a coherer it ever operated at all. At least, I understand Dr. Kennelly to believe that if there was any "tuning" it was of a very modified kind to that now possible when the coherer is taken out of the circuit. I do not think, however, that Pupin is to be so understood; while he said that nobody had succeeded in tuning a receiving circuit, that was because no one had gotten an undamped train of waves or a close enough succession of sparks to "swell up" in the receiver, not because you could not accumulate what you had. Stone and Pierce both insist that there is not the slightest *a priori* reason to doubt that at the ends of the coherer the electrostatic charges may accumulate as a result of the striking of the successive pulses against the coherer, and that the final breaking down of the coherer may not be due to a real accumulation of potential. Of course, I have no means of judging such a question as this and shall only proceed upon the undoubted fact that a very great scientist, Sir Oliver Lodge, certainly believed that he did procure an integration of the energy of the whole wave-train which broke down the coherer. His patents are meaningless upon the assumption that only the first great pulse is operative and his expression quoted referred only to distant telegraphy. As I have shown, he seems to have modified that judgment by 1897.

Now in circuits such as these antennæ there is considerable loss of current due to the resistance in the circuit itself, the energy disappearing in the heating of the wires or capacity areas; and, especially in the case of the receiver, where the energy to be detected is excessively small, it is of prime consequence to avoid such losses. To do this both Lodge and Marconi introduced a local circuit about the coherers, the purpose of which was to divert into it as great a part as possible of the energy which came down the antenna. In this local circuit they placed a condenser and an inductance coil. As I have already said, the antenna and the ground are in fact the opposite plates of a condenser, and if the condenser and the inductance coil of the local circuit are attuned to the antenna circuit, precisely as the antenna circuit is attuned to the transmitter, then so much of the received pulses as is diverted into the local circuit will have the same period therein from one plate to the other of the condenser as the period of the pulses in the antenna circuit itself. That period, as we saw, was the exact period of the wave-train, so that it has become now a commonplace of wireless telegraphy to tune in harmony, the transmitter, the receiving antenna, and the local receiving circuit. There is also a local circuit in the transmitter, inserted for the same reason, and this must also be in tune. Hence if when the first wave comes down the greater part of it begins to oscillate in the local receiving circuit, the second wave will enter that point in the local circuit at exactly the same phase of its cycle, as the "echo" of the first wave is in. Thus at that point and at that instant, there is obtained precisely the same integration, or summation, of pulses in the local circuit as in the antenna; but the resistance losses are avoided which

would exist if the whole of the pulses had to pass through the antenna circuit.

The complainant's position is not that he was the first to discover this kind of tuning of the local circuit, which, he says, was well-known before (so far as tuning was possible with a coherer), but that he was the first to add to a receiving circuit a local closed tuned circuit, and that this appeared from his original specification and claim. The answer is that, regardless of whether this would be a good invention or not, it was an interjected idea. In his original claim 3 he mentioned a condenser in shunt with the coils 7, 7 and the associated ring 8, without however any inductance coil, and that is the only mention in the claims of the condensers at all. Not a word appears in either specifications or claims of "tuning." In the specifications he says that the condensers indicated in the diagrams may be put in shunt with transmitter or receiver, and that is his only mention of them. Nowhere does he either describe or show in diagram an induction coil. The first action in the Patent Office rejected all claims and required the applicant to state the purpose of the condensers. Thereupon he directed the deletion of the condenser in the transmitter, and amended his specifications by saying that the condenser in the receiver was to avoid resistance losses, setting forth in detail how the proportion of the current in the main circuit could be reduced so that the maximum might flow in the local circuit. The reason for this result I do not understand, but it is irrelevant here. The patent was actually allowed once on this showing and, indeed, was reopened again, still showing nothing of tuning. In June, 1902, two and one-half years after the original application, the specifications were amended so as to include the tuning of the closed circuit, and 23 new claims were added claiming tuning in a great variety of forms. Subsequently other claims were added, which were, however, not a departure, if the amendments themselves were proper.

Two quite separate questions arise: First, whether Fessenden in 1899 understood and expressed the tuning of the local circuit; second, whether, if he did, he had any idea of claiming it originally. As to his knowledge, the question must remain in doubt. How much he or any one else knew is not capable of ascertainment except by what he said, and neither in his patent, nor anywhere else, did he say anything in the least resembling it. Of course, it may have been obvious as Kennelly says, but in patent causes we are chary of too ready an assumption of the obvious. Every one concedes that Stone is a very expert person and one of the best men in the art, yet it was not so obvious but that he put an untuned condenser across a coherer in a local circuit. It may be that the complainant is right that a tuned receiving circuit was unknown while the coherer was used; but, if so, it was all the more incumbent on Fessenden to point out that he had obtained a real tuning, for the first time possible, when the circuit was closed. Certainly that which he first did should not have been included in the obvious.

Fessenden during the summer and autumn of 1899 had written two or three times about his new apparatus and had never mentioned tuning. On August 12th he had shown a condenser in series with the coils and no local circuit, but did not give it any function. On September

16th, he had shown three forms, one with a condenser in shunt with the coils, but he described that as little as the condenser in series, and seemed to regard it as a mere alternative of arrangement. In his lecture he showed one form with a condenser in shunt which he says would avoid resistance losses, just as he afterwards said in the patent. Not a word in that lecture suggests that you should tune the local circuit. At that time his problem had not been worked out, and among the 12 points recapitulated were the effect of condensers in shunt with the receiver, but not a word about the tuning of the local circuit. Furthermore, I attach great importance to the amendment first made. Surely when he found that the examiner did not understand, he must have explained it if he understood it himself. Is it not too much to ask of us that we should now accept, as too obvious to require mention, what an expert in the Patent Office asked for an answer to? It was certainly no less obvious that the condenser was put in to avoid resistance losses than that it should be tuned after it was put in. Again, it is very significant that in his patent 727,325, which was based upon the separate tuning of different receiver circuits, he spoke freely of tuning and made it the very kernel of his invention. Is it not rather strange that if he knew its necessity here he did not mention it? Finally, it seems to me of prime consequence that nowhere did he put an inductance coil in his local circuit, though every one concedes that the variation of the inductance is as absolute a condition of tuning as the variation of the condenser. In short, he did not prescribe anywhere one essential part of a local tuned circuit. For that matter, he has never done that to this day. Mr. Clay says that Fessenden's trouble throughout has been that he assumed too much knowledge in his audiences. That may well be so, and, if it is, I am very sorry for it, but we cannot know what was in his mind if he did not speak it out; that is the misfortune of the taciturn.

It is, however, really irrelevant whether or not Fessenden understood the nature of his own condenser, for, even if he did, he did not make any claim to the combination, and that is all that counts. Whether he thought that it was not worth claiming, or whether he thought it was not patentable, makes not a particle of difference. A patent claim is a formal instrument, and its meaning depends upon its words, and not on the mind of the inventor. Nothing can be plainer than that claim 3 did not ask for a monopoly on a local tuned circuit, even if it was obvious that the apparatus contained in fact such a circuit. The claim must point out what the applicant regards as his monopoly, and there may be many things obvious enough from the specification which he does not claim. The complainant has argued as though it were enough to show that tuning were obvious from the specifications, but that is not half the story. Is it clear that he meant to claim that feature? It is clear that he did not; and, therefore, he could not afterwards change his mind. Perhaps the other applications in suit, filed during those two and one-half years, which resulted in tuning patents may not originally have had tuning features in them, no one knows; but presumably they did, if now valid, and Fessenden could not by an amendment antedate them. Besides, the rule as to amendments may

have for its justification a protection to the intervening art, but it does not depend in its application upon a showing that there is such an art to be injuriously affected; it is enough that the applicant make some radical change of base. I have no doubt that he did in this case, and this disposes of the tuning claims in suit.

As to claim 15 for a low-resistance receiving mechanism, it is enough to say that the defendant's crystal detector has a resistance of 100,000 ohms, quite as much as the old coherer.

I have laid wholly out of this case the Hughes device on the assumption that Fessenden had succeeded in antedating it. As to that question I should hardly feel disposed to any doubt that he had in fact perfected his apparatus in May, 1899, were it not for his own contemporaneous expressions. For instance in November, 1899, he said:

"A few experiments were made in June, but the matter would have been dropped had it not been that my former assistant and present colleague, Prof. Kintner, * * * offered to help me, and * * * it has been found that it will be possible to carry the work to a successful conclusion."

On August 12th he says:

"My experiments seem to show that it (a coherer) is not really necessary."

In June, 1902, he swore:

"During the month of September, 1899, * * * he was engaged in making experiments in signaling by electromagnetic waves; that on or about September 15, 1899, he constructed and used an apparatus," etc.

Kintner supports him in the same words. Fessenden's own explanation of his language in these instances did not seem to me satisfactory. I must confess that, if I was forced to decide whether he had tested out his invention by actual reduction to satisfactory experiments before September, 1899, I should certainly think that he had not. I have no doubt, however, that he had proceeded far enough to give some instructions and diagrams to his attorney in July, 1899, and the diagrams must have been those in the patent. That he had therefore grasped the full conception of the patent by June, 1899, may perhaps be true, but I do not think it necessary to decide that question here.

I have considered this case as though it was one of first impression, because the complainant was so extremely solicitous to have it done. Quite regardless of the prior decision, I should not, I think, have felt any difficulty in deciding it as I have done. In any case there cannot be any question that, as I look at the facts, I ought not to hesitate for a moment to follow the decision of the Circuit Court of Appeals for the First Circuit. (198 Fed. 386, 117 C. C. A. 262). The suit appears to me to be an effort, natural and sincere enough, to raise what was a simple, and not very useful, contrivance into a great pioneer patent. Fessenden was indeed, the first inventor to patent commercially a directly transforming device. It so happened that the art through very different channels found other independent devices, the electrolytic, and now the crystal, detector which have superseded everything else. Hence it was natural for him to feel that he was the father of them all. He was nothing of the kind, but in this case an ingenious adapter

of the ideas of others to this field. Of course, it must be obvious that as to his other inventions I have nothing to say, and I am very glad to assume, as Mr. Clay assures me, that his contributions have been greater than those of any other man in this country.

The bill will be dismissed, with costs.

HESS-BRIGHT MFG. CO. et al. v. FICHTEL et al.

(District Court, E. D. Pennsylvania. December 29, 1913.)

No. 745.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BALL-BEARING.

The Conrad patent, No. 822,723, for a ball-bearing, in view of the prior art, must be limited to a device in which the concentric rings forming the raceway are solid and unbroken throughout, which was the central thought of the invention. So construed, *held* not infringed.

In Equity. Suit by the Hess-Bright Manufacturing Company and others against Hedwig Fichtel and Ernst Sachs, doing business as Fichtel & Sachs. On final hearing. Decree for defendants.

Robert Fletcher Rogers, Wm. R. Kennedy, and Donald Campbell, all of New York City, for plaintiffs.

Frederick P. Fish, of Boston, Mass., Wm. A. Redding and Wm. B. Greeley, both of New York City, and Julian C. Dowell, of Washington, D. C., for defendants.

J. B. McPHERSON, Circuit Judge. This suit was originally brought upon two patents, both issued to Robert Conrad, No. 822,723, on June 5, 1906, and No. 838,303, on December 11, 1906. The first is for an article of manufacture, an improved ball-bearing, and the second for the method of assembling its parts. The method patent was withdrawn early in the litigation, and at the same time the charge of infringing the other patent was limited to the eighth and ninth claims. This is the fourth suit in this court upon No. 822,723, but the second and third suits (which are not reported) need not be referred to. In the first suit claims 8 and 9 (and one other) were involved; the parties being the present plaintiffs and the Standard Roller-Bearing Company. The case was decided in March, 1910, and is reported in 177 Fed. 435. As stated by Judge Holland, the only issue there was lack of invention:

"The defendant makes the sole defense of lack of invention. Hence the only question for the court is whether or not the three claims of the first and the one claim of the second (method) patents are valid; that is to say, do they cover patentable subject-matter, and did it involve invention to produce the bearing in view of the prior art?"

The prior art then receives some general consideration, and the patents to Lechner and to Pettee are specifically referred to; but the present plaintiffs concede that the English patent to Gentry, and the Oldfield patents and prior use, were not then before the court. Neither does it appear from Judge Holland's opinion (and it is most un-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

likely) that he considered the file-wrapper of Conrad's patent, upon which the present defendants lay much stress. The Gentry and the Oldfield references are now relied upon to invalidate the claims altogether, or at least, in connection with the file-wrapper, to limit them to a solid, unbroken structure that is not infringed by the defendants' bearing. Admittedly these defenses are open in this suit, and they have been fully discussed.

The point of difference between the parties is exceedingly narrow, for the plaintiffs are obliged to admit that if the notch, or opening, that is a vital feature in the defendants' bearing, extended 44/10000 of an inch farther than it does, there would be no infringement. If, then, the case for the plaintiffs depends upon so minute a measurement, which can barely (if at all) be observed by the unaided eye, it is necessary, I think, to determine with precision just what is the scope of the patent in suit. Let us turn, therefore, to Conrad's own description, as he laid it before the office, in language that varied from time to time, but never lost sight of the solid, unbroken rings that lie at the heart of the patent.

But a few preliminary observations may be useful. The plaintiffs do not assert, and could not successfully assert, that ball-bearings were invented by Conrad. In 1904, when the application was filed at Washington, every element contained in the patent was well known (concentric rings, balls, or rollers, and spacers or spreaders), and these elements had already been frequently combined in one form or another. To make a ball-bearing at all, it was obviously necessary to begin with two concentric rings, and these needed to be grooved, or the balls could not be confined as they rolled. It was just as obvious that these grooves, or curves, must be upon the inner periphery of the outer ring and the outer periphery of the inner ring; in other words, the sides of the peripheries must overhang the balls to prevent them from escaping. The grooves need not be deep, but in some degree they must exist. It was also elementary that the balls must be put into the raceway formed by the grooved peripheries, and it was seen without difficulty that they could readily be inserted through a filling-opening, or notch, cut into the side of one ring or into the sides of both rings. In this manner the raceway could be completely filled with balls, and at first this was believed to be the necessary, or at least the most desirable, method of operating the bearings. But it was soon discovered that the friction between adjacent balls distorted them so that the bearing quickly became ineffective. Thereupon various devices, such as a small coiled spring, or a rigid cage, or some other spreader or distributor, were adopted to keep the balls from touching each other.

There were other difficulties also about these structures, especially about the openings for inserting the balls. Obviously the bearing was weakened if part of the rings was cut away; and, moreover, the inequality thus produced in the surface of the raceway, slight though it might be, was found to injure the balls and to impair seriously the usefulness of the bearing. Of course the opening could be closed up, and this expedient was tried by several inventors, but the result was not

satisfactory. At this stage of the art Conrad entered the field. He believed that he was the first to conceive the idea of making both rings solid in all their parts, and this is essentially his contribution toward the solution of the problem. But, with solid rings having no opening for putting balls into the raceway, it is clear that only one way remained by which these could be inserted, namely, displacing the rings eccentrically as the first step toward assembling the parts. This was the only practicable expedient, as a moment's experiment will instantly prove, and this had already been shown by Gentry, whose patent is in precisely the same art. But, if the rings be displaced eccentrically, it is impossible to introduce more than a limited number of balls, and it was necessary to recognize this fact also. By the use of force one or two more balls than would normally fill the eccentrically shaped space might be squeezed in; but even by the use of force it was impossible to make the raceway take as many balls as could be inserted through the openings that had previously been employed. It is clear, I think, that Conrad's method of construction is inseparably connected with an adequate description of his completed bearing as an article of commerce. Merely to describe the bearing as it should appear after completion would not instruct the public how to make it, for the eccentric displacement of the rings was the indispensable first step in the process. As the file-wrapper abundantly shows, Conrad himself was well aware of this fact, and to that extent his method of assembling must inevitably be taken into account. In my opinion what Conrad had in mind, and sought to protect, was a solid structure, unbroken in every part, and therefore altogether free from openings into the raceway. He knew that this would overcome the weakness of former constructions, and this was one of his principal objects. Another object was to secure a smooth, continuous raceway, free from the least irregularity of surface. He was obliged to content himself with a limited number of balls, and, still further, he was obliged to use spreaders, or spacers, to perform a new function, namely, to distribute the balls and to keep them apart, in order that the balls and the spreader, acting in unison, might hold the bearing together as a unitary structure. It was not to prevent friction between adjacent balls, but to make a unitary structure, that he used the spreader. For, if he did not distribute the balls and also hold them apart, they would run together, the rings would become eccentric, a crescent-shaped space would develop, and the bearing would disassemble. All this will be clearly seen to have been in Conrad's mind.

Let us now examine the file-wrapper. The proceedings in the Patent Office began in February, 1904, when the application was presented. In it Conrad declared himself to be the inventor of new and useful improvements in ball-bearings, and went on as follows (Record, pp. 470, 471):

"Ball-bearings having the balls running between grooved carrying rings, one on the inside and one on the outside of the race course, answer (as proved by Professor Striebeck in Neubabelsberg) in general the most extensive technical requirements with regard to carrying power, decrease of friction, and wear. There is, however, a material drawback connected with this construction, consisting in that one of the rings or both must be provided with some lateral or

radial recesses or excavations, in order to allow of the introduction of the balls into the race groove of the bearing. Although the recess can be under circumstances closed up again, after the balls have been brought in, nevertheless the following evils arise hereby:

"(1) Upon the part through which the balls are introduced no pressure is to be exerted.

"(2) The strain of hardness of the damaged balls frequently causes the bursting of the balls, which can also occur when the balls are not well mounted, or when incidentally a pressure is exerted upon the part through which the balls are filled in.

"(3) For the screw bolts adapted to fill out the filling holes, excavations must be provided to allow the screws of being mounted in the casing.

"(4) As the filling-hole or recess must always be arranged in the stationary ring, it is always necessary to have the rings made double with an inner filling-hole and an outer one. The same as the above-mentioned evils, this evil will be removed by the application of the new bearing.

"The subject of the present invention is a ball-bearing with two grooved uniform full rings, having no recesses and being not broken. This construction is thus a material improvement over the well-known bearings."

Describing the drawings, he said (Record, pp. 472-474):

"As seen from Fig. 1 the space between the rings is not quite filled out with the balls; moreover the latter are situated in their guides at a certain distance from each other and separated by the well-known cages. By the arrangement of a smaller number of balls than that which would have place between the carrying rings, it is possible to bring in the balls between the carrying rings without the necessity of providing the latter at any part with a passage, or weakening it at any part. The filling in of the balls is, as seen from Fig. 3, effected by placing both carrying rings eccentrically to each other and bringing in the rings (balls?) into the crescent-shaped space *d*. The number of the balls to be filled in in the above-stated manner can be even increased from 8 (Fig. 3) to 9, when a free space for this additional ball is created by a slight elastic deformation of one or both of the rings; the deformation or slight tilting allowing of at least one of the balls being pressed between the others.

"The bearing with the balls being brought in in the manner specified is not yet ready for use, since the balls will come out of alinement as soon as the rings will get any eccentric position to each other. In order to prevent this, the distance between the different balls is fixed by the insertion of special parts *c*, so-called cages, which, though old in themselves, have been used neither in this combination nor for this purpose.

"The special form of the cages has no influence whatever upon the construction and operation of the bearing, and thus any form can be used inasmuch as the same permanently fixes the distance of the balls."

The claims were as follows (Record, pp. 475, 476):

"(1) In ball-bearing the combination with the race-surface, of inner and outer grooved rings, said rings being unrecessed and unbroken, and adapted to bear a smaller number of balls than that which would actually have place between them, substantially as specified.

"(2) In ball-bearings the combination with the race-surface, or inner and outer grooved rings, said rings being unrecessed and unbroken, and adapted to bear a smaller number of balls than that which would actually have place between them, the rings being adapted to be placed eccentrically to each other, so as to allow of the introduction of the balls from the side of them, substantially as specified.

"(3) In ball-bearings the combination with the race surface, of inner and outer grooved unrecessed and unbroken rings, said rings being adapted to be placed eccentrically to each other, so as to allow of the introduction of balls from the side of them, of some partitions of any form, material, and arrangement, and forming a cage to be placed between the balls, and adapted to keep the balls at the proper distance from each other, substantially as specified."

In March, 1904, the examiner rejected all the claims, and in January, 1905, the applicant made certain amendments and substituted the following claims (Record, pp. 482, 483):

"(1) Roller-bearing, comprising two parallel concentric but eccentrically movable, solid, unbroken rings, a limited number of balls between said rings, and distance pieces alternating with and between and in line with said balls and keeping them at a practically inalterable distance.

"(2) Roller-bearing, comprising two parallel concentric but eccentrically displaceable, solid, uninterrupted rings with substantially axially parallel walls, ball-keeping races in the opposite surfaces of said rings, a limited number of balls between said rings, and guides in said races, non-rolling distance pieces alternating with and between and in line with said balls.

"(3) Roller-bearing, comprising two parallel concentric but eccentrically displaceable, solid, unbroken rings with substantially parallel walls, ball-keeping races in the opposite surfaces of said rings, a limited number of balls in said rings and guided in said races, springs loosely inserted between and alternating with said balls and in line with the same.

"(4) The method of inserting balls between the races of eccentric roller-bearings, which consists in placing said bearings eccentrically to each other, inserting a limited number of balls into the open space between the eccentrically placed bearings, placing non-rolling distance pieces between said balls, and restoring the roller-bearings into concentric position."

In February, 1905, these claims also were rejected, and after slight amendment were rejected again in July of the same year. In April, 1906, the applicant presented eight new claims (the last 8 of the patent in suit), and afterwards added what is now claim 1. The following argument was offered with the eight new claims (Record, pp. 491, 492):

"The foregoing amendment is made in view of the examiner's letter of July 3, 1905. In the successive amendments in this case the claims have departed from the real invention, as expressed perhaps informally in the claims originally filed.

"A new set of claims is filed herewith based on the fundamental invention, namely, a bearing of the type known commercially as a 'closed' bearing; this being a unitary article of sale consisting of the two concentric rings and the balls and spacers, all held together merely by their relative positions. With this article of sale the assembling is done in the shop of the manufacturers. The user has only to apply the inner ring to his shaft and the outer ring to the surrounding frame, as for example the axle and wheel of an automobile, respectively. To make such a closed bearing with rings, each of which is unbroken either at the edge to form a filling-recess or at any other point, is the problem toward which applicant directed his attention and which has resulted in the present invention."

The present specification was also substituted, and in this shape the patent issued. The specification follows:

"This invention provides a ball-bearing having concentric-grooved rings; the sides of the grooves being uninterrupted throughout their circumference, and the parts being so proportioned and designed that the balls may be admitted to the grooved space by displacing the rings relatively to each other. The term 'ball-bearings' is to be understood as including various other known equivalent devices rolling between the rings.

"The principal advantage of the new bearing lies in the continuity of the sides of the groove, which insures the regular running of the balls, and consequently great durability of the bearing, and which also enables the bearing to support a greater pressure than bearings having an interruption or recess for inserting balls through the side of the ring.

"Other features of improvement are referred to in detail hereinafter.

"The accompanying drawings illustrate embodiments of the invention.

"Figure 1 is a face view of complete bearing. Fig. 2, a diametrical section of Fig. 1. Fig. 3, a face view showing the manner of introducing the balls. Figs. 4 and 5 are views similar to views 1 and 2, showing the modified construction. Fig. 6 is a face view, and Fig. 7 an edge view, of the cage used in Figs. 4 and 5. Fig. 8 is a face view of another modification.

"Referring to the embodiment of the invention illustrated, the two concentric rings *a* and *b* have between them a number of balls *c* or equivalent rolling devices. Each ring has a groove, the sides of which overhang the balls to a slight extent. The sides of the grooves, and, in fact, all the parts of each ring, are continuous and practically integral throughout the entire length of the ring. In the normal position of the parts the balls cannot escape; the space between the sides of the grooves being slightly less than the diameter of the balls. Similarly the balls hold the two rings together against axial displacement, so that all the parts are held together and form a unitary device. The edges of the rings, however, are spaced so far apart from each other that they may be displaced eccentrically relatively to each other in the manner shown in Fig. 3, leaving a crescent-shaped space of sufficient width to permit the introduction of a limited number of balls. The crescent-shaped space is marked *d*. The rings may be then restored to their concentric position, and spreaders or distributing devices introduced into the spaces between the balls, so as to distribute them entirely around the raceway and to prevent their return to a position such as Fig. 3, which would permit the escape of the balls.

"The number of balls which can be introduced may be increased by effecting a slight elastic deformation or tilting, and at the same time pressing an additional ball between the others.

"The exact shape of the groove is not material. It will depend upon the shape of the ball or rolling device or on various other conditions. The spacers also may be of various designs, many of which are known in connection with ball-bearings of other types, where, however, they do not serve the same function of retaining all the parts together in a unitary whole.

"In Figs. 1 and 2 the spacers *f* are connected to each other by a ring *e*, so as to form a cage. One or two of the spacers *f* are made of extra length and bent over at the end in order to prevent the cage from being removed in an axial direction. It will be seen that the spacers *f* hold the balls in the position of Fig. 1 (that is to say, in the distributed position), preventing the balls from running together, and thus allowing one of the rings to fall down against the other and release the balls through the crescent-shaped space. In Figs. 4 to 7 are shown spacers of another type. These spacers are in the form of arms projecting from a ring; but in this case a split ring *g* is employed, and the arms *i* at their juncture at the ring are reduced to form recesses *h*, with overhanging edges. To insert these spacers, the ring is compressed and inserted near the innermost points of the balls, so that the overhanging arms *i* may pass between the balls. The ring being then released expands, so that the balls are caught in the recesses *h* and hold the cage in place.

"Instead of the solid spacers shown, yielding spacers may be employed, and the spacers may be connected to or disconnected from each other. For example, in Fig. 8 there is shown a separate and yielding spacer in the form of the spiral spring *k*, which upon being compressed may be introduced into the groove or withdrawn therefrom between the overhanging edges of the groove.

"I do not claim in the present application the described method of assembling the parts of my improved ball-bearing; this method being claimed in a divisional application filed May 18, 1906."

Claims 8 and 9 are the only claims in suit. They are practically identical, and are in the following words:

"(8) A bearing comprising two concentric rings, balls between said rings, each ring having a groove both sides of which overhang said balls and are continuous and practically integral throughout their circumference, the number of balls being such that they can be inserted in the space between the rings when the latter are displaced from their normal position, and means for distributing the balls throughout the length of the groove, whereby the two rings are held together against axial displacement by the engagement of the balls with the

overhanging walls of the grooves and the parts are held together so as to form a unitary device.

"(9) A bearing comprising two concentric rings, *a* and *b*, balls *c*, between the said rings, each ring having a groove both sides of which overhang said balls and are continuous and practically integral throughout their circumference, the edges of said sides being separated so far from each other that by displacing the rings eccentrically a limited number of balls may be inserted between them, and distributing devices adapted to be introduced between said edges and into the spaces between said balls when the rings are restored to concentric position, whereby the two rings are held together against axial displacement by the engagement of the balls with the overhanging walls of the grooves, and the parts are held together so as to form a unitary device."

I do not think it necessary to discuss the patentability of the device. Gentry's structure undoubtedly shows the eccentric displacement of the rings and is a dangerous reference, while Oldfield (although he may not have realized the full scope of his invention) comes so near the Conrad bearing that careful discrimination would be required. But I think it clear that, if the validity of the patent be assumed, I cannot treat it as a pioneer; it must be confined to the rings, solid and unbroken throughout, upon which Conrad laid repeated and emphatic stress. This is the central thought of his invention, and I am not prepared to follow the plaintiff's experts and to give the patent a construction now that makes it cover any ball-bearing whatever, even if only the minutest fraction of unbroken surface is shown at the bottom of the raceway. How such a minute fraction as 44/10000 of an inch could "overhang" is not perceptible; and, moreover, any filling-opening is a departure from the patent in an important particular, because it inevitably weakens the bearing, and to that extent is disadvantageous. This weakening was one of the defects in the prior art that Conrad sought to remedy by making his rings solid in all their parts. He nowhere alluded to the "sides" of his grooves in any way that would justify the elaborate theory that has been offered on behalf of the plaintiffs. The "sides" overhang the balls; the "sides" are continuous and are practically integral throughout their circumference; the "sides" are practically integral throughout the entire length of the rings; the space between the "sides" of the grooves is slightly less than the diameter of the balls. I do not understand how the "sides" of the raceway can be continuous and practically integral if they are cut in half, or so nearly in half that 44/10000 of an inch further would finish the job; and this is the conceded situation in the defendants' bearing. Still further, Oldfield (No. 674,213) had already shown a notch, "which cuts nearly into the center of said raceways," and his device was made with metal as well as with rawhide; the latter being the material he preferred. It seems to me that the defendants copy Oldfield much more closely than they copy Conrad; but of course that is Oldfield's affair and not Conrad's.

I think the defendants' supplemental brief summarizes accurately the material differences between the patent and the defendants' bearings:

"There are three features which the Conrad patent has pointed out and emphasizes as characteristic of his alleged invention. They constitute his invention. They are:

"(1) Continuous, unnotched, and unrecessed rings;

"(2) The limited number of balls (only as many balls as can be inserted by eccentrically displacing the rings, plus perhaps one); and

"(3) Distributing means, necessary to prevent the bearing from falling apart, and having that function.

"The defendants' bearings lack each one of these characteristics, and, on the contrary, contain its exact opposite:

"(1) Notched, recessed rings;

"(2) A large number of balls (from one to several more than could be inserted by displacing the rings eccentrically); and

"(3) A ball-spacing device, which is not necessary for preventing the bearing from falling apart, and has no such function."

Without further discussion I state my opinion to be that the defendants do not infringe; and, if this conclusion be correct, the plaintiffs must fail. The defense of laches, which would otherwise need consideration, will not be dealt with.

A decree may be entered dismissing the bill at the costs of the plaintiffs.

CLIP BAR MFG. CO. v. STEEL PROTECTED CONCRETE CO.

(District Court, E. D. Pennsylvania. September 11, 1913.)

No. 1,091.

1. PATENTS (§ 327*)—SUITS FOR INFRINGEMENT—EFFECT OF PRIOR ADJUDICATIONS.

An adjudication of the invalidity of a patent in one circuit does not render the question *res judicata* except as between the parties to the suit, nor prevent the bringing of other suits for infringement against different defendants in other circuits.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 76*)—UNFAIR COMPETITION—INTERFERENCE WITH BUSINESS OF ANOTHER.

Notices of claims of infringement given by the owner of a patent to customers of a manufacturer of a similar article, or even threats of suit, if in good faith, are within its rights and not actionable as acts of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 76.*]

In Equity. Suit by the Clip Bar Manufacturing Company against the Steel Protected Concrete Company. On motion for preliminary injunction. Denied.

E. Hayward Fairbanks, of Philadelphia, Pa., for plaintiff.

Henry N. Paul, Jr., and Joseph C. Fraley, both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The plaintiff moves for a preliminary injunction to restrain the defendant from making representations to the plaintiff's customers that defendant's patent No. 727,233 declared invalid in a suit brought by the defendant against the Central Improvement & Contracting Company in the Circuit Court for the Eastern District of Louisiana (155 Fed. 279), affirmed by the Circuit Court of Appeals in 158 Fed. 1021, 85 C. C. A. 7, is valid, or being

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

infringed by the plaintiff or its customers, and from threatening orally or in writing the plaintiff's customers with threats of litigation for infringement of its patent.

It appears from the bill and the affidavits that the plaintiff is manufacturing and selling a metallic curb guard constructed in accordance with the disclosure in the defendant's patent, and that the defendant has, during the period from February, 1912, down to August, 1913, notified customers of the plaintiff and parties manufacturing the guard for the plaintiff, orally and by letters, that the guard infringes its patent and that it intended to bring suit in this district against such alleged infringers. It further appears that on July 9, 1913, the defendant filed a bill in equity in this court against James Kane charging infringement of the patent and praying for an injunction, an accounting, and damages.

[1] The plaintiff's position is that the notices to the plaintiff's customers of defendant's claims of infringement and its threats of litigation constitute acts of unfair competition in trade; that the Circuit Court for the Eastern District of Louisiana having adjudged the patent invalid, and the Circuit Court of Appeals for the Fifth Circuit having affirmed the decree of the Circuit Court, the patent must be deemed invalid and the subject-matter thereof public property, and that the defendant should be enjoined from assertion of any rights thereunder through notices of claims of infringement to the plaintiff and its customers. While, in view of the doctrine of comity and of the importance of having uniformity of adjudication as to patents, the decree of a court in another jurisdiction is regarded as persuasive and entitled to respect, yet a decree declaring the invalidity of a patent is in no sense a proceeding in rem, and the plaintiff is estopped by such decree as *res judicata* only as to the parties to the suit and their privies. Such decree does not prevent the same or a different plaintiff from bringing a suit against another defendant and establishing its validity upon different or even upon the same evidence. *Ingersoll v. Jewett*, 16 Blatchf. 378, Fed. Cas. No. 7,039; *Stamping Company v. Jewett* (C. C.) 18 Blatchf. 469, 7 Fed. 869; *Consolidated Roller-Mill Co. v. Purifier Co.* (C. C.) 40 Fed. 305; *Imperial Bottle Cap & Machine Co. v. Crown Cork & Deal Co.*, 139 Fed. 312, 71 C. C. A. 442.

[2] It nowhere appears on the record that the notices given to the plaintiff's customers were not in good faith or that they were false or malicious or for the purpose of destroying the business of the plaintiff. To the contrary, the defendant, so far as appears, believing its claims to be valid, has proceeded to bring suit in this district to establish infringement. Under these circumstances, it must be held for the purposes of the present motion that the defendant is acting within its rights. *Adrianse, Platt & Co. v. National Harrow Co.*, 121 Fed. 827, 58 C. C. A. 163; *Mitchell v. International Tailoring Co.* (C. C.) 169 Fed. 145; *Virtue v. Creamery Package Mfg. Co.*, 179 Fed. 115, 102 C. C. A. 413; *United Electric Co. v. Creamery Package Mfg. Co.* (D. C.) 203 Fed. 53; *Farquhar Co. v. National Harrow Co.*, 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755.

The motion for preliminary injunction is denied.

MCGILL v. SORENSEN.

(District Court, E. D. New York. December 17, 1913.)

1. SET-OFF AND COUNTERCLAIM (§ 41*)—MUTUALITY OF CROSS-DEMANDS.

In a suit for infringement, brought by an individual assignee of a patent, a counterclaim for infringement of another patent by a corporation of which complainant is an officer cannot be pleaded, unless it is shown that the corporation is the real party in interest as complainant.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 76-79, 81; Dec. Dig. § 41.*]

2. PATENTS (§ 288*)—INFRINGEMENT—SUITS IN EQUITY—JURISDICTION—PLEADING—COUNTERCLAIM.

To entitle a defendant to plead a counterclaim for infringement of a patent in his answer, under rule 30 of the new equity rules, it must be shown that the infringement was committed within the district, and also that complainant has a regular and established place of business therein.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460-466; Dec. Dig. § 288.*]

In Equity. Suit by James H. McGill against Peter Sorensen. On motion to strike out counterclaim in answer. Motion sustained.

Carrington & Pierce, of New York City (Carlton B. Pierce, of New York City, of counsel), for plaintiff.

Henry C. Townsend, of New York City, for defendant.

CHATFIELD, District Judge. The plaintiff is the assignee of the patentee of an invention manufactured by a corporation of which he is president. The defendant under rule 30 has counterclaimed on a charge of infringement of defendant's patent by the plaintiff and by the corporation of which he is president.

[1] Motion is made to strike out the counterclaim. As to the corporation the motion must be granted, in any event, unless the defendant can show that the corporation is the party entitled to bring suit, and thus compel an amendment of the complaint or of the action to bring in the other party plaintiff.

[2] But as to the present plaintiff, and the corporation as well, the motion must be granted. The United States District Court has jurisdiction of patent suits, and these may be brought in any district where the alleged infringer has "committed the act of infringement and has a regular and established place of business." Section 48, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1000 [U. S. Comp. St. Supp. 1911, p. 149]). The answer alleges an infringement in this district, but not any regular place of business.

The motion will be granted as to the plaintiff McGill.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In re M. F. ROURKE CO.

(District Court, E. D. Tennessee, N. D. March 15, 1913.)

No. 1,226.

BANKRUPTCY (§ 223*)—ADMINISTRATION OF ESTATE—TRUSTEE—CARRYING ON BUSINESS—REFEREE'S COMPENSATION.

Bankr. Act July 1, 1898, c. 541, § 40a, 30 Stat. 556 (U. S. Comp. St. 1901, p. 3436), as amended by Act Feb. 5, 1903, c. 487, § 9, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1500), provides that referees shall receive as full compensation a filing fee, a fee for each proof of claim, and 1 per cent. commission on all moneys disbursed to creditors by the trustee. Section 72 declares that the referee shall not in any form or guise receive any other or further compensation for his services than that prescribed by the act, and Act Cong. June 25, 1910, c. 412, §§ 1, 9, 36 Stat. 838, 840 (U. S. Comp. St. Supp. 1911, pp. 1491, 1501), provide that, where the bankrupt's business is conducted by the trustee for a limited period, the court shall allow such officers, marshals, or receivers additional compensation for such services upon the moneys disbursed or turned over to any person, including lienholders. *Held*, that the act of 1910 made no provision for additional compensation to a referee, and hence, where the trustee was permitted to continue the bankrupt's business, which he did with marked success, the referee was not entitled to any compensation on funds disbursed by the trustee on debts incurred by the trustee in the operation of such business under the referee's orders, but was only entitled to commissions on moneys disbursed to creditors of the bankrupt by the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 888-894; Dec. Dig. § 223.*]

In Bankruptcy. In the matter of the bankruptcy proceedings of the M. F. Rourke Company. On referee's certificate to determine his right to compensation as commissions on funds disbursed by the trustee on debts incurred by him in the operation of the bankrupt business under his orders. Application of referee for such compensation denied.

Green, Webb & Tate, of Knoxville, Tenn., for creditors.

C. H. Smith, of Knoxville, Tenn., for trustee in bankruptcy.

SANFORD, District Judge. The referee has filed his certificate submitting to me the question as to whether he is entitled to commissions on funds disbursed by the trustee on debts incurred by the trustee in the operation of the business of the bankrupt as a going concern under the orders of the referee and upon consent of all creditors in this cause. It appears from his certificate that the bankrupt company, which had been engaged in the plumbing business, had on hand at the time of the adjudication a large amount of plumbing supplies, and also various uncompleted contracts in different parts of the country; that the supplies were of comparatively little value; that it appeared from the statements of the trustee that unless these uncompleted contracts were executed there would be practically nothing for the unsecured creditors; that, upon recommendation of the trustee and with the approval of the creditors, the trustee was authorized and directed to continue all work on out-of-town contracts, and to continue the local business of the bankrupt within certain limits, and was authorized

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for this purpose to purchase additional material necessary to carry on the business; and that the bankrupt's business was continued by the trustee with great success, and that as a result the trustee will have on hand for final distribution to unsecured creditors something like six or eight thousand dollars. In conducting the business the trustee paid out on debts which he incurred something like thirty thousand dollars. The trustee has heretofore, by unanimous consent of the creditors, been allowed the maximum compensation for services rendered in conducting the business as a going concern. It further appears that in order to carry on this business the referee has from time to time adjourned the meeting of creditors from week to week and month to month to hear and act upon the trustee's reports; that the referee has been engaged in holding such meetings from time to time for more than a year; and that in supervising the conduct of the business he has been required to pass upon various questions which have arisen in the conduct of the business, as to which it was necessary to give directions to the trustee and to confer many times with the trustee in regard to the business. The referee now submits the question as to whether he is entitled to commissions on the sum of approximately thirty thousand dollars paid out by the trustee on the trustee's debts incurred in conducting the business, or merely to a commission on such sums as may be paid by the trustee to the creditors of the bankrupt.

The trustee in bankruptcy has answered the certificate of the referee stating that the facts as stated have been fairly and correctly stated by the referee in his certificate, and that his opinion is that, as the case has been one requiring unusual work and time, the referee, as a matter of fact, is entitled to commissions on disbursements made in the conduct of the business, if, as a matter of law, the same can be allowed; and submitting the question of law to the determination of the court.

Section 40a of the Bankruptcy Act, as amended by the Act of Feb. 5, 1903, c. 487, § 9, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1500), provides that referees "shall receive as full compensation for their services" a filing fee of fifteen dollars, twenty-five cents for each proof of claim filed for allowance, "and from estates which have been administered before them one per centum commission on all moneys disbursed to creditors by the trustee."

Section 72 of the Bankruptcy Act, as amended by the Act of 1903, furthermore provided:

"That neither the referee * * * nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized or prescribed in this Act."

By sections 1 and 9 of the Act of June 25, 1910, c. 412, 36 Stat. 838, 840 (U. S. Comp. St. Supp. 1911, pp. 1492, 1501), sections 2 (5) and 48 of the Bankruptcy Act were also amended so as to provide that where the business of the bankrupt is conducted by trustees, marshals or receivers for limited periods "the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any persons, including lien holders, by them * * *". This amendment makes no provision for the al-

lowance of any additional compensation to the referee in such case in consequence of the additional labor entailed upon him in supervising the business so conducted; and, on the contrary, by section 13 of this amendatory Act, the provision of section 72 of the Bankruptcy Act that the referee should in no form or guise, receive any other further compensation for his services than that expressly authorized or prescribed in this Act, was re-enacted.

In *Bray v. Johnson* (4th Circ.) 166 Fed. 57, 91 C. C. A. 643, it was held (Judge McDowell dissenting), before the amendment of 1910, that under the clear language and plain meaning of the Bankruptcy Act, as amended by the Act of 1903, emphasized by the provision of section 72, the referee was only authorized to receive a commission of one per centum on all moneys disbursed to the bankrupt's creditors by the trustee, and was not entitled to a commission on moneys disbursed by the trustee in payment of the trustee's debts incurred in conducting the business of the bankrupt estate. I do not entirely agree in the views of public policy which are stated in the opinion of the court as supporting this construction of the Bankruptcy Act, and am of opinion that where the referee in good faith, on the recommendation of the trustee, and with the consent of the creditors and for the best interest of the estate, authorizes the business of the bankrupt to be conducted for a limited period, thereby entailing great additional labors upon himself, it would be entirely consistent with a sound public policy that he should be allowed, in the discretion of the court, additional compensation for the services thus performed by him. I am nevertheless of opinion that such allowance would be in conflict with the express provision of the Bankruptcy Act as it now stands; and that if, to meet this apparent hardship, provision should be made for the allowance of such additional compensation to referees the remedy must be by additional legislation, and is, under the plain terms of the Act, as it now stands, beyond the authority of the courts. This construction of the Act is furthermore emphasized, under the rule of *expressio unius*, by the provision of the amendment of 1910, above referred to, enacted after the publication of the opinion in *Bray v. Johnson* (4th Circ.) *supra*, by which, in such cases, additional compensation is provided for trustees, marshals and receivers conducting the business, but no provision is made for additional compensation to the referee. I may add that the doctrine of *Bray v. Johnson* is cited with apparent approval in *Collier on Bankruptcy* (9th Ed.) 617; 1 *Loveland on Bankruptcy* (4th Ed.) 232, and 3 *Remington on Bankruptcy*, § 2103, p. 634. And while it appears that in *In re Hart & Co.* (Hawaii) 18 Am. Bankr. Rep. 137, it was held that the referee was entitled to additional compensation for advising the trustee in regard to the business of the bankrupt estate, examining the result of each day's work, examining weekly reports and auditing the same, I am constrained to hold that the sound construction of the act is that given in *Bray v. Johnson* (4th Circ.), *supra*.

I must therefore hold, upon the question submitted by the referee, that he is not entitled to a commission on the funds disbursed by the trustee on debts incurred by the trustee in the operation of the busi-

ness of the bankrupt under his orders, but is only entitled to commissions on such moneys as may be disbursed to the creditors of the bankrupt by the trustee. An order will be entered accordingly.

REICH v. TENNESSEE COPPER CO.

(District Court, E. D. Tennessee, S. D. October 28, 1913.)

No. 1,163.

1. COURTS (§ 307*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

Where plaintiff was a citizen of Tennessee, and defendant corporation a citizen of New Jersey, and the amount in controversy exceeded \$3,000, exclusive of interest and costs, the suit was one within the general jurisdiction of the federal courts, by reason of diversity of citizenship and the amount involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 850-854; Dec. Dig. § 307.*]

2. COURTS (§ 272*)—FEDERAL COURTS—JURISDICTION—VENUE.

Judicial Code (Act March 3, 1911, c. 231) § 51, 36 Stat. 1101 (U. S. Comp. St. Supp. 1911, p. 150), provides that, where federal jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought in the district of the residence of either plaintiff or defendant. *Held* that, where plaintiff, a resident of the Eastern district of Tennessee, sued defendant, a citizen of New Jersey, plaintiff was entitled to maintain the suit in the district of his residence, and was not required to institute the suit in the division of the district in which he resided, since section 53, providing that, when a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides, is limited to cases in which the suit is brought in the district in which defendant resides, and has no application as a limitation on local jurisdiction when the suit is brought in the district of plaintiff's residence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 811; Dec. Dig. § 272.*]

At Law. Action by M. C. Reich against the Tennessee Copper Company. On demurrer to defendant's plea to the jurisdiction. Sustained.

W. S. Roberts, of Knoxville, Tenn., for plaintiff.

Cornick, Frantz, McConnell & Seymour, of Knoxville, Tenn., for defendant.

SANFORD, District Judge. This is a suit brought by the plaintiff, a citizen of Tennessee, against the defendant, a New Jersey corporation, to recover ten thousand dollars damages for personal injuries alleged to have been received by the plaintiff while employed in the defendant's copper mines in Polk County, Tennessee, within the Southern Division of the Eastern District of Tennessee. The summons was served on the highest official of the defendant to be found within this district. The defendant has filed a plea to the jurisdiction of the court over this cause, alleging that the plaintiff is a citizen and resident of Knox County, Tennessee, in the Northern Division of this District, and not a citizen or inhabitant of the Southern Division of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

this district, and that the defendant is not a citizen and resident of Polk County, Tennessee, but a resident of the State of New Jersey; to which plea the plaintiff has filed a demurrer. This demurrer is, in my opinion, well taken, and should be sustained, for the following reasons:

[1] 1. As the plaintiff is a citizen of Tennessee and the defendant a citizen of New Jersey, and the amount in controversy exceeds three thousand dollars, exclusive of interest and costs, the suit is one within the general jurisdiction of the court by reason of the diversity of citizenship and the amount involved.

[2] 2. As the plaintiff is a resident of the Eastern District of Tennessee, and the suit is therefore brought within the district of the residence of the plaintiff, it comes plainly within the provision of section 51 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]), that:

"Where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought in the district of the residence of either the plaintiff or the defendant."

See: *In re Keasby & Mattison Co.*, 160 U. S. 221, 228, 16 Sup. Ct. 273, 40 L. Ed. 402.

3. The jurisdiction of this cause in the Southern Division of the Eastern District of Tennessee is not taken away, even if the plaintiff be a resident of the Northern Division of the district, by the provision of section 53 of the Judicial Code, that:

"When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides."

This provision is clearly limited, in my opinion, to cases in which the suit is brought in the district in which the defendant resides, to which alone its terms can possibly apply, and has no application whatever as a limitation upon local jurisdiction when the suit is not brought in the district in which the defendant resides, but is brought, under the provisions of section 51 above quoted, in the district in which the plaintiff resides. And as the Code contains no limitation upon the right of the plaintiff to bring such suit against the defendant, where diversity of citizenship exists, in the district in which the plaintiff resides, without reference to the particular division of the plaintiff's residence, I think it clear that the plaintiff may, in such case, bring his suit against the defendant in any division of the district in which the plaintiff is a resident in which the defendant may be found and served with process. This is in direct analogy to the cases holding that as the requirement that suits based upon diversity of citizenship alone shall be brought within a district in which either the plaintiff or the defendant resides, have no application to suits brought against aliens, an alien may be sued, if jurisdiction otherwise exists, in the Federal Court of any district in which valid service may be had upon the defendant. *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *Ladew v. Copper Co. (C. C.)* 179 Fed. 245, 253.

I find nothing contrary to this conclusion in *Von Auw v. Fancy Goods Co.* (C. C.) 69 Fed. 448, 450. There was, in the first place, in that case, no decision, express or implied, that the defendants should have been sued in the division of the district in which they resided, but a mere statement that, even if this had been true, this was a personal privilege which they had waived by their general appearance. Furthermore the case presented was entirely different from that at bar, in that it is plainly inferable that the plaintiffs in that case were not residents of the district in which the suit was brought, but were citizens and residents of other States, and that the local jurisdiction depended entirely upon the fact that the defendants were sued in the district in which they resided, in which event it might well have been held that under the limitations contained in the former acts from which section 53 of the Code is derived, the suit should have been brought in the particular division of the district in which they resided. In short, even the hypothetical suggestion in that case is entirely consistent with the conclusion reached in this opinion that, under section 53 of the Code, the limitation upon the local jurisdiction of the District Courts dependent upon the division in which the defendant resides, applies only in cases where suit is brought in the district in which the defendant resides and the local jurisdiction is contingent upon the residence of the defendant, and that such limitation has no application in cases where the suit is brought in the district in which the plaintiff resides and the local jurisdiction is based not upon the residence of the defendant but upon that of the plaintiff.

An order will accordingly be entered sustaining the plaintiff's demurrer to the defendant's plea to the jurisdiction.

THE STARR.

(District Court, W. D. Washington, S. D. December 22, 1913.)

No. 1,375.

ADMIRALTY (§ 21*)—ACTION FOR WRONGFUL DEATH—ADMIRALTY JURISDICTION.

A state statute, giving a right of action for wrongful death to the next of kin of the deceased, extends to a case where the cause of action arose on board a domestic vessel of the state on the high seas, if not within the jurisdiction of any other sovereignty, and an action thereon may be maintained in a court of admiralty, but the admiralty will not create a lien and entertain a suit in rem against the vessel where no lien is given by the statute.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 218-220; Dec. Dig. § 21.*]

In Admiralty. Suit by Olaf Hanson and Anna Hanson, husband and wife, against the steamship Starr; the San Juan Fishing & Packing Company, claimant. On exceptions to libel. Exceptions sustained.

Otis Johnson, of Tacoma, Wash., for libelants.

Hudson, Holt & Harmon, of Tacoma, Wash., for claimant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CUSHMAN, District Judge. This matter is before the court upon claimant's exceptions to the libel. The libel is one in rem to recover for the death of libelants' son, alleged to have been caused, upon the high seas, through negligence, in that the vessel's equipment was defective and that she was insufficiently manned.

The deceased was second mate, at the time of his death, of the respondent steamship, a domestic vessel in the halibut fisheries, hailing from the Port of Seattle. It is alleged that deceased was wifeless and childless and, at the time of his death, was the sole support of libelants. It is further alleged that they are, and were at the time of such death, citizens of the United States and residents of the state of Washington. Nothing is disclosed as to the citizenship and residence of deceased.

The Washington statute provides:

"When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. If the deceased leave no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support and who are resident within the United States at the time of his death, may maintain said action. * * * In every such action the jury may give such damages, as under all circumstances of the case may to them seem just." Section 183, Rem. & Bal. Code; tit. 81-15, Pierce's Code, 1912.

The general rule is:

"Where the statute of a state causes a survival to the next of kin of the right of action for damages for death wrongfully caused, such statute can have no application to a case where the death was caused outside the jurisdiction of such state and on the high seas. However, by the weight of modern authority, the state laws follow the domestic vessel upon the high seas until she comes within another jurisdiction, and therefore an action will lie, under a statute of that state, for a death caused by negligence on board a vessel whose home port is in that state, even though upon the high seas, without the jurisdiction of any other sovereignty. * * *" 13 Cyc. 316b.

The Supreme Court of the United States seems to recognize the same rule. The *Hamilton*, 207 U. S. 398, at pages 404, 405, and 406, 28 Sup. Ct. 133, 52 L. Ed. 264; *La Bourgogne*, 210 U. S. 95, at pages 138 and 139, 28 Sup. Ct. 664, 52 L. Ed. 973. In both of these cases the proceeding was one for limitation of liability. Proceedings of this nature are to limit the individual liability of the owner of the vessel; therefore, superseding a cause in personam.

In the *Hamilton* Case, the court says:

"We pass to the other branch of the first question—whether the state law, being valid, will be applied in the admiralty. Being valid, it created an obligation—a personal liability of the owner of the *Hamilton* to the claimants. *Slator v. Mexican National R. R. Co.*, 194 U. S. 120, 126 [24 Sup. Ct. 581, 48 L. Ed. 900]. This, of course, the admiralty would not disregard, but would respect the right when brought before it in any legitimate way. *Ex parte McNiel*, 13 Wall. 236, 243 [20 L. Ed. 624]. It might not give a proceeding in rem, since the statute does not purport to create a lien. It might give a proceeding in personam. The *Corsair*, 145 U. S. 335, 347 [12 Sup. Ct. 949, 36 L. Ed. 727]. If it gave the latter, the result would not be, as suggested, to create different laws for different districts. The liability would be recognized in all." 207 U. S. pages 405 and 406, 28 Sup. Ct. 135, 52 L. Ed. 264.

In construing the effect of liens created by state laws upon domestic vessels, where the cause is maritime, the decisions are not altogether harmonious. In general the admiralty will adopt and enforce liens so provided, as an incident to the cause itself, of which, being maritime, it has jurisdiction.

"Article 3, § 2, of the federal Constitution, provides that the federal judicial power shall extend inter alia 'to all cases of admiralty and maritime jurisdiction.' The first Congress which assembled after the Constitution went into effect passed the famous Judiciary Act of September 24, 1789. Chapter 20, § 9, of this act, vested the federal District Courts with cognizance 'of all civil cases of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it. * * * And such jurisdiction shall be exclusive.' Under the influence of these provisions, the courts have held that the effect of a local statute is merely to add the remedy in rem, or lien to a maritime cause of action, which lien, being maritime, is exclusively enforceable as such in the federal District Courts." 26 Cyc. 770b.

No case has been called to the court's attention where a cause of action is created by the state law, though it fall within the general domain of actions classed as "torts" that admiralty would give its lien to such cause. The admiralty has jurisdiction of such a suit, primarily, because of the place where it arose. The subject-matter of the cause is created by the state law, and, if there be a lien, it, too, should come from such law. In suits founded on contracts, where the state law gives a lien, the greater, the cause of action, may draw to it the less, the incidental lien, but the admiralty will not create a lien for a cause of action created by the state statute. The admiralty jurisdiction generally is exercised to maintain, as far as practicable, uniform laws, where shipping on the seas is concerned.

The foregoing decisions recognize that uniformity of laws within the state is of more importance than absolute uniformity on the seas, and where, alone, citizens of a state and a domestic vessel thereof are concerned, those laws of the state to which both owe allegiance will be recognized and enforced on the ocean, as tending to greater uniformity, simplicity, and certainty.

Where such a cause of action is created by the state and no lien is so created, for the admiralty to give a lien would not make more uniform and certain the laws, but the opposite. It would be creating a lien where there was no lien either on land or sea. The state law gives a right of action against a person in such a case, but neither it nor the admiralty gives a right of action against the thing—the alleged offending vessel.

For the foregoing reason, and in view of the plainly expressed doubt of the Supreme Court, above quoted, the exceptions must be sustained. *The Dauntless*, 129 Fed. 715, 64 C. C. A. 243; *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751; *The Jane Gray* (D. C.) 95 Fed. 693; *The Willamette* (D. C.) 59 Fed. 797; *The Oregon* (D. C.) 45 Fed. 62; *The General Foy* (D. C.) 175 Fed. 590.

HUEBSCH v. ARTHUR H. CRIST CO.

(District Court, N. D. New York. January 2, 1914.)

1. COPYRIGHTS (§ 83*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for infringement of a copyright, evidence *held* sufficient to show that the copyrighted book was printed from plates made from type set within the limits of the United States.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74-76; Dec. Dig. § 83.*]

2. COPYRIGHTS (§ 83*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Under the statute in force in 1903 and 1904 which provided that no person should be entitled to a copyright unless he should, not later than the day of the publication, deliver to the librarian of Congress, or deposit in the mail addressed to him, two copies of the copyrighted book, and providing that such two copies shall be printed from type set within the limits of the United States or from plates made therefrom, in a suit for infringement, evidence that a printing office within the United States was employed to print the book, and that it was afterwards received therefrom printed and ready for the binder, shows sufficiently that the book was printed from type set within the United States or from plates made therefrom, and the possibility that the work was done outside the United States need not be negated.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74-76; Dec. Dig. § 83.*]

3. COPYRIGHTS (§ 83*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In a suit for infringing a copyright, evidence in connection with the certificates of the librarian of Congress and the register of copyrights *held* sufficient to show the deposit of the title of the book before publication and the deposit of two copies thereof on the day of publication with the librarian of Congress, as required by the statute in force in 1903 and 1904.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74-76; Dec. Dig. § 83.*]

4. COPYRIGHTS (§ 82*)—ACTIONS FOR INFRINGEMENT—BURDEN OF PROOF.

In a suit for infringing a copyright, though there was no denial that complainant's book was duly copyrighted, he was bound to make proof of his copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73; Dec. Dig. § 82.*]

5. COPYRIGHTS (§ 83*)—ACTIONS FOR INFRINGEMENT—SUFFICIENCY OF EVIDENCE.

In a suit for profits and damages from the infringement of a copyright, evidence *held* to show negligence on the part of defendant and that it was defiant after having its attention called to the infringing character of its publication.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74-76; Dec. Dig. § 83.*]

6. COPYRIGHTS (§ 87*)—ACTIONS FOR INFRINGEMENT—ACCOUNTING.

Under a bill alleging the infringement of a copyright and asking for an accounting of the profits arising from the sale of defendant's piratical leaflet, and that defendant be required to pay such damages as complainant had suffered, as well as all profits which defendant had made, the court could not arbitrarily find the amount of damages and profits, and fix the amount or impose penalties, but would refer the case to a master to take and state an account, unless the parties agreed otherwise.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81; Dec. Dig. § 87.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. COPYRIGHTS (§ 87*)—ACTIONS FOR INFRINGEMENT—SUFFICIENCY OF EVIDENCE.

In a suit for infringement of a copyright, where complainant proved his copyright, that all books printed, published, and sold by him bore the copyright notice required by law on the page following the title page, and it was admitted that defendant had printed and sold a leaflet which was a copy of a substantial part of complainant's book, complainant was entitled to an accounting for profits and damages.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81; Dec. Dig. § 87.*]

8. COPYRIGHTS (§ 73*)—INFRINGEMENT—ACTIONS—RELIEF.

Act March 4, 1909, c. 320, § 25, 35 Stat. 1081 (U. S. Comp. St. Supp. 1911, p. 1480), providing that the infringer of a copyright shall be liable to an injunction, to pay the copyright proprietor such damages as he may have suffered, as well as all profits made by the infringer, and that the court may also, in its discretion, allow certain specified amounts for each infringing copy, applies to infringements of copyrights obtained prior to its passage, where the infringements were subsequent thereto.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 66, 71; Dec. Dig. § 73.*]

In Equity. Suit by Benjamin W. Huebsch against the Arthur H. Crist Company. Decree for complainant.

The bill was filed June 4, 1912, to recover profits and damages by reason of alleged infringement of copyright for book, "Moral Education," of which Edward Howard Griggs was the author and which was copyrighted about September 17, 1903, all rights thereunder having been duly assigned to the complainant on or about May 9, 1912, together with the right and rights of action for infringement.

H. C. Sholes, of Utica, N. Y. (Alvin M. Higgins, of New York City, of counsel), for complainant.

C. J. Fuess, of Utica, N. Y., for defendant.

RAY, District Judge. The bill of complaint alleges: That both the complainant and defendant are publishers and printers engaged in the business of making, editing, preparing, printing and publishing, and selling books, pamphlets, leaflets, etc.; the former having its principal place of business at New York City and the latter at Cooperstown, N. Y. That since September 17, 1903, one Edward Howard Griggs has from time to time edited, prepared, and published a book, or work, which had not then been published, entitled "Moral Education," and generally known and labeled on the back as "Moral Education," and that said Griggs was the author and proprietor of such book, and, desiring to secure a copyright upon the same, deposited in the mail at the city of New York, addressed to the librarian of Congress at Washington, D. C., a printed copy of the title of said book, and that December 5, 1904, not later than the day of the publication thereof, he deposited in the mail two copies of such copyrighted book addressed to the said librarian at said place. Also, "that such copyrighted book was printed from plates made from type set within the limits of the United States." That Griggs from time to time after said 17th day of September, 1903, prepared, published, and became and was the author of such book, all of which was written, prepared, arranged, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

published by and under the direction of said Griggs, and that such book contains a large amount of original matter, and that same continued to be the property of said Griggs, and that "said author and proprietor applied for and obtained the copyright therefor as aforesaid." That by agreement with Griggs, before the infringement complained of, the complainant had undertaken and became interested in and assumed a part of the risk and responsibility of the publication of such book, and has ever since continued and continues to be so interested, and had and has incurred and been at great expense to make and establish himself as the sole publisher of said book and work, and that it is of great financial interest and prestige to complainant to be known and recognized as the sole publisher of such book "Moral Education."

The bill then alleges the assignment to the complainant of said book copyright and the claim, etc., for damages for infringement. That Griggs and complainant printed and sold a large number of copies and on the back of the title page of each volume inserted the information and notice of such copyright required by law.

The bill then alleges: That for several years last past defendant has and now publishes and sells a leaflet known as, "No. 9. Moral Education Through Work, by Edward Howard Griggs," of which it publishes large numbers in competition with said copyrighted book. That defendant, with fraudulent intent, impressed a notice of copyright on said uncopyrighted leaflets.

A copy of the leaflet is attached to the bill, and a copy of the book is also made a part thereof. The book, "Moral Education," contains about 296 or more pages of printed matter and is divided into chapters or subdivisions or subjects and "X," pages 86 to 100 inclusive, is headed "Moral Education Through Work." In short, the defendant has taken and published, printed and sold, 15 pages of this book in the leaflet form referred to. This is a substantial part of the book.

The defendant puts in a plea by way of answer as follows:

"This defendant by protestation, not confessing or acknowledging all, or any of the matters and things in the said plaintiff's bill of complaint mentioned and contained to be true, in such sort, manner, and form as the same are therein set forth and alleged, for plea to the whole of said bill, by his solicitor, C. J. Fuess, comes and defends the wrong and injury when, etc., and says that he is not guilty of the supposed grievances above laid to his charge, or any of them, or any part thereof in manner and form as the said plaintiff has above complained against him, and of this defendant puts himself upon the country. All of which matters and things this defendant doth aver to be true, and he pleads the said matters as a bar hereto and prays that judgment of this honorable court whether he should be compelled to make any other or further answer to the said bill and prays to be hence dismissed with his costs and charges in that behalf most wrongfully sustained."

Evidence was taken before an examiner, and the case came on for a hearing. The defendant raises the point that the complainant has not proved his case, in that he has not shown a valid copyright or any copyright of the book "Moral Education." The specific points presented are that sending by mail of the copy of the title page and of the two copies of the book when printed is not duly proved, and (2) that it is not proved that the said book, "Moral Education," was

printed from plates made from type set within the limits of the United States.

[1, 2] The copyright law in force in 1903 and 1904 provided that the author or proprietor of any book shall, "upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same."

Also:

"No person shall be entitled to a copyright unless he shall, on or before the day of publication in this or any foreign country, deliver at the office of the librarian of Congress, or deposit in the mail within the United States, addressed to the librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book, * * * for which he desires a copyright, nor unless he shall also, not later than the day of the publication thereof in this or any foreign country, deliver at the office of the librarian of Congress, at Washington, District of Columbia, or deposit in the mail within the United States, addressed to the librarian of Congress, at Washington, District of Columbia, two copies of such copyrighted book * * * provided, that in the case of a book, * * * the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States, or from plates made therefrom." Act March 3, 1891, c. 565, §§ 1, 3, 26 Stat. 1106 (U. S. Comp. St. 1901, pp. 3406, 3407).

The evidence on the subject of the printing of the two copies of this book, "Moral Education," and the whole of it, is as follows (Benjamin W. Huebsch, the complainant, being the witness):

"Q. Who attended to the copyrighting of the book entitled 'Moral Education,' by Edward Howard Griggs? A. I did.

"Q. Was such copyright book, 'Moral Education,' printed from plates made from type set within the limits of the United States? A. It was."

On cross-examination on this subject, the witness testified:

"XQ. Did you see 'Moral Education' being printed? A. I am unable to state definitely, at this time, whether I did or not.

"XQ. When did you first see the plates from which it was printed? A. I am not sure that I ever saw the plates.

"XQ. Did you ever see the type from which the plates were made? A. Probably not. * * *

"XQ. Where did you have the book 'Moral Education' printed? A. I don't remember, and I have made use of a dozen or more press rooms, by which I mean printing offices, in the last ten years. The book was manufactured in New York City.

"Recross-Examination:

"XQ. Who were the printers that printed the book 'Moral Education'? A. I cannot tell without consulting my manufacturing record.

"XQ. Do you know who set the type from which the plates of this book was made? A. I am not certain, but I think Redfield Bros., New York City."

Does this, taken together, furnish evidence that these two copies of this book in question, deposited with the librarian of Congress, were printed from plates made from type set within the limits of the United States? First the witness says they were. But, did he know? Did he know any fact or facts from which it can be inferred that he did or could know? On the other hand, does it not appear that the witness did not know and could not know, except by mere hearsay? First, he says that he attended to the copyrighting, but this does not prove or tend to prove that he knew where the type was set from which the

plates were made. Second, the witness is unable to say that he saw the book being printed. Third, he is not able to say that he ever saw the plates from which the books were printed. Lastly, he never saw the type from which the plates were made. However, he says the books were manufactured, that is, printed and bound, in the city of New York. However, he could not state which one or ones of the ten or a dozen press rooms or printing offices employed by him printed the books. To repeat:

"Q. Do you know who set the type from which the plates of this book was made? A. I am not certain, but I think Redfield Bros., New York City."

I am of the opinion that the evidence as a whole is to this effect: "I attended to the copyrighting of this book, the printing of the books and copies thereof, employed the printing houses that did the work, and, while I am not certain which of these houses set the type from which the plates were made from which the books were printed, my best recollection is (I think) that they were set by Redfield Bros. of New York City." But how could he know if he neither saw the plates nor the type? It is fair to say that the evidence shows the witness employed Redfield Bros. to set type and make plates therefrom to be used in printing these books; that subsequently the books came out duly printed. It is urged that the fair and legitimate inference and finding is that the type was set and plates made by the publishing house employed to do the work of printing the books and which actually did produce the books printed; that the fair inference and resultant finding is that the work was done in the city of New York where the firm of Redfield Bros. did business. It is contended that with this proof in the case there is no justification for the court to guess, surmise, or speculate. That possibly the house employed to do the work had it, or any part of it, done outside of the United States. If A. goes into the Tribune office, or Sun office, or World office, and contracts for the printing and publication of a book of which he is the author, which he desires to copyright and put on the market, and the book printed and ready for the binder comes to him in due time; is not proof of these facts sufficient evidence that such book was printed from type set or plates made from type set within the United States? Must witnesses be called who either did the work or saw it done, to testify that the type from which the plates were made was set in the United States? It seems to me a fair and just inference and conclusion that the work was done in that office. It is true that the work may have been done outside the United States, but I do not think the complainant called upon to negative that possibility.

In *Osgood v. A. S. Aloe Instrument Company* (C. C.) 83 Fed. 470, it was held:

"An author suing for infringement of a copyright has the burden of showing a literal compliance with each and every statutory requirement in the nature of conditions precedent to the acquisition of a valid copyright."

This case has been cited and followed in *Saake v. Lederer*, 174 Fed. 135, 136, 98 C. C. A. 571 (C. C. A. 3d Circuit); *Louis De Jonge &*

Co. v. Brenker & Kessler Co., 191 Fed. 35, 36, 111 C. C. A. 567; Lederer v. Saake (C. C.) 166 Fed. 810, 811; Freeman v. Trade Reg. Inc., 173 Fed. 419; and G. & C. Merriam Co. v. United Dictionary Co. (C. C.) 140 Fed. 768, 769. The case is in line with the decisions of the Supreme Court of the United States. Merrell v. Tice, 104 U. S. 557, 26 L. Ed. 854.

[3] The defendant also contends that the complainant has failed to make his case in that the certificates of the deposit of the two books with the librarian of Congress are not competent evidence of such deposit or mailing. In Merrell v. Tice, supra, the court held that the complainant in a copyright case could not recover without proving the deposit of the books as required by the copyright statute, and as to the certificate of the librarian under seal left it a query:

"Is the certificate of the librarian, under his official seal, that two copies were so deposited, competent evidence of the fact?"

See pages 560, 561, of 104 U. S., 26 L. Ed. 854.

In Lederer v. Saake (C. C.) 166 Fed. 810 (J. B. McPherson, D. J.), it was held that:

"The certificate of the librarian of Congress that two copies of a book were deposited with him is competent evidence of such fact in an action for penalties for infringement of the copyright of such book, and is sufficient where the identity of such copies with the book in suit is shown."

The judgment in this case was reversed (Saake v. Lederer, 174 Fed. 135, 98 C. C. A. 571), but not on this ground, although the court said:

"When suit for infringement is brought, the librarian's certificate does not per se establish the copyright; but the burden rests on the plaintiff to show compliance with statutory requirements as conditions precedent."

The court cited Merrell v. Tice, and Osgood v. Aloe Co., supra, as authority.

In Belford v. Scribner, 144 U. S. 488, 505, 506, 12 Sup. Ct. 734, 739 (36 L. Ed. 514), the court said:

"It is also contended that the copyright of 1880 was invalid because no sufficient proof appeared that two copies of that book were duly deposited. We are of opinion that the certificate of the librarian of Congress set forth in the margin, as printed in the record, that two copies of the new edition of the plaintiff's copyrighted book were received by him November 15, 1880, which was within ten days after the publication, was competent evidence, although the certificate was not under seal."

If the certificate is competent evidence, it ought to be true that it establishes what it states in the absence of contradiction. In that case the document was as follows:

"New York, Nov. 15th, 1880.

"Mr. A. R. Spofford, the Librarian of Congress, Washington, D. C.—Dear Sir: We send you to-day by mail (2) two copies of Marion Harland's 'Common Sense in the Household,' new edition, to complete the copyright for that book. The certificate for title entry is numbered 14239 L. Please acknowledge their receipt.

"Yours truly,

Charles Scribner's Sons.

"2 copies of the above received Nov. 15, 1880.

"A. R. Spofford, Librarian of Congress."

On the subject of depositing the title of the book and thereafter prior to the publication of the book depositing the two copies thereof required to be deposited, the evidence of the complainant is as follows:

"Q. Did you deposit in the mail within the United States a printed copy of the title of the book 'Moral Education,' and, if so, when, where, and to whom did you address such communication? A. My best recollection of the details is that I complied with the requirements making application, by submitting either a printed title page or a typewritten copy of the title page to the librarian of Congress, or with the register of copyrights at Washington from New York, N. Y., at the post office in that city, prior to the publication of the book, during 1903.

"Q. Did you send two copies of the book to be copyrighted; if so, from and where and to whom? A. I sent the two copies necessary to complete the copyright from New York, N. Y., to the library of Congress, addressing them to the librarian of Congress or to the register of copyrights, whichever one was then authorized to receive such copies. * * *

"Q. Within what time, after you first published the book 'Moral Education,' did you deliver to the librarian of Congress, if you did deliver it, or deposit in the mail addressed to the librarian of Congress, at Washington, D. C., two copies of the book to be copyrighted under the name 'Moral Education,' by Edward Howard Griggs? A. On the day of publication.

"Q. Were these copies of the best printed, complete edition issued? A. Yes."

And on cross-examination the witness testified as follows:

"Q. Did you personally deposit in the post office in New York City the two volumes that you stated were deposited on the day of publication? A. I am unable to state positively that I personally deposited the copies.

"Q. Did you personally deposit the title page in the post office in New York City at the time you stated it was deposited? A. I do not know."

In addition to this evidence, the complainant put in evidence the following:

"Class A, XXc. No. 68549.

E

"Library of Congress, to wit:

"Be it remembered, that on the seventeenth day of September, 1903, Edward Howard Griggs, of Montclair, N. J., hath deposited in this office the title of a book, the title of which is in the following words, to wit: Moral Education, the right whereof he claims as author and proprietor in conformity with the laws of the United States respecting copyrights.

"Office of the Register of Copyrights, Washington, D. C.

"Herbert Putnam, Librarian of Congress,

"By Thorwald Solberg, Register of Copyrights.

"I hereby certify that the foregoing is a true copy of the original record of copyright.

"In witness whereof, the seal of this office has been hereto affixed this sixteenth day of June, 1913.

Thorwald Solberg, Register of Copyrights.

"Copyright Office of the United States of America, Washington, D. C. [Seal.]"

"Copyright Office of the United States of America.

"Library of Congress, Washington.

"I hereby certify that two copies of the book entitled Moral Education, registered for copyright on September 17, 1903, Class A, XXc. No. 68549, were received as copyright deposits on December 5, 1904.

"In witness whereof, the seal of this office has been hereto affixed this sixteenth day of June, 1913.

"Thorwald Solberg, Register of Copyrights. [Seal.]"

By chapter 230, § 91, 16 Stat. 213, Act of July 8, 1870, it was made the duty of the librarian of Congress to give the certificate of the deposit of the title.

In *Callaghan v. Myers*, 128 U. S. 617, 655, 656, 9 Sup. Ct. 177, 187 (32 L. Ed. 547), the court said and held:

"Section 4 of the act of 1831 requires the clerk to give a copy of the title as deposited and recorded, under the seal of the court, to the author or proprietor who deposits it whenever he shall require the same. Necessarily, such copy is sufficient *prima facie* evidence of the deposit of the title. Such a copy was given in regard to each of the volumes in question here. On each of these papers the memorandum of the fact and of the date of the deposit of the work, signed by the clerk, was written. The clerk was the officer required to receive the deposit of the work. He was not required to keep a record of such deposit; and he was required to transmit the works so deposited to the Secretary of State, at least once a year. The memorandum in the present case of the fact and date of the deposit, purporting to be signed by the clerk, must be regarded as a sufficient *prima facie* certificate of such deposit, and as competent evidence of the fact and of the date, without further proof of the signature of the clerk, that being on the same paper with his signature as clerk to the certificate of the copy of the record of the deposit of the title, and it being open to the defendants to show that his signature to the memorandum was not genuine.

"We do not think the present case is governed by the decision in *Merrell v. Tice*, 104 U. S. 557 [26 L. Ed. 854]. In that case the librarian of Congress had given a certificate to a copy of the record of the deposit of the title of the book. On that paper was written a memorandum in these words, 'Two copies of the above publication deposited' on a date given. This memorandum was not signed by the librarian of Congress. This court held the memorandum not to be competent as proof of the deposit of the two copies of the book, on the ground, that it was not a certificate of that fact. We are of opinion that the memorandum in the present case, purporting to be signed by the same clerk, is substantially a certificate of the fact and date of the deposit of the work, written by him on the same paper with the other certificate, and that it is not open to the objection which obtained in the case of *Merrell v. Tice*."

I think this evidence and that previously quoted in connection with the certificates, Exhibits 1 and 2, is sufficient to show the deposit of the title of the book September 17, 1903, and the deposit of the two copies of the book itself December 5, 1904, the day of its publication.

[4] In truth, there was no denial that the book was duly copyrighted, but the complainant was, of course, bound to make the proof.

Damages.

[5] The bill does not in terms ask for an injunction. It is true that the defendant was defiant at first. On the outside first page of the first edition of the leaflet we find the following:

"No. 9. Moral Education Through Work, by Edward Howard Griggs, published by Crist, Scott & Parshall, Cooperstown, N. Y., Price 3¢ each; 80¢ per 100, postpaid."

On the outside first page of the second edition, we have the same, except that, in place of "Published by Crist, Scott & Parshall, Cooperstown, N. Y.," we find the following: "Copyright by The Arthur H. Crist Co., Cooperstown, N. Y., 188 Main St."

The defendant claims and Mr. Crist says under oath that this was an error of the printers who took and issued one of their set forms on this leaflet by mistake. Mr. Crist also claims that he believed the assignment from Mario C. Woodallen to Crist, Scott & Parshall of all the "leaflets, or booklets, copyrights, royalties and rights of action for the leaflets or booklets heretofore published and sold by the Wood-

Allen Publishing Company and listed in their advertising announcements from numbers one to thirty as per the attached memorandum," and dated February 28, 1907, included and carried the leaflet, "Moral Education Through Work." In fact, the said memorandum includes no such leaflet. The memorandum attached to such assignment omitted Nos. 8, 9, 10, and 16. As early as January 25, 1912, the attention of the Arthur H. Crist Company was called to this leaflet and its infringing character, and in reply that company said:

"We acquired this pamphlet from Dr. Mary Wood Allen at the same time that we took her books. We do not know what arrangements Dr. Wood Allen had made with the author or publisher, but we always found Dr. Wood Allen very careful in these matters, so we presume that she had the proper authority for using the matter published in this leaflet. We know that Dr. Wood Allen put this little leaflet before the public quite a long time before we had anything to do with her publications."

Later, and April 17, 1912, the defendant wrote Mr. Higgins, who represented the complainant, as follows:

"Cooperstown, N. Y., Apr. 17, 1912.

"Mr. Alvin M. Higgins—Dear Sir: We now wish to answer your letter of March 12th in full—the delay in taking this up being due to severe illness in the family as already explained.

"1. You ask what assurance was made to us by the Wood-Allens. In reply to that question we herewith enclose you a copy of the contract made between us and the Wood-Allens when we purchased these leaflets and the rights to publish the same. We believe you will find this copy a pretty complete answer to your question.

"2. The next paragraph in your letter assumes a great deal. If you had any personal knowledge of our company and the men who comprise it, we do not believe you would have written this paragraph in quite the language which it is couched. After purchasing the Wood-Allen rights in these leaflets and copyrights, we have since had the copyrights taken out in our own name which we believe we have a perfect right to do, after purchasing such rights from other people.

"3. Your next paragraph again makes a very strong assumption of unfair intention and purpose on our part. We repeat however what we said that the sale of this leaflet has been so small that if we were the ones at fault and you carried out your original threat to make us account for every cent received, you would be somewhat astonished and chagrined to find what a tempest in a teapot the whole thing had been. We offered the page advertisement in future editions simply as a matter of courtesy and good will to Mr. Huebsch. As our intention in this matter has been entirely misunderstood and misinterpreted, we herewith withdraw that offer.

"For further responsibility in this matter we refer you to Mr. Wood-Allen, who sold us the leaflets and the rights thereto and guaranteed to 'defend the same against any person or persons whomsoever claiming the same.'

"Very respectfully yours,

The Arthur H. Crist Co.

"Arthur H. Crist."

Mr. Crist testifies he dictated "which we believed we have a perfect right to do," not "believe." This letter, in any event, is defiant and assumes a purchase of the leaflet in question, when the assignment itself, on its face, shows that it was not included. At best there was negligence on the part of the defendant.

[6] The bill asks for an "account of the profits arising from the sale of said piratical leaflet so far as any profits have been made," and that defendant be required to pay over to your orator such damages

as your orator may have suffered due to the infringement as well as all profits which the defendant, the infringer, shall have made from the infringement, in accordance with the copyright law," and also costs, etc.

[7] The evidence of Mr. Crist himself shows the printing and sale of the second editions of said infringing leaflet within the two years prior to the commencement of this action, June 4, 1912. In all the books "Moral Education" printed, published, and sold by complainant he had on the page following the title page, the words, "Copyright, 1903, by Edward Howard Griggs," as required by law. See Act June 18, 1874, c. 301, § 1, 18 Stat. 78. It was optional with the complainant to print the statement, "Entered according to Act of Congress," etc., or the words and figures "Copyright, 1903, by Edward Howard Griggs." See 3 U. S. Comp. St. 3411; *Lithographic Co. v. Sarony*, 111 U. S. 53, 55, 4 Sup. Ct. 279, 28 L. Ed. 349.

I think the complainant has made a case which entitles him to the relief prayed for, an accounting, etc., and it will be referred to a master to take and state the account of profits and damages unless the parties agree. The damages, etc., cannot be large. The leaflet sold for 3 cents per copy, while the book sold for \$1.60 per copy, and it cannot be inferred that the sale of a leaflet prevented a sale of a copy of the book. The complainant is also entitled to full costs, and a reasonable attorney's fee will be added on the coming in of the master's report. Section 40, Act of March 4, 1909. As this bill of complaint is framed, this court cannot substitute an arbitrary finding of damages and profits and fix the amount or impose penalties. *Stevens v. Gladding*, 17 How. 447, 453, 15 L. Ed. 155; *Callaghan v. Myers*, 128 U. S. 617, 663, 9 Sup. Ct. 177, 32 L. Ed. 547; *Root v. Railway Co.*, 105 U. S. 189, 193, 26 L. Ed. 975.

In 9 Cyc. 959, it is said, citing cases:

"The usual mode of ascertaining profits is by reference to a master to take evidence and report, although they may be ascertained from affidavits filed by the defendant."

In *Patterson v. Ogilvie Pub. Co.* (C. C.) 119 Fed. 451:

"The usual practice is to enter an interlocutory decree providing for an injunction and then send the matter to a master to take proof of damages and profits. Upon the return of the master's report, a final decree disposes of the question of damages."

[8] I think the provisions of section 25 of the Act of March 4, 1909 (35 Stat. 1075, c. 320 [U. S. Comp. St. Supp. 1911, p. 1472]), "An act to amend and consolidate the acts respecting copyright," apply in this case. It is immaterial, so far as the remedies provided by that act are concerned, that this copyright was obtained prior to the passage of that act. That section provides:

"That if any person shall infringe the copyright in any work protected under the copyright laws of the United States, such person shall be liable," etc.

It was competent for Congress to give additional or more severe or more drastic remedies for the infringement of copyrights theretofore granted. But, of course, the remedies would only apply in the case

of infringements committed after the act of 1909 went into effect. The assignment with a certificate of its record according to law was put in evidence.

There will be a decree accordingly.

STORM LAKE TUB & TANK FACTORY v. MINNEAPOLIS & ST. L. R. CO.

(District Court, N. D. Iowa, C. D. December 24, 1913.)

No. 29.

1. REMOVAL OF CAUSES (§ 25*)—FEDERAL QUESTION—HOW SHOWN.

The provisions of section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]) for the removal of suits arising under the Constitution or laws of the United States authorizes such removal only when such facts appear from plaintiff's own statement of his claim, and, if they do not so appear, their omission cannot be supplied by the petition for removal or by any subsequent pleading.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

2. REMOVAL OF CAUSES (§ 19*)—AMOUNT IN CONTROVERSY—SUITS ARISING UNDER LAW REGULATING COMMERCE—CARMACK AMENDMENT.

An action against a railroad company to recover for loss of or damage to an interstate shipment of goods through the negligence of defendant is one to enforce the common-law liability of the defendant, and is only removable from a state court on the ground of diversity of citizenship and when the amount in controversy exceeds the sum or value of \$3,000. Such action is not a suit arising under "any law regulating commerce," within the meaning of Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1092 [U. S. Comp. St. Supp. 1911, p. 136]) § 24, par. 8, of which the district court by paragraph 1 is given jurisdiction, regardless of the citizenship of the parties or the amount involved, as based on Interstate Commerce Act Feb. 4, 1887, c. 104, § 9, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), which is limited to actions for damages because of the violation of some provision of the act, nor as based on the so-called Carmack amendment to section 20 of the act, embodied in Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1911, p. 1307), requiring the issuance of bills of lading for interstate shipments, the purpose of which is to make the carrier issuing such bill liable thereon by statute for any loss or damage occurring on connecting lines.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-46, 48, 52, 53; Dec. Dig. § 19.*]

At Law. Action by the Storm Lake Tub & Tank Factory against the Minneapolis & St. Louis Railroad Company. On motion to remand to state court. Motion sustained.

Bailie & Edson, of Storm Lake, Iowa, for plaintiff.

Price & Joyce, of Ft. Dodge, Iowa, for defendant.

REED, District Judge. The plaintiff filed its petition against the defendant railroad company in the district court of Iowa, in and for Buena Vista county, July 28, 1913, in two counts, which are in effect the same, alleging in substance: That plaintiff is an Iowa corporation engaged in manufacturing butter tubs and tanks at Storm Lake, Iowa; that defendant is a railroad corporation engaged as a common carrier

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of persons and property in the states of Iowa and Minnesota; that about March 1, 1913, the plaintiff delivered to the defendant at Storm Lake, and loaded into one of its cars at that place, 2,000 butter tubs, consigned to R. E. Cobb, of St. Paul, Minn., to be carried by the defendant to St. Paul and there delivered to said consignee; that defendant undertook to so carry said tubs to St. Paul, but in doing so they were damaged, by its neglect in transporting them, to such an extent that they were of no value, and plaintiff has suffered damages because thereof in the sum of \$400. There is a further claim by plaintiff in each count for \$7.20 as an overcharge on freight by the defendant. The plaintiff asks judgment against the defendant for \$407.20, with interest and costs.

In due time the defendant filed in the state court its petition and bond to remove the cause to this court, in which petition it is alleged:

"That this suit is one of a civil nature at common law of which the District Courts of the United States have sole and exclusive jurisdiction; that it is an action brought by the plaintiff, which is a corporation organized under the laws of the state of Iowa, with its principal place of business at Storm Lake, in said state, against the defendant, which is a common carrier, incorporated under the laws of the state of Minnesota, from Storm Lake, in the state of Iowa, to the city of St. Paul, in the state of Minnesota, and that the said shipment of goods, on which it bases its claim for damages, was an interstate shipment; that plaintiff's claim is based upon the following statement of facts, to wit: On March 1, 1913, it loaded and consigned to R. E. Cobb, at St. Paul, 2,000 butter tubs of the value of 20 cents each. That, owing to the negligence of the said defendant, said tubs were totally destroyed, wherefore plaintiff sustained damages in the sum of \$400. It is further claimed that the defendant charged the plaintiff excess freight in the sum of \$7.20, which amount is sought to be recovered. That said suit involves a federal question, viz., an application and construction of section 20 of the federal Interstate Commerce Act, as amended by the act of June 29, 1906, which act, as construed by the court, grants to the United States District Courts exclusive jurisdiction of the character above described"

—and defendant asks that the cause be removed to this court.

The state court ordered the removal over the objections of the plaintiff, and the latter now moves to remand the cause to the state court upon the grounds substantially: (1) That the amount involved is less than \$3,000, exclusive of interest and costs. (2) That the cause of action alleged in its petition does not arise under or by virtue of any law regulating commerce; nor is it founded upon or created by any federal law. (3) That plaintiff's cause of action so alleged is based upon the alleged negligence of defendant, whereby plaintiff has been damaged in the amount for which it claims judgment, and does not arise under the Constitution, laws, or treaties of the United States.

The contention of the defendant is that the cause of action alleged by the plaintiff in its petition is one arising under the laws of the United States, and particularly under the "act of Congress to regulate commerce" (chapter 104, § 20, Act Feb. 4, 1887, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169], as amended by section 7 of Act of June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]), of which it is claimed the federal courts have exclusive jurisdiction, and may be removed from a state court, when brought therein, to the

proper District Court of the United States, regardless of the amount involved or the citizenship of the parties. Sections 24 and 28 of the Judicial Code are relied upon by the defendant as sustaining its contention. Those sections, so far as material to the questions now involved, read in this way:

"Sec. 24. The District Courts (of the United States) shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects. [Then follows the provision as to suits upon foreign bills of exchange, and upon promissory notes or other choses in action in favor of assignees, etc.] * * * Provided, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."

The succeeding eighth paragraph of this section is:

"Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court."

"Sec. 28. (1) Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district.

"(2) Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state.
* * *

(These paragraphs are numbered as (1) and (2) for the convenience in hereinafter referring to them.)

The state courts of competent jurisdiction and the District Courts of the United States have concurrent jurisdiction of the suits mentioned in these sections, except where the jurisdiction of the latter is exclusive under some provisions of the Constitution of the United States, or is made so by section 256 of the Judicial Code or some other act of Congress. *Claffin v. Houseman, Assignee*, 93 U. S. 130, 136, 137, 23 L. Ed. 833; *Mondou v. New York, etc.*, R. R. Co., 223 U. S. 1, 55, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Galveston, H. & S. A. Ry. Co. v. Wallace*, 223 U. S. 481, 490, 32 Sup. Ct. 205, 56 L. Ed. 516.

[1] The removal of this cause from the state court cannot be sustained under paragraph (1) of section 28, for that paragraph authorizes the removal of suits arising under the Constitution, laws, or treaties of the United States only when such facts appear from the plaintiff's own statement of his claim, and, if they do not so appear, their

omission cannot be supplied by the petition for removal, or in any subsequent pleading. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; *Oregon Short Line, etc., Ry. Co. v. Skottowe*, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048; *Florida Central, etc., R. R. v. Bell*, 176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486; and the recent case of *In re Winn*, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873. This question, it would seem, is not open to debate in the lower federal courts.

[2] There is nothing in the petition of the plaintiff in this case that shows even remotely that the cause of action therein alleged is one "arising under the Constitution or any law of the United States," unless it be the allegation "that defendant is a railroad corporation engaged as a common carrier of persons and property in the states of Iowa and Minnesota." It is entirely clear that this allegation does not show any cause of action arising under clause (a) of the first paragraph of section 24 of the Judicial Code, unless it be that part of the petition which claims \$7.20 as an overcharge upon some shipment of freight. It is not alleged, however, that this overcharge was made upon the shipment in question, nor upon any other interstate shipment of freight; nor is it claimed in argument by counsel for either party that this claim has any bearing upon the question of the right to remove this suit; it might well, therefore, be dismissed from further consideration; but it will be referred to later. The removal of the cause from the state court cannot therefore be sustained under paragraph (1) of section 28 of the Judicial Code. May it be removed under paragraph (2) of that section? That paragraph authorizes the removal from a state court by the *nonresident* defendant of "any other suit of a civil nature at law or in equity (pending therein) of which the District Courts of the United States are given jurisdiction by this title."

The proviso in the first paragraph of section 24 saves from the jurisdictional amount fixed by that paragraph the cases mentioned in the "succeeding paragraphs of that section." The "cases mentioned" in the succeeding eighth paragraph are:

"All suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court."

The suits and proceedings of which the Commerce Court is so given exclusive jurisdiction are those mentioned in section 1 of the act of Congress approved June 18, 1910 (36 Stat. 539, c. 309 [U. S. Comp. St. Supp. 1911, p. 217]); section 207 of the Judicial Code. It is the contention of the defendant that the cause of action for the loss of the freight, alleged in the plaintiff's petition, falls within the provision of the "eighth paragraph" of section 24, and may therefore be removed from the state court to this court, regardless of the amount involved or the citizenship of the parties. It is obvious that the "suits and proceedings" mentioned in the eighth paragraph of section 24 are suits and proceedings other than those arising under clause (a) of the first paragraph of that section, viz., under the Constitution, laws, or treaties of the United States, for a suit or proceeding arising under "any

law regulating commerce" would of necessity be one arising under "a law of the United States." What, then, are the suits and proceedings that may arise under "any law regulating commerce" of which original jurisdiction is conferred upon the District Courts? Chapter 104 of the act of Congress approved February 4, 1887 (24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), is entitled an "act to regulate commerce," and that act, with its amendments, is commonly known as the "act to regulate commerce." This act in certain of its sections imposes upon the common carriers made subject thereto, the duty to establish schedules of reasonable and just rates for the transportation of persons and property in interstate commerce over their roads and file copies thereof with the Interstate Commerce Commission, and forbids them, under the penalties prescribed, from directly or indirectly, by any device whatever, charging, collecting, or receiving from any person or persons any other or greater or less compensation for any service rendered or to be rendered by them in the transportation of persons or property than that fixed in the schedules so filed, or as they may be changed by the Interstate Commerce Commission, or than it charges, collects, or receives from any other person or persons for a like and contemporaneous service under substantially similar circumstances and conditions, and declares that it shall be unlawful for any such common carrier to so do.

Section 8 of the act provides that in case any common carrier subject to the provisions of the act shall do, permit, or cause to be done any act, matter, or thing in the act forbidden or declared to be unlawful, or shall omit to do any act, matter, or thing required by it to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation, together with a reasonable attorney's fee, to be fixed by the court in every case of recovery, and taxed as part of the costs in the case.

Section 9 of the act provides that any person claiming to be damaged by any common carrier subject to the provisions of the act may either make complaint to the Interstate Commerce Commission, as hereinafter provided, or may bring suit in his own behalf for the recovery of the damages, for which such common carrier may be liable under the act, in any District Court of the United States of competent jurisdiction, or in any state court. Section 16, as amended by the Act of June 18, 1910, c. 309 (36 Stat. 539, 554). But such person shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure therein provided he will adopt.

This act creates a right of action against such carriers that did not previously exist in favor of any person who has suffered damages because of a violation by any such common carrier of its provisions, and authorizes such person to apply to the Interstate Commerce Commission for relief, or to bring suit in a District Court of the United States, or any state court, of competent jurisdiction for the recovery of such damages; but he must elect which of such remedies he shall pursue; and, before bringing an *action at law* to recover such damages, he must

first apply to the Interstate Commerce Commission for such relief as it may afford. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1073.

These are obviously the "suits and proceedings" mentioned in the eighth paragraph of section 24 of the Judicial Code, as arising under "any act to regulate commerce," of which the District Courts of the United States are given original jurisdiction by the first paragraph of that section, regardless of the amount involved or the citizenship of the parties, and which may be removed from a state court, when brought therein, by *the defendant*, to the proper District Court of the United States, under paragraph (1) of section 28 of the Judicial Code.

The "act to regulate commerce" has been much amended by the acts of June 29, 1906 (34 Stat. 584, c. 3591), and of June 18, 1910 (36 Stat. 544, c. 309), and it is claimed that the cause of action alleged in the plaintiff's petition falls within that part of section 7 of the act of 1906 (34 Stat. 595), known as the "Carmack amendment," and is therefore a cause of action arising under the "act to regulate commerce" of which the District Courts of the United States are given jurisdiction by the first paragraph of section 24; and *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, and *McGoon v. Northern Pacific Ry. Co.* (D. C.) 204 Fed. 998, are relied upon by the defendant as sustaining this contention. The so-called "Carmack amendment" reads in this way:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgment or transcript thereof."

This amendment saves to the shipper or holder of the receipt the right of action under existing federal law not inconsistent with its provisions. *Adams Express Co. v. Croninger*, 226 U. S. 491, 509, 33 Sup. Ct. 148, 57 L. Ed. 314. The questions of the constitutional validity of this amendment, and of its true interpretation, came before the Supreme Court in the case of the Atlantic Coast Line Railroad Co. v. *Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. That was an action by the *Riverside Mills* to recover the value of certain goods which it had delivered to the Atlantic Coast Line Railroad at a point on its line in the state of Georgia for transportation to points in other states not on its line, and for which it gave to the mill company a receipt or through bill of lading which contained certain conditions, one of which was:

"No carrier shall be liable for loss or damage not occurring on its portion of the route."

The Atlantic Coast Line delivered the goods in good condition to a connecting carrier to be forwarded to their destination, but they were lost while in the custody of such connecting carrier, and the mill company sued the Atlantic Coast Line Company under the Carmack amendment in the United States Circuit Court for their value. The railroad company in its defenses challenged the constitutional validity of the amendment and denied its liability for a loss not occurring upon its own line. Its defenses were overruled, and judgment rendered against it by the Circuit Court for the value of the goods and an attorney's fee for the plaintiff's counsel, which was fixed by the court and taxed as part of the costs. The railroad company carried the case to the Supreme Court, which sustained the validity of the amendment, and in its opinion referred to its own prior decisions, the English decisions, and the conflicting decisions of many of the American courts upon the question of the liability of the initial carrier, in the absence of legislation, for the loss of goods received by it for carriage to points beyond its own line, and said of the effect of the Carmack amendment:

"The indisputable effect of this amendment is to hold the initial carrier engaged in interstate commerce and receiving property for transportation from a point in one state to a point in another state as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents."

The judgment against the Atlantic Coast Line Company for the value of the goods was therefore sustained. But of the judgment for an attorney's fee taxed as part of the costs, Mr. Justice Larton, speaking for the court, said:

"The authority for this is supposed to be found in the eighth section of the act to regulate commerce of February 4, 1887 (24 Stat. 379, 382, c. 104). That section reads as follows: 'That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, which shall be fixed by the court in every case of recovery and taxed and collected as part of the costs of the case.' But that section applies to cases where the cause of action is the doing of something made unlawful by some provision of the act, or the omission to do something required by the act, and there is a recovery 'of damages sustained in consequence of any such violation.' The cause of action in the present case is not for damages resulting from 'any violation of the provisions of this act.' True, the plaintiff in error attempted by contract to stipulate for a limitation of liability to a loss on its own line, and in this action has defensively denied liability for a loss not occurring on its own line. But the cause of action was the loss of the plaintiff's property which had been intrusted to it as a common carrier, and that loss is in no way traceable to the violation of any provision of the act to regulate commerce. Having sustained no damage which was a consequence of the violation of the act (to regulate commerce), the section has no application to this case. The judgment was erroneous to this extent, and the provision for an attorney's fee is stricken out, and the judgment thus modified is affirmed."

The true interpretation or meaning of the Carmack amendment was directly involved in that case, and it is held that suits or actions

to recover, from the primary carrier under that amendment, damages for an injury to or loss of property received by it as a common carrier for transportation as an interstate shipment do not arise under "the act to regulate commerce" but are actions to recover from such carrier upon its common-law liability as a common carrier for damages to or loss of the property occurring upon the line of any connecting carrier to whom it delivers the property as its agent to be carried to or towards its destination.

There is nothing in *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, that in any way modifies this decision. In that case the express company was sued in a state court for the actual value of property it had received for carriage from one state to another under a receipt in which it limited its liability, in case of the loss of the property, to its value as fixed by its owner, and upon which the cost of carriage was based (to do which has always been regarded as just and reasonable, *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 640, 647, 33 Sup. Ct. 391, 57 L. Ed. 683), contrary to a statute of the state of Kentucky which forbade it to make any rule or contract so limiting its liability. The state court denied the right it so claimed, and the case went to the Supreme Court under section 709 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 575). The question of the jurisdiction of the District Courts of the United States of such a suit, either upon original process or by removal from a state court, was in no way involved and is not considered or determined. Some things said in the opinion *arguendo* might indicate that not only state laws or rules regulating common carriers by railroad in interstate commerce, inconsistent with the Carmack amendment, were superseded by that amendment, but that the liability of common carriers as at common law for the loss of property intrusted to them for carriage was also superseded. Clearly it was not in the mind of the court to hold that the liability of common carriers as at common law for such loss, not traceable to any violation of the act to regulate commerce, was superseded by this amendment.

In this connection it is well to bear in mind the oft-quoted words of Chief Justice Marshall, who in speaking of some dictum of his own in *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, said:

"It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L. Ed. 257.

And see *Hans v. Louisiana*, 134 U. S. 1, 20, 21, 10 Sup. Ct. 504, 33 L. Ed. 842.

So limited, there is nothing in the decision of *Adams Express Co. v. Croninger* that bears even remotely upon the question of the jurisdiction of the District Courts of the United States of such an action or suit. That case only decides that state statutes and regulations incon-

sistent with the Carmack amendment are superseded by that amendment, not that the common-law liability of a carrier for the loss of property intrusted to it for carriage upon its own line or that of its agent, not traceable to any violation of the act to regulate commerce, is superseded or done away with by the amendment. And especially was it not in the mind of the court to hold that the District Courts of the United States are given exclusive jurisdiction of such suits, or jurisdiction thereof at all, except when the requisite diversity of citizenship and amount in controversy exist.

But, apart from this, the present suit is one to recover from the defendant railroad company the value of property received by it from the plaintiff at Storm Lake, to be carried as a common carrier to a point upon its line in Minnesota, for damage to the property occurring upon its own line, not traceable to any violation of the act to regulate commerce. The Carmack amendment does not create its liability for such a loss, for such liability arises under the common-law rule which holds a common carrier of property liable for its loss or injury while in its custody as such carrier from all causes not due to an act of God or the public enemy. True the amendment provides that the carrier receiving the property for an interstate carriage shall issue a receipt therefor and shall be liable to the holder of such receipt for any damage to the property caused by it or by any connecting carrier to whom it may be delivered to be carried towards its destination. But the purpose of this amendment, as held in *Atlantic Coast Line Co. v. Riverside Mills*, 219 U. S. 197, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, in *Galveston, H. & S. A. Ry. Co. v. Wallace*, 223 U. S. 481, 490, 32 Sup. Ct. 205, 56 L. Ed. 516, and in *M., K. & T. Co. v. Hariman*, 227 U. S. 657, 672, 33 Sup. Ct. 397, 57 L. Ed. 690, is to make the primary carrier liable as at common law for a loss of the property occurring upon the line of its agents, the connecting carrier or carriers, the same as if it had occurred upon its own line.

Since the decision of Judge Amidon in *McGoon v. Northern Pacific Ry. Co.* (D. C.) 204 Fed. 998, mostly relied upon by the defendant, the dockets of this court in the several divisions of the district are being filled with suits brought in the state courts by shippers against different railroad companies to recover damages in small amounts, for injuries to or loss of property intrusted to them to be carried from one state to another, and removed to this court by the defendants, regardless of the amount involved or the citizenship of the parties, some of which suits come from justices of the peace before whom they were commenced.

The case of *Atlantic Coast Line R. R. Co. v. Riverside Mills*, above, was decided January 3, 1911, and the Judicial Code was enacted March 3d following. With this in mind, and in view of the fact that the Supreme Court had frequently held that the Judiciary Acts of March 3, 1887, c. 373, 24 Stat. 552, and Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), was intended to contract the jurisdiction of the lower federal courts, and such obviously was the purpose of the Judicial Code as to the jurisdictional amount at least (except in those cases where the Circuit and District Courts formerly exercised jurisdiction of suits involving small amounts), it seems incredible that

Congress should have intended by the Judicial Code to confer jurisdiction upon the District Courts of the United States of causes of action such as that alleged in plaintiff's petition, and it is clear that it has not by apt words done so.

The conclusion, therefore, is that the cause of action alleged by the plaintiff for the loss of its property is not one of which the District Courts of the United States are given jurisdiction by section 24 of the Judicial Code or the eighth paragraph thereof, and its suit to recover therefor may not rightly be removed from the state court to this court. This conclusion is contrary to the decision in *McGoon v. Northern Pac. Ry. Co.* (D. C.) 204 Fed. 998, above; but that decision, it seems to me, is not in harmony with the decision of the Supreme Court in *Atlantic Coast Line R. R. Co. v. Riverside Mills and Galveston, H. & S. A. Ry. Co. v. Wallace*, above, and it must yield to the decisions of the Supreme Court.

If the claim of the plaintiff for \$7.20 is a charge for an interstate shipment of freight in excess of the schedule rate filed by the defendant with the Interstate Commerce Commission, it may be a claim arising under the eighth paragraph of section 24 of the Judicial Code. *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Atchison, T. & S. F. Ry. Co. v. Kinkade* (D. C.) 203 Fed. 165. But no such question is presented by this record, and it need not be and is not considered or determined.

The motion to remand is sustained, and the cause remanded to the state court from which it was removed. An order may be entered accordingly.

UNITED STATES v. ALBERT STEINFELD & CO. et al.

(District Court, D. Arizona. December 1, 1913.)

No. C 705.

1. NEUTRALITY LAWS (§ 5*)—VIOLATION—PLACE OF COMMISSION—VENUE.

An indictment for violating Neutrality Resolution March 14, 1912, No. 10, 37 Stat. 630, in that defendants made and caused to be made a certain shipment of munitions of war from New Haven, Conn., to Tucson, Ariz., from which they were to be shipped to Mexico, showed that the offense, if any, was committed in Connecticut and not in Arizona; the gist of the offense being the shipment of the goods and not the mere ordering thereof nor the delivery to defendants at a point within the jurisdiction of the court, to be transshipped abroad.

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. §§ 14-17; Dec. Dig. § 5.*]

2. NEUTRALITY LAWS (§ 5*) — VIOLATION — MUNITIONS OF WAR — SHIPMENT — CONGRESSIONAL RESOLUTION—CONSTRUCTION.

Neutrality Resolution March 14, 1912, No. 10, 37 Stat. 630, prohibiting the violation of neutrality by shipment of munitions of war procured in the United States and exported to an American country in which conditions of domestic violence exist, does not prohibit the shipment of munitions of war from one point in the United States to another, but only from a point in the United States to a point in a foreign country; and hence an indictment merely alleging that defendants caused to be made a shipment of munitions of war from New Haven, Conn., to Tucson, Ariz.,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to be there transshipped to the state of Sonora, Mexico, as its ultimate destination, merely charged an intent to violate the law, and was therefore fatally defective.

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. §§ 14-17; Dec. Dig. § 5.*]

3. CONSTITUTIONAL LAW (§ 304*)—NEUTRALITY LAWS (§ 5*)—VIOLATION—INDICTMENT—SHIPMENT OF ARMS—DESTINATION—JUDICIAL NOTICE.

Where an indictment for violating Neutrality Resolution March 14, 1912, No. 10, 37 Stat. 630, in the shipment of munitions of war from the United States for use in Mexico, alleged that the material was shipped by defendants from New Haven, Conn., to Tucson, Ariz., "with the state of Sonora in the United States of Mexico as the ultimate destination of said shipment," etc., the court would take judicial notice that the state of Sonora was a large country and not a place, and that it contained numerous cities, to any of which the shipment might have been made; and hence the indictment was fatally defective for failure to charge a "place" in Mexico to which the shipment was made.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 925-939, 941-949; Dec. Dig. § 304;* Neutrality Laws, Cent. Dig. §§ 14-17; Dec. Dig. § 5.*]

Albert Steinfeld & Co. and others were indicted for violating Neutrality Resolution March 14, 1912, No. 10, 37 Stat. 630. On demurrer to the indictment. Sustained.

Joseph E. Morrison, U. S. Atty., of Bisbee, Ariz.

Thos. Armstrong, Jr., Geo. P. Bullard, Ernest W. Lewis, and L. T. Carpenter, all of Phenix, Ariz., for defendants.

SAWTELLE, District Judge. The indictment in this case charges as follows:

"That Albert Steinfeld & Co., a reputed corporation, Hugo Donau, and Albert Steinfeld, on or about the 11th day of April, 1913, at the county of Pima, in the said district and within the jurisdiction of said court, did unlawfully, knowingly, willfully, and feloniously, and with intent to export the munitions of war hereinafter described from the United States of America to and into the United States of Mexico, make and cause to be made a certain shipment of munitions of war, to wit, twenty thousand cartridges of the caliber commonly known and designated as 30-30, that is to say, did make and cause to be made a shipment of said munitions of war from the city of New Haven, in the state of Connecticut, and with the state of Sonora, in the United States of Mexico, as the ultimate destination of said shipment, by then, at the city of Tucson, in the county of Pima, state and district of Arizona, transporting and causing the said munitions of war to be transported from said city of New Haven, in the state of Connecticut, over and upon the lines of certain common carriers to the grand jurors unknown, to the said city of Tucson, in the county of Pima, state and district of Arizona."

The indictment was intended to charge the defendants, and each of them, with a violation of the provisions of the Joint Resolution of March 14, 1912, No. 10, 37 Stat. at Large, p. 630, which is as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled: That the joint resolution to prohibit the export of coal or other material used in war from any seaport of the United States, approved April twenty-second, eighteen hundred and ninety-eight, be, and hereby is, amended to read as follows:

"That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress.

"Sec. 2. That any shipment of material hereby declared unlawful after such proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both."

A demurrer has been interposed to said indictment, upon the grounds: First, that it appears upon the face of the indictment that the offense was committed in the state of Connecticut and not within the state of Arizona or within the district of Arizona, and that this court has no jurisdiction over the offense charged; and, second, that said indictment fails to state facts sufficient to constitute a public offense against any law of the United States of America.

In the opinion of this court, the indictment in this case is fatally defective, for three reasons:

1. Because it appears upon the face of the indictment that the offense charged was not committed within the district of Arizona and within the jurisdiction of this court.

2. Because the indictment at most charges a mere intent to ship the munitions of war into the state of Sonora in the United States of Mexico, the forbidden territory, and a mere intent to ship the munitions of war into the forbidden territory is not an offense under the resolution.

3. Because the indictment fails to specify any point of destination within the forbidden territory to which the alleged shipment of munitions of war was made, and thereby fails to give the defendants notice of the crime with which they are charged and to enable them to plead a conviction under this indictment in bar of a subsequent indictment for the same offense.

[1] I. The indictment charges that the defendants made and caused to be made a certain shipment of munitions of war from the city of New Haven in the state of Connecticut, to the city of Tucson in the state and district of Arizona, thus showing that the initial point of the shipment was the city of New Haven in the state of Connecticut, and not the city of Tucson in the state of Arizona.

The shipment of the goods is the thing forbidden by the statute, and not the mere ordering of a shipment to be made, if, indeed, an order was made, as does not clearly appear; and as the term "shipment" means the act of shipping anything, or the act of putting the thing to be shipped on board of the means of transportation, it seems clear that the initial point of this shipment was New Haven, Conn., and not Tucson, Ariz., and, such being the case, it is plain that the jurisdiction of the initial point of the offense alleged was in the District Court of the United States for the District of Connecticut, rather than in the District Court of the United States for the District of Arizona.

Furthermore, if this offense is to be construed as one of those offenses deemed to be begun in one place and ended in another (Act March 3, 1911, c. 231, 36 Stat. at Large, § 42, p. 1100 [U. S. Comp. St. Supp. 1911, p. 148]), so that the defendants might be indicted and

tried by the court having jurisdiction of either the initial or the terminal point of the shipment, then the defendants in this case could not be indicted and tried by this court, because the initial point of the shipment was in New Haven, Conn., and the terminal point would be the final, or, as is alleged in the indictment, the ultimate destination of the shipment in the state of Sonora, in the United States of Mexico; and the mere fact that the goods were delivered to the defendants at a point within the jurisdiction of this court could not make this alleged offense indictable here within the jurisdiction of this court, unless it could be held that the defendants could be indicted and tried at any point in any district where the goods might happen to be landed, or through which they might happen to pass in course of transit between New Haven, Conn., and Tucson, Ariz., which would be a manifest absurdity.

[2] II. When the indictment in this case is reduced to its last analysis, it is apparent that all that is charged against the defendants is the mere intent to ship the munitions of war from Tucson, Ariz., into the state of Sonora, United States of Mexico, the forbidden territory. The indictment, it is true, charges that the defendants caused the munitions of war to be shipped from New Haven, Conn., to Tucson, Ariz.; but the shipment of munitions of war from one point in the United States of America to another point within the United States of America cannot within itself be deemed to be an offense under the joint resolution of Congress quoted above, because that resolution distinctly makes the shipping of the forbidden goods from some point in the United States into the forbidden territory an offense, and nowhere does it prohibit the shipping of the goods from one point in the United States to another point in the United States, no matter how near the point of destination within the United States may be to the forbidden territory; so that, when this indictment is stripped of the surplusage which it contains, it charges nothing on its face except the intent to ship the goods into Mexico.

A careful examination of the joint resolution of Congress above referred to discloses no provision, either in its express terms or which could follow from necessary implication, that the mere intent to ship the goods into the forbidden territory should be deemed an offense under the resolution, and, so long as the defendants confine themselves to mere intent, they are guilty of no offense under the resolution; it is only when they put that intent into effect by causing an actual shipment to be made from some point in the United States to some point within the forbidden territory—that is, within the United States of Mexico—that they become chargeable with an offense.

Then, under the law as laid down in the case of *United States v. Chavez*, 228 U. S. 525, 33 Sup. Ct. 595, 57 L. Ed. 950, from the very moment when a shipment is started from any point in the United States to a point within the forbidden territory, the act forbidden by the joint resolution of Congress becomes an offense under that resolution and is punishable accordingly; but, so long as the mere intent is not coined into an act of actual shipment made from a point in the United States to a point within the forbidden territory, no offense has

been committed. A careful examination of the Chavez Case above referred to bears out this idea.

In the Chavez Case, the defendant started with the munitions of war on his person, intending to deliver them at a definite point within the forbidden territory, to wit, the city of Juarez, Mexico, and was stopped on the way at a point in the city of El Paso somewhere between the initial and terminal points of the shipment; but, as a matter of fact, it appears in that case that the munitions of war were put on their final shipment and were actually in transit to and into the city of Juarez, in the United States of Mexico, when the defendant in that case was arrested.

In the case at bar, it nowhere appears that the intent to ship the munitions of war into the United States of Mexico was ever coined into an act of actual shipment; but, on the contrary, it is manifest from the indictment that the munitions of war were shipped from New Haven, Conn., to Tucson, Ariz., and there the shipment stopped, and it does not appear from the indictment that the munitions of war were ever shipped from Tucson, Ariz., or from any other point, into the forbidden territory; consequently it is manifest that the indictment charges only the mere intent to reship the forbidden goods from Tucson, Ariz., into the forbidden territory, and nothing more, and, as this mere intent is not an offense under the joint resolution, the indictment is bad in this particular and cannot be sustained.

[3] III. The indictment in this case does not name any point of destination within the forbidden territory to which it attempts to charge that the shipment of munitions of war in question was alleged to have been made. It merely charges that a shipment was made from New Haven, Conn., to Tucson, Ariz., with the state of Sonora, in the United States of Mexico, as its ultimate destination. It thus appears that the indictment, in failing to name a point of destination within the forbidden territory, is lacking in "that degree of certainty which is required in criminal pleadings in order to notify the defendant, as well as the court, of the nature of the offense charged and to enable the defendant to plead any judgment which may be rendered in the case as a bar to subsequent prosecution for the same offense." 10 Enc. P. & P. p. 473.

This indictment, naming no place of destination of the shipment, and no person or persons to whom the shipment is alleged to have been consigned, would place the defendants at an unfair disadvantage, because it would fail to give them that certain notice of the offense charged to which they are entitled, and a conviction or acquittal of the defendants had under this indictment could not be pleaded in bar to a subsequent indictment charging the same offense in the same general and indefinite way.

This court takes judicial knowledge that the state of Sonora is a large country and not a place, that it contains numerous cities and towns of various sizes, among which are Nogales, Cannanea, Hermosillo, Agua Prieta, Guaymas, Magdalena, and Empalme, to any of which, as well as to any of the many other places in the said state, shipment might have been made, and the shipment to any of such places would be covered by the indictment at bar.

The ordinary course of business is that, when goods or merchandise or anything of value is shipped from one place to another, a bill of lading is made out for the goods, and the goods are in some way labeled with the name of the person to whom they are consigned and the destination to which they are to be shipped, and it is hardly conceivable that any sane person would ship munitions of war or anything else of value from a point in the United States to "the state of Sonora," in the United States of Mexico, or to any other country, without causing a bill of lading for the goods to be made out, and the goods labeled with the name of the consignee and the point of destination; and, if these defendants actually caused a shipment to be made of the munitions of war in question to the United States of Mexico, it is hardly conceivable that they would have made such a shipment without having made it to some certain consignee at some definite destination, and, if this had been done, it could and should have been so charged in the indictment.

In the case of *Almy v. State of California*, 65 U. S. (24 How.) 174, 16 L. Ed. 644, the Supreme Court of the United States said:

"A bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a shipmaster without taking written evidence of its receipt on board the vessel, and the purpose for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country."

During the argument of this demurrer, the United States Attorney avowed that in drawing the indictment in this and other similar cases he took the indictment in the case of the *United States v. Chavez*, *supra*, as his model. Since the indictment in the *Chavez Case* charges a shipment of munitions of war made to the city of Juarez, Mexico, a definite place of destination within the forbidden territory, and the indictment in the case at bar merely charges a shipment of munitions of war made with the state of Sonora, a large country and not a place, as its ultimate destination, it appears that the pleader did not follow his model in this particular in this indictment, and it becomes pertinent to inquire why he did not do so. Under these circumstances, it seems reasonable to assume that, if the pleader did not charge the place of ultimate destination in the state of Sonora, he did not do so because he could not, and he could not do it because he did not know what the destination was; and if he did not know what it was, and still did not charge that the place of destination was to the grand jury unknown, he must have done so because no shipment had actually been put on its final transit towards and into the forbidden territory, and there was in fact no shipment made and hence no place of ultimate destination within the state of Sonora.

In this connection, it should be observed that the indictment charges that the ultimate destination was the state of Sonora, and that the word "ultimate" was interlined in the original indictment, thus showing that the pleader of necessity had it in mind that the shipment made from New Haven to Tucson was not the final shipment, and that the munitions of war in question were to be afterwards reshipped, from Tucson or some other place, across the border into the state of Sonora, and therefore that the shipment charged in the indictment was merely from one place in the United States of America to another place in the United States of America, and not in the state of Sonora, as the indictment apparently charges, and consequently that the indictment in fact charges no overt act of illegal shipment done in connection with the mere naked intent charged.

It should also be observed that in holding that a definite destination of the shipment should have been named in the indictment, or else that the indictment should have charged that the destination of it was to the grand jury unknown, this court intends to go no further than the United States Supreme Court tacitly went in upholding the indictment in the Chavez Case on this point, and does not intend to hold or even to intimate that allegations charging the giving of a bill of lading and the naming of a consignee are necessary ingredients of an indictment of the kind under consideration here; but what has been said and quoted above regarding a consignee and a bill of lading has been used merely for the purpose of showing the necessity of having a definite place of destination of a shipment of munitions of war or goods of any other kind in commercial transactions of every sort, where a shipment is alleged.

The demurrer will be sustained, and the indictment will be quashed and dismissed. A judgment accordingly will be entered.

UNITED STATES v. PHELPS-DODGE MERCANTILE CO. et al.

(District Court, D. Arizona. December 1, 1913.)

No. C 697.

1. NEUTRALITY LAWS (§ 5*)—VIOLATION—SHIPMENT OF MUNITIONS OF WAR—INDICTMENT.

Since a mere intent to ship munitions of war from a point within the United States into the United States of Mexico is not a violation of Neutrality Resolution March 14, 1912, No. 10, 37 Stat. 630, unless such intent is coupled with an actual shipment made from a definite point in the United States to a definite point in Mexico, an indictment charging that defendants, unlawfully, etc., and with intent to export munitions of war from the United States to and into Mexico, made and caused to be made a shipment of cartridges from Douglas, Ariz., to the state of Sonora in the United States of Mexico as the ultimate destination, by then and there transporting and causing such munitions of war to be transported by wagons and by express and railroad transportation from the store buildings of defendant hardware company in the city of Douglas, Ariz., to the store buildings of a mercantile company in the city of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Bisbee, state of Arizona, merely alleged an intent to violate the resolution and was demurrable.

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. §§ 14-17; Dec. Dig. § 5.*]

2. NEUTRALITY LAWS (§ 5*)—VIOLATION—MUNITIONS OF WAR—SHIPMENT TO MEXICO—INDICTMENT—ULTIMATE DESTINATION—DESIGNATION.

An indictment for violating Neutrality Resolution March 14, 1912, No. 10, 37 Stat. 630, in the shipment of munitions of war from the United States to Mexico, merely alleging the state of Sonora in the United States of Mexico as the ultimate destination of the shipment, was fatally defective for failure to specify a definite point of destination within the forbidden territory or to charge that the point of destination in the state of Sonora in the United States of Mexico was to the grand jury unknown.

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. §§ 14-17; Dec. Dig. § 5.*]

The Phelps-Dodge Mercantile Company, a corporation, and the Douglas Hardware Company, a corporation, and certain others, were indicted for violating Neutrality Resolution March 14, 1912, No. 10, 37 Stat. 630, in that they participated in a shipment of munitions of war intended for use in the Mexican revolution. On demurrer to the indictment. Sustained.

Joseph E. Morrison, U. S. Atty., of Bisbee, Ariz.

Doan & Doan, of Douglas, Ariz., for Douglas Hardware Co.

Ellinwood & Ross, of Bisbee, Ariz., and Reese M. Ling, of Phoenix, Ariz., for Phelps-Dodge Mercantile Co., W. H. Brophy, and F. E. Coles.

SAWTELLE, District Judge. The indictment in this case contains two counts. The charging part of the first count thereof is as follows:

"That Phelps-Dodge Mercantile Company and Douglas Hardware Company, reputed corporations, and W. H. Brophy, F. E. Coles, and W. F. Fisher, on or about the 15th day of May, A. D. 1913, in the said district and within the jurisdiction of this court, did unlawfully, knowingly, willfully, and feloniously, and with intent to export the munitions of war hereinafter described from the United States of America to and into the United States of Mexico, make and cause to be made a certain shipment of munitions of war, to wit, fifty thousand (50,000) cartridges of the caliber commonly known and designated as 7-M-M, that is to say, did make and cause to be made a shipment of said munitions of war from the city of Douglas, in the county of Cochise, state and district of Arizona, and with the state of Sonora, in the United States of Mexico, as the ultimate destination of said shipment, by then, at the city of Douglas, in the county of Cochise, state and district of Arizona, transporting and causing the said munitions of war to be transported, by means of horses and wagons and by express and railroad transportation in and over the railroad lines of the railroad commonly known and designated as the El Paso & Southwestern Railroad, from the store buildings of the said Douglas Hardware Company, in said city of Douglas, county of Cochise, state and district of Arizona, to the store buildings of the said Phelps-Dodge Mercantile Company, at the city of Bisbee, county of Cochise, state and district of Arizona."

The second count is identical with the first, except that it charges a shipment of 90,000 cartridges of the calibers commonly known and designated as 7-M-M and 30-30 from the store building of the Phelps-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Dodge Mercantile Company at Bisbee, county of Cochise, state and district of Arizona, and with the state of Sonora, in the United States of Mexico, as the ultimate destination of said shipment, by transporting said munitions of war by means of horses and wagon, from the store building and warehouse of the Phelps-Dodge Mercantile Company at Bisbee, to a point in the village of Bakersville, near the Bakersville Hotel, in the said county of Cochise, state and district of Arizona.

The indictment was designed to charge the defendants, and each of them, with a violation of the provisions of the Joint Resolution of March 14, 1912, No. 10, 37 Statutes at Large, p. 630, which is as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled: That the joint resolution to prohibit the export of coal or other material used in war from any seaport of the United States, approved April twenty-second, eighteen hundred and ninety-eight, be, and hereby is, amended to read as follows:

"That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress.

"Sec. 2. That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both."

A demurrer has been interposed to each count of the indictment, upon the grounds that neither count of said indictment states facts sufficient to constitute a public offense on the part of the defendants, or any of them, under the laws of the United States of America.

[1] It will be observed that the pleader has attempted to follow the form of indictment approved by the Supreme Court of the United States in the case of the United States v. Chavez, reported in 228 U. S. 525 et seq., 33 Sup. Ct. 595, 57 L. Ed. 950; but in my opinion the indictment in this case does not measure up to the indictment in the Chavez Case; and it is my opinion that the demurrer to the indictment in this case should be sustained, because, when the indictment is carefully considered, it is made manifest that the defendants are charged with the mere intent to ship the munitions of war in question into the forbidden territory, and nothing more, and because the indictment is fatally defective in that it does not name a place of destination of the shipment of the said munitions of war within the forbidden territory.

As I have stated in the case of United States v. Steinfeld & Company (No. C 705) 209 Fed. 904, decided at this term, and in which case demurrer was sustained to the indictment, I do not consider the mere shipping of munitions of war from one point in the United States of America to another point in the United States of America an offense under the joint resolution of Congress above referred to, and I do not consider the mere intent to ship goods from a point within the United States of America into the United States of Mexico an offense, unless that intent is coupled with an actual shipment made from a definite

point in the United States of America to a definite point in the United States of Mexico.

In the case of *United States v. Chavez*, above referred to, the offense charged was an actual shipment started from El Paso, Tex., to the city of Juarez, Mexico, and the defendant was carrying the munitions of war on his person and was arrested in the city of El Paso, after having started and while he was on his way to the city of Juarez. That case is not a parallel one to the case at bar, because in the case at bar the actual shipment charged was a shipment made from one point in the United States of America, and in the state of Arizona, to another point in the state of Arizona, and a careful study of the indictment reveals no actual shipment made from a point in Arizona to a point within the forbidden territory, and the mere intent to make a shipment of munitions of war cannot, in my judgment, be held to be an offense under the joint resolution of Congress in question, because that resolution nowhere makes it an offense, either directly or by necessary implication; and the *Chavez Case*, above referred to, as I construe it, does not so hold, because in the *Chavez Case* the intent which appears in the indictment was coupled with the actual shipment made from El Paso to the city of Juarez, while in the case at bar the intent stands alone and is coupled with no actual shipment save the shipment which was already made and previously ended.

[2] Furthermore, this indictment is bad in law, because it fails to specify a definite point of destination within the forbidden territory to which the shipment of munitions of war is alleged to have been made, or to charge that the point of destination in the state of Sonora, United States of Mexico, was to the grand jury unknown.

In the case of *Almy v. State of California*, 24 How. (65 U. S.) 174, 16 L. Ed. 644, to which I have already referred in my opinion in the case of *United States v. Steinfeld & Company*, the Supreme Court of the United States has made it very clear, if the opinion of any court on the point were necessary, that the course of business is that, when a shipment of goods is made from one country to another, a bill of lading is made out and the goods are shipped and consigned to some definite consignee at some definite point of destination.

It is not conceivable that the defendants in this case should have shipped the munitions of war in question into the forbidden territory without having shipped them to some definite consignee at some definite destination, and, if this had been done, the point of destination could and should have been alleged in the indictment, so as to give the defendants notice of the precise offense charged against them, and so that a conviction or acquittal under this indictment could be pleaded in bar to a subsequent indictment for the same offense charged in the same way.

During the argument of this demurrer, the United States attorney avowed that, in drawing the indictment in this and other similar cases, he took the indictment in the case of *United States v. Chavez*, *supra*, as his model. Since the indictment in the *Chavez Case* charges a shipment of munitions of war made to the city of Juarez, Mexico, a defi-

nite place of destination within the forbidden territory, and the indictment in the case at bar merely charges a shipment of munitions of war made, with the state of Sonora, a large country and not a place, as its ultimate destination, it appears that the pleader did not follow his model in this particular in this indictment, and it becomes pertinent to inquire why he did not do so. Under these circumstances, it seems reasonable to assume that, if the pleader did not charge the place of ultimate destination in the state of Sonora, he did not do so because he could not, and he could not do it because he did not know what the destination was; and if he did not know what it was, and still did not charge that the place of destination was to the grand jury unknown, he must have done so because no shipment had actually been put on its final transit towards and into the forbidden territory, and there was in fact no shipment made, and hence no place of ultimate destination within the state of Sonora.

In this connection, it should be observed that the indictment charges that the ultimate destination was the state of Sonora, and that the word "ultimate" was interlined in the original indictment, thus showing that the pleader of necessity had it in mind that the shipment made from the city of Douglas to the city of Bisbee, or the shipment from the city of Bisbee to the village of Bakersville, was not in either case the final shipment, and that the munitions of war were to be afterwards reshipped, from Bisbee or Bakersville or some other point, across the border into the state of Sonora, and therefore that the respective shipments charged in the indictment were merely from one place in the United States of America to another place in the United States of America, and not in the state of Sonora, as the indictment apparently charges, and consequently that the indictment in fact charges no overt act of illegal shipment done in connection with the mere naked intent charged.

It should also be observed that in holding that a definite destination for each shipment should have been named in the indictment, or else that the indictment should have charged that such destination was to the grand jury unknown, this court intends to go no further than the United States Supreme Court tacitly went in upholding the indictment in the Chavez Case on this point, and does not intend to hold or even to intimate that allegations charging the giving of a bill of lading and the naming of a consignee are necessary ingredients of an indictment of the kind under consideration here; but what has been said and quoted above regarding a consignee and a bill of lading has been used merely for the purpose of showing the necessity of having a definite place of destination of a shipment of munitions of war or goods of any other kind in commercial transaction of every sort, where a shipment is alleged.

The demurrer will be sustained to each count, and the indictment will be quashed and dismissed, and judgment accordingly will be entered.

PREST-O-LITE CO. v. H. W. BOGEN, Inc., et al.

(Circuit Court, S. D. California, S. D. September 12, 1910.)

No. 1,492.

TRADE-MARKS AND TRADE-NAMES (§ 72*)—UNLAWFUL COMPETITION—INJUNCTION.

Complainant manufactured, sold, and exchanged "Prest-O-Lite" auto gas in tanks bearing complainant's trade-mark, which tanks were sold to automobile owners, and when empty could be exchanged for full tanks at a nominal charge at complainant's exchange stations. Defendants purchased these tanks, when empty, from automobile owners, refilled them with other gas, and sold and furnished them to customers, after having pasted a paper label on them indicating that they had been refilled; but such label did not entirely cover plaintiff's trade-mark, nor was it sufficient to successfully advise the purchaser that he was not obtaining Prest-O-Lite gas. *Held* that, though defendants were entitled to purchase such tanks and refill the same, their resale under such conditions constituted unfair competition, which complainant was entitled to enjoin.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 83; Dec. Dig. § 72.*]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. Suit by the Prest-O-Lite Company against H. W. Bogen, Incorporated, and others. Decree for complainant.

Woodruff & McClure, of Los Angeles, Cal., for complainant.

H. C. Millsap and R. T. Quinn, both of Los Angeles, Cal., for defendants.

WELLBORN, District Judge. While I do not purpose to here review the arguments or authorities submitted in the briefs of the respective parties, or, indeed, to do more than announce generally my conclusions, yet one matter of argument, since it is brief, may be profitably suggested.

To limit the consideration of this case to the right which the purchaser of one of complainant's tanks has to use and dispose of it according to his pleasure affords but an incomplete, and therefore misleading, view of the controversy. This is exemplified in that part of defendants' brief filed June 27, 1910, where they quote from the case below cited as follows:

"The fact remains, however, that when complainant company sells the tank filled with gas, without restrictions as to the use, such tank becomes the property of the purchaser, and he may use the tank as he sees fit, and have it refilled with gas by any one." *Prest-O-Lite Co. v. Avery Portable Light Co.* (C. C.) 161 Fed. 648.

Construed properly—that is, with reference to its context—this is doubtless a correct statement of the law. The question, however, it determines, is very different from that which arises where a person embarks in the business of buying up, or otherwise procuring and recharging, old tanks bearing a peculiar trade-mark, and then offering to resell them to the public, in competition with the owner of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trade-mark, who is also engaged in like business. The one case does not necessarily involve detriment to the owner of the trade-mark, while, in the latter, injury to him manifestly results from an unauthorized use of his property; for, of course, no one will assert that the sale of an article bearing a trade-mark operates as an assignment or license of the latter. A careful reading of the case from which the above extract was taken shows that the distinction which I have endeavored to present was clearly in the mind of the judge by whom the opinion was written; indeed, the applicability of the doctrine the extract announces is expressly denied in the context, which, together with the extract itself, is as follows:

"The fact remains, however, that when complainant company sells the tank filled with gas, without restriction as to use, such tank becomes the property of the purchaser, and he may use the tank as he sees fit, and have it refilled with gas by any one or with something else. This, however, is a different proposition from the one presented in this case. The defendant company either buys up these old tanks with the plate first described, or trades for them, thus becoming the owner. This it has the right to do. It then fills them in its way with its own acetylene gas, and, in some cases, pasting over a part of the copper plate on the tank a paper label, easily removed, either sells them outright, or gives them to users in exchange for others. This label is sometimes above or below the plate, and sometimes is bottom side up when the tank stands on end. This label reads as follows: 'This tank has been refilled with acetylene gas by the Avery Portable Lighting Company, Milwaukee, Wis., Albany, N. Y., Manufacturers of Autogas Tanks.' The defendant is a competing company in this business, and has a tank of its own, which it can and does fill with its own gas, described and advertised as 'Autogas.' Avery, of the defendant company, was formerly with the complainant company, and is familiar with its business methods.

"It is evident to me that the defendant pursues this method, and gets hold of these 'Prest-O-Lite' gas tanks, and passes them out to its customers, for the purpose of taking trade from the complainant company. It in no way changes the appearance of the tank, except by pasting on the label, easily removed, and which only covers a part of the plate, and when it says, 'This tank has been refilled with acetylene gas by the Avery Portable Lighting Company,' etc., it implies and fairly represents to the purchaser, not only that he is getting acetylene gas made by the Prest-O-Lite Company, but that he is obtaining a properly refilled 'Prest-O-Lite gas tank.' When the lower part of the plate is not covered by the label, surely the user or purchaser recognizes it as a 'Prest-O-Lite gas tank,' and will naturally assume that it holds 'Prest-O-Lite gas,' and this is especially true as the defendant company has a different tank of its own make, bearing a different plate, and the purchasers will naturally assume that, when they take a 'Prest-O-Lite tank,' they get Prest-O-Lite acetylene gas properly placed therein, and that, when they take an 'Autogas tank,' they obtain Autogas properly placed therein. The natural result is that would-be purchasers of the Prest-O-Lite gas get Autogas imperfectly placed in the Prest-O-Lite tank. If the purchaser has doubts that he is getting a Prest-O-Lite tank properly filled with Prest-O-Lite gas, he easily scrapes off the label, and, finding the complainant's trade-mark, 'Prest-O-Lite,' he feels assured he has obtained what he desired. I think, and am constrained to hold, that this is an improper use of these tanks bearing complainant's trade-marks, and that these acts constitute unfair competition in trade, and should be restrained." *Prest-O-Lite Co. v. Avery Lighting Co., supra.*

The labels which defendants in this case claim they placed on the tanks they recharged do not fulfill the requirements of the order made in the case cited, nor can such labels, in the very nature of things, fully counteract, so far as concerns the public, the effect of the trade-

mark, and to the extent they fail in this respect they are lacking in adequate protection to complainant.

The foregoing views, it will be observed, do not take into account the restrictive conditions stenciled on many of complainant's tanks, and it is a fair inference from the testimony that such tanks constitute the bulk of those covered by this litigation. These conditions, however, obviously give additional strength to complainant's case, so far as it involves the stenciled tanks.

I am of opinion that the record on this hearing shows unfair competition, involving also infringement of complainant's trade-mark, and, accordingly, an injunction will be issued, as prayed for in the bill.

PREST-O-LITE CO. v. DAVIS et al.

(District Court, S. D. Ohio, W. D. October 1, 1913.)

No. 6,697.

TRADE-MARKS AND TRADE-NAMES (§ 72*)—UNLAWFUL COMPETITION—USE OF GAS CONTAINERS FOR COMPETING GAS.

Complainant manufactures and sells acetylene gas for automobile illumination put up in metal containers of peculiar construction and has also provided an exchange system by which an automobile owner, having once purchased a tank, can exchange it when empty for a filled tank at a nominal charge in almost any town in the United States of over 2,000 inhabitants. Defendants sold "Searchlight" gas for similar use, put up in different containers; but, in order to enable purchasers of its gas to take advantage of complainant's exchange system, purchased a quantity of complainant's empty Prest-O-Lite tanks, which defendants procured to be filled with Searchlight gas and which they sold to consumers. *Held* that, while defendants had a perfect right to purchase empty Prest-O-Lite containers from the owners, complainant's exchange system was a property right which was impaired by defendants filling such tanks with Searchlight gas and selling them, which constituted unlawful competition, though defendants pasted a paper label thereon from which the purchaser might, by close attention, discover that the gas contained therein was not Prest-O-Lite.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 83; Dec. Dig. § 72.*]

In Equity. Suit for unlawful competition in trade by the Prest-O-Lite Company against Arthur C. Davis and another, doing business as Coughlin & Davis. Decree for complainant.

Dudley V. Sutphin and P. Lincoln Mitchell, both of Cincinnati, Ohio, and Clarence Winter and Keyes Winter, both of New York City, for complainant.

Robert H. Parkinson and Wallace R. Lane, both of Chicago, Ill., James G. Stewart, of Cincinnati, Ohio, and John S. Miller and Merritt Starr, both of Chicago, Ill., for defendants.

HOLLISTER, District Judge. The complainant makes acetylene gas for illuminating purposes for use on automobiles, and sells gas in tanks of peculiar construction. The gas is known by the name

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Prest-O-Lite," and complainant has caused that name to be registered under the laws of the United States as its trade-mark. Under that name the complainant has established a large and valuable business in its tanks filled with its gas, and, at great expense in money and effort, has built up a business system and good will of great value.

At the time of suit, the complainant, through contracts made for the purpose with dealers in automobile supplies, had depots (perhaps not agencies in the legal sense) in every town in the United States of over 2,000 inhabitants, at which the owner or user of one of its tanks originally filled with its gas could, at a nominal fixed price, exchange the same, when exhausted, for another of its tanks charged with its gas and ready for use. The purchaser of such a tank from the complainant, or from a dealer, or from the automobile maker as a part of the machine's equipment (many makers, among whom appear the names of a number of the manufacturers of the most important and best known automobiles, furnished Prest-O-Lite tanks charged with Prest-O-Lite gas as a part of the machine's equipment) had the assurance wherever he might be of an immediate exchange of his exhausted tank for a tank charged and ready for use.

The utility of a service of such general availability to the user is obvious. If illustration is needed, it may be found in the testimony of the witness Carpenter, who thought Searchlight gas the better, but insisted upon always receiving a Prest-O-Lite tank because of its value for purposes of exchange. (He thought the Searchlight gas was better than Prest-O-Lite gas because he had been told by the defendants that it was better.) The cost of the exchange was small, while the price of the original tank filled with gas was large. It is in evidence and undoubtedly true that the purchaser was willing to pay the initial price in order to participate in a system of such great usefulness to him. He knew it was to the interest of the maker and the dealer to keep him supplied with a full tank for the empty tank, and had the assurance when he bought that the exchange could be made at a small cost at almost any time or place.

It is not surprising that the complainant's sales gradually grew to enormous proportions after the establishment of this system, and that, from its practical use, there accrued to the complainant a valuable good will toward and in the gas made by it. Of course, its gas was identified by the tanks in which it was confined. The tanks were identified not only by their appearance, including particularly the valve apparatus at one end, but also by the trade-mark and trade-name etched upon them, as well as by other letters and numerals not requiring particular reference.

The makers of the acetylene gas known as "Searchlight" gas were in competition with the complainant, the Searchlight gas being used for the same purpose as Prest-O-Lite gas; but defendants' containing tanks differed in appearance from Prest-O-Lite tanks, particularly because the location of the valve controlling the emission of the gas was not exposed to view, it being hidden in the concave bottom of the tank, and because the tank was marked to indicate its contents, Searchlight gas.

We are not now concerned with the difference in quality between Prest-O-Lite gas and Searchlight gas, if there is any difference. But it is in evidence, and is probably true, that the owner of a Prest-O-Lite tank would, when the tank was exhausted of its Prest-O-Lite gas, want and ask for Prest-O-Lite gas when he offered his empty tank in exchange for a full tank. No doubt, in many instances, such owner asks only for a full tank, but expects to get the Prest-O-Lite gas he has been using. Of course, if he were tendered a Searchlight tank he would know he was not getting what he expected if he would see what he was getting, or if, in the event it was light enough to see, he took notice of any other fact than that an exchange of tanks was being made. It is highly probable that in many, if not most, instances, the pertinent communication between the user and the dealer is confined to the former's expressed desire for a full tank and the dealer's affirmative answer, either in words, or in acquiescence, silent, so far as words are concerned. It is easy to see how an exchange for one of these tanks for the other might be made without the user's present knowledge.

Howsoever far deception in this way might be practiced by an unscrupulous dealer upon the owner of a Prest-O-Lite tank which, exhausted of gas, he offered in exchange for a Prest-O-Lite tank charged with gas of that name he wanted and expected, is not directly involved in this controversy, but reflects upon the more subtle form of deception with which the defendants are charged. When to such user, whether requesting a full tank or a tank of Prest-O-Lite gas, is given by the dealer in exchange a Prest-O-Lite tank filled with Searchlight gas, the opportunities for deception are even much greater than under the circumstances referred to above. It is with deception of this very kind, as affecting its trade-mark and its trade-name and its goodwill and business system, that complainant charges the defendants in this case.

It is obvious that the purchaser of one of the empty tanks made by complainant becomes its owner with all the rights of absolute ownership, and equally obvious without paradox that, while he may use it for his own purposes or sell it or give it away, he cannot sell it charged with other gas to persons believing it to contain complainant's gas. The substance of the main charge against the defendants is that they sold and sell Prest-O-Lite tanks charged with Searchlight gas. They do not deny this, but say that complainant's contracts with the dealers come under the ban of the Sherman Anti-Trust Act, and that, in any event, having become the owners of empty Prest-O-Lite tanks, they could with propriety exchange them charged with Searchlight gas, for the user knew at the time he was getting Searchlight gas and not Prest-O-Lite.

The Sherman Law is not applicable to this case. Even if it were assumed that the contracts referred to were in any respect obnoxious to that act and that such decisions as *Dr. Miles Medical Co. Case* (*Dr. Miles Med. Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502) would require a holding to that effect, it may be said that the contracts are not themselves involved in this case. They serve no other purpose here than as a description of the method through

which the complainant's system of doing business was established. The case comes, therefore, within the ruling of the Circuit Court of Appeals for this circuit in *Coca Cola Co. v. Gay-Ola Co.*, 200 Fed. 720, 726, 119 C. C. A. 164.

Giving due weight to the testimony of defendants' witness Gluchowsky of want of intention at any time to deceive, it is abundantly proved that acts of deception were practiced by defendants which are evidence not only of a particular instance, but tend to show a course of conduct in defendants' dealings. The facts disclosed by the witnesses Camm, Ross, and Coughlin, relative to complainant's tanks Nos. 241920 and 45716, are of too circumstantial a character in connection with other evidence in the case, actually disclosed, or with some certainty to be inferred, to be dealt with as were the facts in the *Gorham Silverware Case* (*Gorham Mfg. Co. v. Emery, etc., Co.*, 104 Fed. 243, 43 C. C. A. 511). These tanks were obtained by Camm as Prest-O-Lite tanks filled with Prest-O-Lite gas. They were in fact charged with Searchlight gas, and there was nothing about them or the statement of the defendants' clerk to even suggest the contrary. They were dealt with by defendants' clerk as and for genuine Prest-O-Lite tanks; that is to say, Prest-O-Lite tanks charged with Prest-O-Lite gas. Complainant's trade-mark and trade-name was on them. These tanks were part of a shipment to defendants by the Searchlight Gas Company of Prest-O-Lite tanks charged by the Searchlight Company with Searchlight gas. The tanks so charged were hidden by defendants, lest the Prest-O-Lite representative in Cincinnati should see them. These tanks were presumably charged with Prest-O-Lite gas, and there was nothing about them to indicate the contrary.

After suit was brought, but continuing to sell Prest-O-Lite tanks charged with Searchlight gas, the defendants, apparently because they saw or suspected the manifest impropriety of using old Prest-O-Lite tanks ("bottles"), took off of the Prest-O-Lite tanks the name plate of complainant, formerly used to designate the tanks and their contents, and adopted the label Exhibit L, to which further reference will be made.

It is established by the evidence beyond a doubt that, after the contract relations between the complainant and defendants had come to an end and dealings between them had stopped, the defendants had advertised largely and professed to deal in both Prest-O-Lite and Searchlight systems, though they sold as genuine Prest-O-Lite tanks charged with Searchlight gas. That some of defendants' customers ordering Prest-O-Lite believed that they were getting the genuine Prest-O-Lite gas in the Prest-O-Lite tanks sent them by the defendants is not open to doubt.

Defendants, when dealing in genuine Prest-O-Lite tanks charged with Prest-O-Lite gas, had a large trade in Cincinnati; there then being some 1,800 users of Prest-O-Lite tanks in that city. Defendants stopped dealing with complainant and tried to introduce Searchlight tanks charged with Searchlight gas. Their trade wanted Prest-O-Lite tanks and gas. Their customers would not, knowingly, take Searchlight tanks because Prest-O-Lite dealers throughout the country would

not take them in exchange. Sometimes a customer, such as the witness Carpenter, wanted Searchlight gas, but he would have no other than a Prest-O-Lite tank, because he could get that filed in places where Searchlight gas could not be procured. He prefers the Prest-O-Lite tank because of its "exchangeability" wherever he might be using his automobile. The defendants are using the name and reputation of complainant's product and complainant's business system to further their own competing goods. Every time they sell a charge of Searchlight gas in a Prest-O-Lite tank, they either deceive the user desiring Prest-O-Lite gas (what he had before) or the purchaser knowingly takes Prest-O-Lite tanks charged with Searchlight gas. In one case they palm off their own goods as complainant's and trade on complainant's good will; in the other, they sell their own goods (gas) only because the purchaser knows he can, by having a Prest-O-Lite tank, participate in the system of business established by the complainant. In either case the complainant loses and the defendants gain by defendants' use of something which belongs to the complainant.

The defendants' right to purchase old Prest-O-Lite tanks cannot be doubted, but they have not shown that it is cheaper to buy them than the genuine Searchlight tanks. Why do they continue to use old Prest-O-Lite tanks, either purchased or received in exchange? If Searchlight gas is as good as or better than Prest-O-Lite gas, why not sell Searchlight gas and Searchlight tanks?

But defendants, having the right to own and use as they please Prest-O-Lite tanks so long as they do complainant no injury of which the law takes cognizance, say no injury to the complainant can result from recharging Prest-O-Lite tanks with Searchlight gas, because (after this suit had been instituted) they put paper labels on the tanks marked with complainant's trade-mark and trade-name of such character that no one can be deceived as to the contents of the tank. Complainant's Exhibit L; Defendants' Exhibit 2A.

I am not prepared to say (there would be an impropriety in saying in advance of the question) whether or not such a label, indelibly marked upon a Prest-O-Lite tank, complainant's own marks having been obliterated, would meet any legal objection which complainant might attempt to raise against it. But in my judgment, for several reasons, this label does not afford adequate protection to the complainant's rights under its trade-mark and trade-name and to the business and good-will built up and belonging to it under and through the name "Prest-O-Lite."

1. It is probably true that many owners of automobiles, while knowing their own tank as a "Prest-O-Lite" tank, which, to them, means it contains acetylene gas called "Prest-O-Lite," would not recognize in the legend printed in large type on the label, "The Searchlight System" and the smaller, though large, type "Of Acetylene Storage," any difference between their own "Prest-O-Lite" (which is without doubt a searchlight) and a similar light distinctly named "Searchlight." The statement in bold but smaller letters, "This Re-filled Tank Contains Acetylene Gas made by the Searchlight Gas Company," would not, unless the owner knew that Prest-O-Lite gas was made by the Prest-

O-Lite Company, be more enlightening than the statement of the system.

The label is so devised that the negation of the contents being Prest-O-Lite gas is so placed and in such comparatively small type that one cannot but discover purpose in choice of description and selection and arrangement of type.

2. The lighting apparatus is but one of many important features of an automobile. Doubtless the manipulator of the machine is more concerned with the machinery and especially with the intricate handles, levers, and buttons which control its action. When the exchange of tanks is being made it is seldom done by him. The tank does not come into his hands, and he is usually, particularly if after a trip of some length, looking to the more important parts of the machine. In any event, if he remains in the machine while the exchange is being made, the tank from its location is some little distance away from him, and when placed in its receptacle is, for the most part, concealed from view. He would scarcely notice the label while the tank was being carried to the machine. It is not like a label on a box or a package or a bottle. These are usually handled by the purchaser within easy vision and with more or less concentration. Even so, he is frequently misled by an ingeniously contrived label.

It would seem (although a decision on the question here is not necessary and is not made) that the case affords an opportunity for the application of the principle upon which some of the decisions rest; that when an article has become known to the trade by its shape, size, color, and general appearance, and is identified by these or some of them, it cannot be used for purposes of competition. The product sold by complainant through the dealers at the time of exchange of tanks is gas. It cannot be identified by any other means than by the receptacle which contains it. When an exchange is made, the appearance of the tank indicates the origin of the gas. Even if defendants' label covers the trade-mark, it does not negative the clear impression the tank makes of being the counterpart of the package surrendered on exchange, and that it is filled with the same gas as the package surrendered. That the package received on exchange contains a different gas from that which it purports to contain would only appear upon an examination of the printed label, to which, from the appearance of the package, there would be no occasion to give particular or even any scrutiny. But since it is the practice of complainant also to put labels on its tanks, there would be by so much the less occasion for inquiry by the user.

3. The purchaser from the complainant gets more than the tank itself. He buys a right and opportunity to participate in the business system complainant has, at great expense, established and maintained. The especial value the tank has is its exchangeability, when empty, for a full tank essentially the same as the other. The popularity of Prest-O-Lite is without doubt due to this fact. By furnishing dealers in all parts of the country with charged tanks for exchange for its empty tanks, and advertising in many ways, an enormous demand has been created by complainant for its tanks and gas. This system of exchange

is necessarily highly profitable to the complainant and, in a smaller measure, to the dealer, and performs a service to the user of the greatest importance. This service and the general knowledge that it may be had is the very life of complainant's business. To the tank, the title of which has passed from the complainant, is attached a quality—the quality of exchangeability practically anywhere in the United States. This quality the complainant has created and it belongs to the complainant and is a valuable asset in its business.

The makers of Searchlight tanks and gas use, in competition with the complainant, a similar system; but, for the purposes of this case, a finding is justified by the evidence that the service afforded by the Searchlight system is not as extended as complainant's and its gas is not, through its own system, to be had in as many places as complainant's. Hence it is, and the witness Carpenter's testimony but confirms the natural deduction, that, while a user might be content with Searchlight gas, he would only be satisfied with a container known and recognized as a Prest-O-Lite tank exchangeable for another Prest-O-Lite almost anywhere.

And so the defendants, in order to sell Searchlight gas, the profit of which goes to them and the Searchlight Company which charges defendants' tanks with its gas, exchange with the user Prest-O-Lite tanks charged with Searchlight gas for empty Prest-O-Lite tanks and thereby reap a very considerable part of the value of the quality of exchangeability inherent in every tank the complainant sells. There is surely something unfair in this, if not morally wrong.

Fair competition between the two systems is excellent, but the acts complained of do not involve competition between the two systems. They involve a use by the defendants in the furtherance of their competitive business, and the appropriation, of something of value which actually belongs to their competitor. Instead of using their own system in competition with complainant's system, they actually make complainant's system the very medium through which their gas was introduced to complainant's customers.

Clearly, it was not contemplated by the complainant and a purchaser in its business system that that system should itself be used to further the business of complainant's competitor; and it is equally clear that, if such use is permitted, the result would be a total destruction of the complainant's business system, for anybody anywhere could, by the use of Prest-O-Lite tanks, introduce Searchlight gas or any other similar illuminant, and eventually break down the complainant's business. This, not through the introduction of or the intent to introduce, a competing business system, but by using complainant's system for its own destruction. The result of this would be not only disastrous to the business system built up by complainant, but necessarily destructive of any other similar system.

The facts in this case differ widely from the facts appearing in such cases as the Chicago Board of Trade Case (*Board of Trade v. Christie, etc., Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031), or the Stock Ticker Case (*National News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805), or the Trading Stamp Cases

(*Sperry v. Mechanics*, etc., Co. [C. C.] 128 Fed. 800; *Id.* [C. C.] 135 Fed. 833; *Sperry v. Temple* [C. C.] 137 Fed. 992; *Sperry v. Weber* [C. C.] 161 Fed. 219), or the *Phonograph Disc Case* (*Fonotipia Limited et al. v. Bradley* [C. C.] 171 Fed. 951); but, nevertheless, there is in them a principle which seems applicable to this.

The great value of complainant's business lies in the interchangeability of its tanks. This quality the complainant has created. It is his, and no one has the right to appropriate it for his own gain to the detriment and even destruction of complainant's business. That quality is incorporeal and intangible, but is property nevertheless. The complainant manifestly having no adequate remedy at law is entitled to have his property protected by a court of equity. This, of course, is aside from any question involved in the ownership of a registered trade-mark; or any question of deceit. Defendants' wrong does not lie in the mere use of old Prest-O-Lite tanks, but in using them to destroy the complainant's business system for the purpose of, or with the result of, injuring the complainant's business.

4. Tanks containing illuminating gas are, under the circumstances of their use, constantly exposed to the weather, and are frequently cleaned by the use of water. It is obvious, and there is evidence tending to show, that paper labels on a metal tank are easily detachable when wet, and, of course lack permanency. In addition to what has already been said on the subject of the label on which defendants rely, it seems to me that the complainant's trade-mark, in which, as such, it has a property right, is not sufficiently obliterated by pasting over it a paper label.

The complainant is entitled to an injunction.

This conclusion is in agreement with the decision of Judge Anderson in the case of *Prest-O-Lite Co. v. Searchlight Gas Co.* (no written opinion) in the District Court of the United States for the District of Indiana, as the same appears in the decree and order entered by him in that case; and is in accordance with the views of Judge Welborn in the Southern Division of the Southern District of California in the case of *Prest-O-Lite Co. v. H. W. Bogen*, 209 Fed. 915, as they appear in the opinion filed by him in that case.

Complainant may take a decree in accordance with the views expressed in this opinion.

In re TAYLOR HOUSE ASS'N.

(District Court, N. D. New York. December 29, 1913.)

BANKRUPTCY (§ 76*)—CORPORATIONS—ACTS OF BANKRUPTCY—COMMISSION—OFFICERS—GOOD FAITH—ESTOPPEL.

Petitioner, as president and secretary of a summer hotel corporation the property of which consisted largely of real estate, holding a note against the company, transferred it without consideration to M. for the express purpose of having him recover judgment against the corporation. Service was made on petitioner alone as representing the corporation. The purpose of obtaining the judgment was to issue execution, make a levy on the property, and advertise it for sale, without intent to make a sale but to form a basis or record condition for a petition in bankruptcy.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Within five days after the levy, petitioner filed an involuntary petition against the corporation alleging failure to set aside such levy as an act of bankruptcy, and that the corporation was insolvent; the purpose in so doing being to prevent another, who held a large judgment against the corporation, from securing a fixed lien which could not be set aside by bankruptcy proceedings after the expiration of four months, and which would create a preference. *Held*, that such facts were sufficient to estop petitioner to institute the proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 56, 97, 99, 100; Dec. Dig. § 76.*]

In Bankruptcy. In the matter of the Taylor House Association, alleged bankrupt. On motion to confirm the report of the referee adjudicating the association a bankrupt. Denied and remanded.

Frederick H. Patterson, of New York City (George Link, Jr., of New York City, of counsel), for petitioner.

H. D. Bailey, of Troy, N. Y., for bankrupt.

RAY, District Judge. This proceeding was instituted on the 4th day of December, 1912, by the filing of a petition in involuntary bankruptcy, and which petition was executed and filed by Henry V. A. Parsell, who was the secretary of the Taylor House Association, a corporation organized and doing business under the laws of the state of New York, and which corporation owned property and for the greater portion of the six months next preceding the date of filing the petition had had its principal place of business at Schroon Lake, in the county of Warren, and state of New York. Mr. Parsell had a claim against the corporation of \$1,250 in the form of a promissory note executed by the corporation. The petition alleged also that the Taylor House Association was insolvent and that it had committed an act of bankruptcy. It also alleged that the creditors of the Taylor House Association are less than twelve in number. The petition charges the act of bankruptcy as follows:

"And your petitioner further represents: That said Taylor House Association is insolvent, and that within four months next preceding the date of this petition the said Taylor House Association committed an act of bankruptcy, in that it did heretofore, to wit, on the 6th day of November, 1912, while the said Taylor House Association was insolvent, suffer and permit one of its creditors, one John G. Mahony, to obtain a judgment against it for the sum of \$407.28, and allowed the said John G. Mahony to issue execution thereon, to the sheriff of Warren county in state of New York. That the said sheriff of the county of Warren, state of New York, on the 27th day of November, 1912, duly levied upon the personal property of the said Taylor House Association and has duly advertised the said personal property for sale, and that said sale of the personal property of the Taylor House Association is to take place on the 5th day of December, 1912. That should the said sale be consummated the said John G. Mahony will receive a preference in violation of the rights of your petitioner."

To this petition the corporation filed an answer executed by its president, and this answer denies the act of bankruptcy charged, denies that it was insolvent on the 6th day of November, 1912, when it is alleged that the act of bankruptcy was committed and in detail denies the levy, the advertisement of the property alleged to have been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

levied upon, and denies that any sale of property was ever to take place, and denies that John G. Mahony has received or will receive any preference whatever, and denies any levy by any sheriff or officer. The answer also contains other allegations unnecessary to recite. A jury trial was not demanded, and the matter was referred under the rules to James A. Leary, Esq., referee, and a trial of the issues was had before him. The referee on very conflicting evidence has found that the Taylor House Association was insolvent as alleged. It is contended and urged that this finding is clearly against the weight of evidence, but this court is not disposed to reverse the finding, although the question is very close. The finding of insolvency depended entirely on the value of the real estate owned by the corporation, which consists of a summer hotel and other buildings and several acres of land situate on the westerly banks of Schroon Lake, in Warren county. The buildings themselves cost much more than the referee finds the value of the property to be. These buildings are not old or dilapidated, and if there was a market for such property it is quite probable that it would bring more than the indebtedness of the corporation.

On the trial before the referee acting as special master and under the allegations of the answer, the corporation sought to prove by appropriate questions and by an offer to make the purpose of the questions plain and unmistakable: First, that at all the times mentioned the petitioner Henry V. A. Parsell was the secretary of the corporation, and he was allowed to show and did show that up to October 28, 1912, the promissory notes upon which the judgment of John G. Mahony alleged in the petition was obtained and rendered were held and owned by Mr. Parsell. The corporation then offered to show and endeavored to show by Mr. Parsell that on the 28th of October, 1912, the said notes were transferred by Parsell to Mahony, and that Mahony brought suit thereon in the Municipal Court of the City of New York, October 31, 1912, three days later, and that the process in the suit in which such judgment was obtained was served upon said Parsell as the secretary of the corporation, and that judgment was allowed to go by default, and that thereupon a transcript of the judgment was filed in Warren county and execution issued. The Taylor House Association, the alleged bankrupt, also in substance offered and sought to show that the alleged act of bankruptcy set up in the petition of Mr. Parsell and there alleged and complained of was procured by the act of the petitioner himself and with the intent and purpose on the part of the petitioner Parsell to create an act of bankruptcy, and without any intent to actually sell any of the property under the execution, but solely for the purpose of creating a condition of which he (Parsell) could complain as an act of bankruptcy, and thereupon file a petition in bankruptcy. The corporation by appropriate questions sought to show that the notes were transferred to Mahony for the purpose of having suit brought on them, and that Mahony paid nothing for the notes, and that Parsell employed the attorney to bring the action which was brought by Mahony on said notes, and that one of the attorneys in the suit in which the judgment was obtained on the notes is attorney for Mr. Parsell in the bankruptcy proceedings, and that the

execution on the judgment rendered in favor of Mahony was issued by direction of Parsell for the purpose of creating an act of bankruptcy and with no intention of selling the property levied on under such execution. The Taylor House Association also offered a certified copy of the judgment roll in Mahony's action against the Taylor House Association. All of this proof of these alleged facts was objected to, and the objection was sustained.

The referee held that it was a question of conditions as they existed, regardless of the methods of the moving parties.

The Taylor House Association also offered to show that, when these notes were transferred to Mahony and the judgment was obtained, Parsell was president of the corporation as well as secretary. Proof of this fact was objected to, and the objection was sustained.

The record squarely presents this question: Can the president and secretary of a corporation holding a note against such corporation transfer the same without consideration to a third person for the express purpose of having that third person put the same into a judgment against the corporation, service of process being made on such officer who owned and transferred the note and no one else, and the purpose of obtaining such judgment being to issue execution thereon and make a levy on the property of the corporation and advertise same for sale, there being no intent to make a sale but to make a basis or record condition for a petition in involuntary bankruptcy? And can such officer of a corporation who so transferred such note for such purpose and with such intent and obtained such levy to be made, giving directions for the entire proceeding and employing the counsel conducting them, then file and maintain a petition in involuntary bankruptcy against the corporation of which he was president and secretary on the ground that it (the corporation) has committed an act of bankruptcy?

By section 3 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), it is provided that:

"Acts of bankruptcy by a person shall consist of his having, * * * or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

In the case now under consideration, it appears that certain property of the corporation was advertised for sale under the execution issued on the Mahony judgment, and that it was advertised to be sold on the 5th day of December, 1912. The petition was filed by Parsell on the 4th. We have a case where the president and secretary of a corporation, knowing of its insolvency, transfers a note held by himself against the corporation to a third person without consideration for the sole purpose of having the note put in a judgment, execution issued on such judgment, and a levy made; such levy remaining unreleased until within the five days preceding the time fixed for sale for the sole purpose of enabling such president and secretary to then file a petition in involuntary bankruptcy against the corporation and having it adjudicated a bankrupt. Can this be done? Ought the bankruptcy

court to tolerate such a proceeding, conceding the insolvency of the corporation at the time of the transactions referred to? The question is not free from doubt. In this case it appears that another person had obtained a large judgment against the corporation, and that, if four months ran before proceedings in bankruptcy were commenced, it would ripen into a fixed lien which could not be disturbed in the absence of fraud. In this case it also appeared that Parsell had other claims against the corporation. It would seem that the purpose of Parsell was to take such proceedings as would enable him to throw the corporation into bankruptcy, and thereby secure an equality of distribution of the assets among all the creditors and prevent the large judgment referred to from becoming a lien entitled to payment in full. But if he, being an officer of the corporation and one of its creditors, connived with Mahony to take from him (Parsell) a note against the corporation paying no consideration therefor and bring suit thereon, Parsell employing counsel and conducting the proceedings, Mahony then to issue execution, or rather allow it to be done and cause such execution to be levied on the property of the corporation, all to the end that Parsell might then file a petition in bankruptcy against the corporation of which he was an officer, and it was understood that the property levied on should not be sold, is it an answer to such acts to say and prove that Parsell and other creditors had other valid claims, and that a prior judgment had been obtained which was about to ripen into a valid lien which could not be disturbed in bankruptcy proceedings, by reason of the four months' clause, if that time was allowed to run, and that the true spirit and intent of the bankruptcy law to bring about an equality among all creditors would be best served by procuring some act of bankruptcy, no matter how, and so defeat such lien and bring about an equal distribution of assets amongst all creditors? This would bring the bankruptcy law into play and defeat a preference, it is contended, and was not an attempt to defeat or improperly use it.

In Collier on Bankruptcy (9th Ed.) 774, it is said:

"If it appears that the act of bankruptcy was secured by the connivance of a creditor, he should not be permitted to institute the proceedings." (Bankruptcy proceedings.)

In Matter of Harks Brothers (D. C.) 142 Fed. 279, 15 Am. Bankr. Rep. 457, a judgment creditor of the alleged bankrupt, who did not join in the petition, issued an execution on his judgment against the property of such alleged bankrupt at the solicitation of the attorney for the petitioning creditors, who made arrangements with the sheriff for making the levy under such execution, and it was held that "the petitioning creditors, having brought about and assisted in conducting the levy," could not complain thereof and were estopped from setting it up as an act of bankruptcy.

In Moulton v. Coburn, 131 Fed. 201, 66 C. C. A. 90, 12 Am. Bankr. Rep. 553, it was held that:

"Except in special circumstances, a creditor assenting in writing to the terms of a common-law assignment for the benefit of creditors is not entitled

to join in an involuntary petition alleging as the sole act of bankruptcy the making of such assignment."

In *Lowenstein et al. v. Henry McShane Mfg. Co.* (D. C.) 130 Fed. 1007, 12 Am. Bankr. Rep. 601, it was held that:

"Creditors who participate in proceedings wherein a receiver is appointed for an insolvent corporation may not petition for the adjudication of the corporation upon an allegation that the appointment of the receiver was an act of bankruptcy."

But in *Matter of Hirose*, 12 Am. Bankr. Rep. 155, it was held that:

"Creditors assenting to an assignment for the benefit of creditors and acting under it to the extent of filing claims are not thereby estopped from petitioning for a decree of bankruptcy against the assignor."

In *Clark v. Henne & Myer et al.*, 127 Fed. 288, 62 C. C. A. 172, 11 Am. Bankr. Rep. 583, it was held:

"Where, upon the proposal made at a meeting of all the creditors but one, of an insolvent debtor, he executes a transfer in the form of a deed of trust or chattel mortgage in the usual form, with power of sale and condition of defeasance of his stock of goods, wares, and merchandise, and all evidences of indebtedness to a trustee, to apply the proceeds of sale as therein stated, the creditors are estopped from setting up such conveyances as a ground to support an adjudication of bankruptcy against the debtor."

On general principles of equity it would seem that a creditor who is also an officer of a corporation ought not to be permitted to petition his debtor (such corporation) into bankruptcy on the ground that such corporation has committed an act of bankruptcy, which act he himself brought about and caused to be committed.

In *Stroheim v. L. F. Perry & Whitney Co.* (C. C. A. 1st Circuit) 175 Fed. 52, 99 C. C. A. 68, *Stroheim & Romainn*, a copartnership, with one Skelly and one Beaumont, signed and filed a petition in involuntary bankruptcy September 23, 1908, against *Lewis F. Perry & Whitney Company*, alleged bankrupt. On September 10, 1908, the sister of *Stroheim* held several notes of said alleged bankrupt, and on that day she transferred one of such notes to said Skelly without any substantial consideration for the sole purpose of enabling her said brother's copartnership to secure a sufficient number of creditors to proceed with the bankruptcy proceeding. The sister transferred another of her notes to Beaumont for the same purpose. Other of the petitioning creditors had assented to an assignment for the benefit of creditors made by said alleged bankrupt prior to the filing of such petition in bankruptcy. It was held that none of these persons were proper petitioning creditors. As to Skelly and Beaumont the court said:

"Evidently they were not creditors when they joined the petition, because evidently the whole transaction was purely colorable, and the notes still belonged to *Stroheim's* sister. Therefore they could not lawfully make the required oath of the voluntary petition."

As to those who had assented to the assignment, the court held they were estopped to petition the assignor into bankruptcy. If those transfers of these notes were merely colorable, why was not the transfer by *Parsell* to *Mahony* colorable merely in the eye of the bankruptcy

law, and was not Parsell procuring an act of bankruptcy against a corporation of which he was an officer, and was it not his duty to protect it from judgments obtained for the mere purpose of forcing it into bankruptcy? Did not Parsell procure this act of bankruptcy to be committed, and, if so, could he then complain of it and, as sole petitioner, make it a ground for adjudicating the Taylor House Association a bankrupt, even if by so doing he would benefit all creditors, himself with the others, except the one having a prior judgment?

In *Re Weiss et al.* (D. C.) 142 Fed. 279, it appeared that the claim of Weiss & Segal, one of the three petitioning creditors, was represented by Mr. Benjamin Alexander, who prepared the petition in bankruptcy and procured its presentation in court. Prior to the presentation of such petition, Mr. Alexander had an interview with Mr. Geiger, the owner of the judgment upon which the execution was issued and levy made and notice of sale of property based, and he (Alexander) requested Geiger to issue the execution with the understanding that, if Geiger did not receive his money from the alleged bankrupts after the execution was issued, he (Alexander), on the part of his client and two others who would join, would present and file a petition in bankruptcy and allege the levy of the execution on Geiger's judgment as the ground of bankruptcy. Thereupon the execution was issued and a levy made, and thereupon a petition in bankruptcy executed by Weiss & Segal and two others was filed setting forth this execution and levy as the act of bankruptcy. This question was submitted to the jury; the commission of an act of bankruptcy, etc., being denied:

"If you believe the testimony of Mr. Geiger, which is entirely uncontradicted, that he issued execution upon his judgment at the solicitation of the attorney for the petitioners who made arrangements with the sheriff for making the levy upon such execution, then I instruct you that the petitioning creditors, having brought about and assisted in conducting the execution and levy, cannot make complaint of such execution and levy and are estopped from setting it up as an act of bankruptcy, and your verdict must be for the respondent as to the alleged act of bankruptcy."

And the jury having found for the alleged bankrupts on motion to set aside the verdict, the court, Holland, D. J., held:

"Both these motions are overruled, as we are of the opinion that the jury was right in their finding, for the reason that it has been well settled that it is a just ground for refusing to allow a petitioner to complain of an act of bankruptcy which has been induced or brought about by himself. 'To hold otherwise would enable the unscrupulous to entrap a person into bankruptcy.' *Simonson v. Sinsheimer*, 95 Fed. 948, 37 C. C. A. 337. A party cannot thus take advantage of its own wrong. In *re Williams*, Fed. Cas. No. 17,706; *Clark v. Henne*, 11 Am. Bankr. Rep. 583, 127 Fed. 288, 62 C. C. A. 172.

"In these cases the act of bankruptcy in which the petitioning creditors participated was an assignment by the alleged bankrupt for the benefit of creditors; but we see no difference in principle between inducing or participating in an assignment and procuring a judgment creditor to issue execution for the sole and express purpose of enabling the procurer to file a petition in bankruptcy. A debtor might thus be entrapped into bankruptcy, who, if permitted to utilize his resources, could continue in business and eventually meet all his obligations."

In *Loveland on Bankruptcy* (4th Ed.) 393, it is said:

"Creditors may be estopped by their own consent to an act from alleging it against their debtor as an act of bankruptcy to procure an adjudication.

* * * A person will not therefore be allowed to complain of an act of bankruptcy where he induced the act."

It is true that a bad intention on the part of the petitioner will not defeat his right to file a petition in involuntary bankruptcy when an act of bankruptcy has been committed and such act was not procured or assented to by the petitioner. But a good intention will not justify a creditor in procuring his debtor to commit an act of bankruptcy and permit him thus to become a petitioner and allege such act as the basis of an adjudication.

In view of these authorities and the offer of proof made by and in behalf of the alleged bankrupt, it seems to me clear that it was error to reject the evidence sought to be introduced, and that the report must be opened and vacated, and that the case must go back to the referee with instructions to admit all competent evidence offered on the subjects referred to and ascertain and report whether or not Mr. Parsell, the petitioning creditor, induced and procured or consented to the act of bankruptcy alleged in the petition and the facts in relation thereto, and also ascertain and report fully the relation of Parsell to the alleged bankrupt and with Mahony at the time. The parties or either of them may give further evidence on the question of values—that is, insolvency—if so advised.

Ordered accordingly.

THE RIVER MEANDER.

(District Court, S. D. New York. December 23, 1913.)

No. 493.

1. SHIPPING (§ 132*)—DAMAGE TO CARGO—EXEMPTION FROM LIABILITY UNDER HARTER ACT—BURDEN OF PROOF.

To entitle a vessel and owners to exemption from liability for damages to cargo from sea water during a voyage, under Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946), the burden rests on the carrier to show that she was seaworthy at the commencement of the voyage and that the damage was caused by dangers of the sea or from faults or errors in navigation or in the management of the vessel.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. § 132.*]

2. SHIPPING (§ 132*)—DAMAGE TO CARGO—SEAWORTHINESS—BURDEN OF PROOF.

If a vessel proves to be unseaworthy during a voyage, the burden rests on the owner to prove affirmatively that she was seaworthy at the time the voyage began.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. § 132.*]

3. SHIPPING (§ 132*)—LIABILITY FOR DAMAGE TO CARGO—EVIDENCE CONSIDERED.

Evidence considered, and *held* insufficient to show that a vessel was seaworthy at the commencement of a voyage, or that damage to her cargo from sea water resulted from dangers of the sea, or from faults or errors in her navigation or management, but rather to show that it resulted from her unseaworthy condition.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. § 132.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suits by the P. Lorillard Company, by the Liggett & Myers Tobacco Company, by the Great Atlantic & Pacific Tea Company, by the Hills Bros. Company and by the American Tobacco Company against the steamship River Meander; Norton & Son, claimant. Decree for libelants.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for libelants.

Convers & Kirlin, of New York City (J. Parker Kirlin and John M. Woolsey, both of New York City, of counsel), for claimant.

HOLT, District Judge. These are five suits in admiralty, brought by owners of portions of the cargo of the steamer River Meander, to recover for damage to the cargo caused by sea water on a voyage from Smyrna to New York. The steamship was a single screw steel steamer built in 1906, 373 feet long, 50 feet broad, and 24.9 depth of hold. Her hold was divided into five compartments separated by water-tight bulkheads. She was purchased by the American Levant Line in 1912 for £39,400 and was turned over to her purchasers about August 31, 1912. She was at that time in a drydock on the Tyne. A surveyor made a favorable report of her condition to the purchasers at the time of her purchase.

The steamer sailed August 30, 1912, from the Tyne with a cargo of coal and delivered her cargo at the Island of Elba. She then proceeded to Machri, where she took on a part of her cargo for her voyage to New York, and then to Smyrna, where she completed her cargo. The merchandise in question in these suits was taken on at Smyrna. She sailed from Smyrna, stopped at Algiers for coal, passed Gibraltar on October 18th, and arrived at New York on November 5th. The steamer had fairly good weather until she got about four days west of Gibraltar. From that time she encountered exceptionally heavy weather, consisting of a substantially continuous series of full gales, until she passed Nantucket Lightship November 4th.

After loading at New York, she started on a return voyage to England, and, when a few days out, a leak developed, and water entered in such quantities that the crew abandoned the steamer and left her to founder in mid-ocean.

The part of the ship in which the cargo was stowed, for damage to which this suit was brought, was in the No. 3 hold on the port side. In that hold there was below the main deck a section called the "between-decks." Below the between-decks was a deep tank, sometimes used for water ballast and sometimes for the carrying of cargo. On this voyage it was filled with bales of Turkish tobacco. It is the next compartment aft of the engine room and is separated from the forward part of the No. 3 hold by a water-tight bulkhead extending upward to the between-decks. The between-decks above is also water tight, and is fitted with two doors or covers on the floor, through which cargo, when carried in the deep tank, is taken into and out of the tank. These doors or covers are of iron. They stand on coamings 9 inches high and can be screwed on with rubber washers so as to make them entirely

water tight. They are so screwed on when the deep tank contains water ballast, but on this voyage, after the deep tank was filled with bales of tobacco, the doors or covers of these entrances into this deep tank were simply laid on the coamings. Then the between-decks above was filled with figs in wooden cases.

There was a large ventilator of the usual cowl type leading to the forward part of the between-decks about two feet from the after side of the bulkhead of the bridge deck structure, and in a position about opposite the port forward corner of the main deck hatch. The top of the cowl of this ventilator was 8 feet above the main deck. The opening of the cowl was 2 feet 8 inches in diameter, and the size of the main ventilator was 16 inches in diameter. There was also another and smaller ventilator leading through the between-decks into the forward part of the deep tank. The top of this ventilator was six feet above the main deck. It was a little nearer the center of the ship than the large ventilator. Its cowl was 1 foot 10 inches in diameter, and the main shaft of this ventilator was 12 inches in diameter. This small ventilator was about a foot aft of the bulkhead of the bridge deck structure.

The steamer had a full equipment of gear for closing the ventilators in bad weather. Canvas covers were provided to be placed over the mouth of the cowls and lashed fast with a cord, very much as a housewife ties a paper over the mouth of a tumbler of jam. All the ventilators on the ship were so covered as soon as the weather became heavy. Wooden plugs were also provided, to be inserted in the main pipes of the ventilators after the cowls were taken off, for use in very heavy weather.

On the morning of October 26th about 6:15, these canvas covers on the two ventilators leading into the No. 3 between-decks and deep tank were found to be off the ventilators. The assumption is that they were blown off by the wind or washed off by seas. One of the officers testified that they were in their place and in proper condition that morning when he went off watch a little after 2 a. m. It therefore appears that those canvas covers were off those ventilators not more than four hours that night, and of course may have been off any less time. The officer who discovered that they were off immediately put new covers on. The ventilators were constructed in the usual way. A solid iron pipe was riveted to the deck, coming up a certain distance above the deck, and having an iron band around it a portion of the distance from the deck, upon which was fitted the upper part, or cowl, of the ventilator, very much as one piece of a stovepipe is put upon another. By this arrangement the cowls of the ventilators can be turned in any direction. The evidence is that both these ventilators were turned that night so that the cowls turned toward the port quarter of the ship, away from the prevailing northwest wind.

On the forenoon of the 26th, the cowls of these two ventilators were removed and a wooden plug inserted in each of the iron pipes of the ventilators. These plugs were covered with tarpaulins, and in this way the ventilators were made absolutely water tight. These plugs were provided for the vessel in case of very heavy weather, and ap-

parently were not used in any of the other ventilators, which during the continuous gales of that voyage were simply protected by the canvas mouth covers.

The officers testify that they had no idea at the time that any water to any serious extent had gotten down those ventilators. Soundings were taken whenever possible at regular intervals during the voyage to see whether there was any water in the holds. There were some days during this very severe weather on which soundings could not be taken, and on those occasions the pumps were set to work and pumped any water out. No unusual amount of water was discovered in the ship until the 3d of November, eight days after the ventilator covers blew off. On the morning of November 3d the soundings showed 4 feet 6 inches of water in the No. 3 port bilge. This was pumped out, but water continued to accumulate there in large quantities, and on the morning of the 5th, when the steamer reached New York, there was found to be two feet of water in that bilge.

There was a leak also in the port side of the No. 1 hold, beginning about October 25th, and continuing substantially all the way across the Atlantic. The pumps kept the water out, but it collected in that part of the ship, apparently at the rate of about a foot in 12 hours, substantially through the voyage. It seems to be admitted by all the parties that the water under the No. 1 hold could not have affected the cargo in the No. 3 hold because of the intermediate water-tight bulkheads; but the amount of water which entered the No. 1 hold, as well as that in the No. 3 hold, may be properly taken into consideration on the question of the seaworthiness of the ship.

When the hatches were opened and the cargo taken out in New York, it was found that a portion of the cargo in the between-decks and in the deep tank on the port side of No. 3 was damaged by sea water. A drawing has been made of the damage, which is marked "Claimant's Exhibit 3" of November 25, 1912, and which, according to the evidence, correctly shows the part of the cargo which was injured. Under the small ventilator a small portion of the tobacco in the deep tank was wet. This wet tobacco did not extend down to the floor of the deep tank, and was situated immediately under the ventilator. Under the large ventilator opening into the between-decks, cases of figs were wet, and this wet portion extended down directly from a point each side of the ventilator entrance, widening somewhat as it went down until a point about 10 or 12 inches above the bottom of the between-decks, and at that point all the cases were wet clear across the bottom of the between-decks. The only part of the figs in the between-decks which were wet were those under the ventilator and those on the floor. The rest were dry. In the deep tank immediately under the door or covering under the large ventilator opening into the tank the bales of tobacco had sunk down, leaving an open space; then, from the top of the bales under the covering down to a point near the bottom of the deep tank, the bales were wet, sodden, and steaming, and all the bales at the bottom of the deep tank were also wet and steaming. All the rest of the tobacco in the deep tank was entirely dry, except the small portion under the small ventilator which has been already described.

After the vessel had been unloaded, there was evidence of a leak in three frame spaces on the starboard side of the ship at the forward end of the between-decks about opposite where the injured part of the cargo had been. At that place it was found that the iron was corroded, and there were signs that water had been running there. The stringer plate under the deck was slightly bent down, and a wooden chock was displaced which had been fastened by cement, and the angle iron on the bulkhead had four rivets missing. Some of the witnesses say that the water stains there showed that a good deal of water had been coming down there for quite awhile. Others say it showed only a slight trickling. There was an icebox and a coal bunker on the deck above this place. They were removed and a test to ascertain whether there was a leak there, made by building a cofferdam and putting water to the depth of about a foot on the deck; but no evidence of any leak there was discovered by that test. Some of the libelants' witnesses claim from the signs of water on these three forward frame spaces that there had been a leak there which had admitted a considerable amount of water while the ship was laboring in the heavy weather, and that the reason that no leak appeared when tested in New York was that the ship was lying still. But I cannot believe that sufficient water came into the steamer at that place to afford any explanation of the damage to the cargo which is the subject of these suits.

The claimant's theory is that all the water which damaged this cargo came down the two ventilators. Claimant's counsel argued on the hearing that it was not necessary to infer that it came down the two ventilators during the period of not exceeding four hours when the ventilator covers were off, but that the ventilator covers may have been taken off at other times during the voyage. In my opinion the evidence affords no basis for the inference that any water got down those ventilators except for the brief period when the covers were off on the morning of October 26th. There is no evidence that the covers were off those ventilators before October 26th at any time when the weather was stormy enough to cause water to accumulate on deck in such a mass as to pass down the ventilators, and the evidence is uncontradicted that on the forenoon of the 26th the cowlings were taken off, the wooden plugs inserted, and both ventilators made absolutely water tight, and that that condition continued substantially during the rest of the voyage. The theory, therefore, that the damage to the cargo was caused by sea water coming down through those ventilators, must start with the assumption that the only time during which that could have occurred was during that part of the period between about 2 a. m. and 6 a. m. on the morning of October 26th, when the covers were off.

It is estimated that the entire amount of water which was ultimately found in the between-decks and deep tank amounted to about 50 tons. The claimant's theory is that this water entered through these ventilators; that it went substantially straight down through the cases of figs, and then straight out on the floor of the between-decks, until it reached a point higher than the coaming of the door into the deep tank, and that when it reached that point it soaked through under the loose cover over the coaming into the deep tank; that when it got into the

tobacco it was absorbed by the tobacco to the point of saturation, and then passed out into the bilges; and that that is the explanation of the fact that on November 3d there was found 4½ feet of water in the bilge of No. 3. This theory seems to me simply incredible. In the first place, if we are to judge by the situation of the damaged cargo, the amount of water that went down the small ventilator was slight; it only wet the tobacco immediately under that ventilator for a portion of the way through the deep tank, so that the great bulk of the water must have gone down through the large ventilator. The cases of figs were not so stowed as to completely fill the between-decks; there was the usual space of from six inches to a foot at the top of these cases of figs.

If the water came through this ventilator it is hardly possible to imagine it as coming down in a steady stream, no matter how heavy the seas were that were breaking on the ship. Even if it came down in a steady stream, it could not, it seems to me, have simply wet the cases immediately under the ventilator, but would have dashed off in every direction over the whole of the cargo. If the water came down intermittently, it nevertheless must have come at times in such quantities as to produce the same result, if it be assumed that as much as 50 tons came down in four hours. Moreover, the evidence is specific that the cowls of these ventilators were turned that night towards the port quarter away from the prevailing wind. How could a large quantity of water get down there in so short a time? No seafaring men were produced who ever heard of such a case. I have no doubt that the damage to that portion of the figs in the between-decks immediately under the large ventilator was caused by water coming down through this ventilator; but I think the fact that the water only damaged those cases immediately under each ventilator shows that the water which came in was mostly spray or small quantities of water entering from time to time. I do not believe that much of the water in the bottom of the between-decks came in through the ventilators, or that much of the water which got into the deep tank was originally held in the bottom of the between-decks and from there drained through the door over the deep tank. I think that most of the injury to the tobacco was caused by the four feet six inches of water found in the port side of No. 3 hold on the 3d of November, and I think that that water got into the ship at that point in some manner which is not explained, and did not get into it through the ventilators.

[1] The claimant's position is that, the water having entered through the ventilators, the damage was caused either by a peril of the sea or by mismanagement in the navigation of the steamer, and that, in either case, the claimants are exonerated from liability by the provisions of the Harter Act. But the Harter Act only exonerates a shipowner from responsibility for damages or loss resulting from faults or errors in navigation or in the management of the vessel or from dangers of the sea, in case the owner has exercised due diligence to make the vessel in all respects seaworthy. So far as the damage to the tobacco in the deep tank is concerned, I think the burden of showing that the damage arose from one of the excepted causes was upon the carrier, that the

evidence leaves the efficient cause of the damage wholly unexplained, and that therefore the doubt as to the cause of the entrance of the sea water must be resolved against the carrier. *The Folmina*, 212 U. S. 354, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748. So far as the damage caused by water entering through the ventilators is concerned, I think it is clear that such damage was caused either by a peril of the sea by which the canvas coverings were either blown off or washed off in the very heavy weather on the morning of October 26th, or through fault in the navigation of the vessel by the omission to take the cowls of the ventilators off earlier and put the wooden plugs in the ventilators.

But if the vessel was not seaworthy when she started upon the voyage, then the provisions of the Harter Act do not apply to the case at all. In the first place, there can be no presumption of seaworthiness in such a case as this. *The Wildcroft*, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794. It must be affirmatively proved by the shipowner. Now there is no evidence in this case that the vessel was seaworthy when she began her voyage. The only evidence relied on to show that she was seaworthy at that time is a report made to the purchasers by a surveyor before the ship sailed from the Tyne. The surveyor was not called as a witness, and his report is mere hearsay. No evidence has been given as to the actual condition of the ship before she sailed from the Tyne. Nor has any evidence been given of her condition before she sailed from Smyrna. It may be in this case that the Tyne is to be taken as the place from which the voyage commenced, but the cargo taken out to the Mediterranean was completely unloaded and a new cargo taken in for New York; and, if Smyrna is to be regarded as the place from which the voyage began, then there is no evidence at all of the condition of the ship before she sailed from Smyrna. Moreover, on the voyage to New York the serious and substantially constant leak in the No. 1 port hold, which began shortly after leaving Gibraltar, shows, in my opinion, that the ship was not seaworthy during the voyage. It is said that that leak had nothing to do with the damage to the cargo, which I think is true; but the requirement of the Harter Act is that the owner must provide a ship that is in all respects seaworthy before he can take advantage of the exemptions from liability required by that act. Moreover, in my opinion, the water which was found in the port side of the No. 3 hold on the morning of November 3d showed that the ship was not seaworthy at that time. I believe that it came in in some way entirely unexplained. But whatever explanation may be made of its getting in, the fact is that it got there, and that after it was pumped out it came in again at that place in large quantities. The ship was not drydocked at New York. There is a good deal of evidence to the effect that she was examined in New York as well as she could be in the water when not put in the drydock, and that she appeared to be in good condition; but it seems to me that the leaks which had occurred on the voyage to New York would have led any prudent shipowner to have had her drydocked here before her return voyage to Europe. When the fact is considered that when she was four or five days out on her return voyage, after a day or two

of heavy weather she sprung a leak on the port side of the ship about at the place where the damage to the cargo occurred, and that although all the pumps were put in operation the water gained upon them so rapidly that at the end of about 36 hours the ship was abandoned in a sinking condition, it seems to me an inevitable conclusion that this ship was not seaworthy during the voyage to New York. In my opinion, if a ship is shown to be unseaworthy during a voyage, the inference may be drawn, in the absence of any explanation to the contrary, that she was unseaworthy when she started. Cargo owners usually cannot prove unseaworthiness at the time a voyage begins.

[2] It is the duty of the shipowner to know that his ship is seaworthy before the voyage begins, and if he does know it he can prove it. If a vessel proves to be unseaworthy during a voyage, the burden should be on the shipowner to prove affirmatively that she was seaworthy at the time the voyage began.

[3] No such affirmative evidence has been given in this case; and my conclusion upon the whole case is that the River Meander was not seaworthy when the voyage to New York began, and that the claimants are not entitled, in respect to any of the damage which was caused by sea water on this voyage, to exemption from liability by any of the provisions in the bill of lading or by the terms of the Harter Act.

The libelants are entitled to a decree in each case as demanded in the libel. If the damages in each case are not agreed upon, there should be the usual reference to fix the amount.

TRIUMPH ELECTRIC CO. v. THULLEN.

(District Court, S. E. D. Pennsylvania. December 4, 1913.)

No. 1143.

INJUNCTION (§ 136*)—PRELIMINARY INJUNCTION.

Where complainant company, engaged in the manufacture of electric motors, generators, and transformers, employed defendant as chief electrical engineer under a contract that he should devote his entire attention to the business of the company, and in the event of any design being developed, capable of being patented, the application should be assigned by defendant to the company, except that this should not apply to any patentable design defendant might discover, not applicable to the line manufactured by complainant, and defendant invented a control system for electric motors, which might be applied to the appliances manufactured by complainant, the fact that certain expert witnesses claimed that such system was a separate line from that of complainant did not show, as a matter of law, that it was within the exception of the contract, and hence complainant was entitled to a preliminary injunction restraining defendant from assigning any rights therein under the patent, or granting a license thereunder, or incumbering the same pending determination of such question.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec Dig. § 136.*]

In Equity. Bill by the Triumph Electric Company against Louis H. Thullen. On motion for a preliminary injunction.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Henry N. Paul, Jr., of Philadelphia, Pa., and Edwards, Sager & Wooster, of New York City, for plaintiff.

E. Hayward Fairbanks and Furth, Singer & Bortin, all of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. From the bill of complaint, it appears that the defendant was employed by the plaintiff from about November 20, 1909, until April 30, 1913, as chief electrical engineer. The agreement between the parties, which is in the form of a letter addressed to the defendant by the plaintiff, contains the following provision:

"It is mutually understood and agreed that you will devote your entire time and attention to the interests of this company; that, while in its employ in the event of any design being capable of being made the subject-matter of a patent application, such application and patent shall be assigned to the company, they paying the necessary attorney and patent office fees.

"It is understood that this does not apply to any patentable design you may discover not applicable to the line manufactured by this company."

There were two subsequent modifications of this contract as to compensation to the defendant which did not affect the provisions above cited. It is alleged in the bill that the plaintiff was, at the times mentioned, engaged in the manufacture and sale of electrical apparatus of all types and classes for many different purposes; that, while in the employ of the plaintiff, the defendant acted as its chief electrical engineer and, in pursuance of his duties as such, had supervision of the design and manufacture of electrical apparatus and systems of all kinds and for various purposes, including control systems for electric motors; that, in pursuance of his duties, he made experiments and research work, particularly in the design of control systems for electric motors in the factory and at the expense of the plaintiff, which experiments and research work led to the development and invention by the defendant of improved designs in various types and classes of apparatus and electrical systems; that, while in the employ of the plaintiff, the defendant made inventions and improvements in designs capable of being made the subject-matter of patent applications, which were applicable to the class of goods or line manufactured by the plaintiff, and made applications for patents and obtained patents thereon, particularly patent No. 1,070,638, for a control system for electrical motors, which was applied for December 11, 1912, and granted August 19, 1913; that the invention of patent No. 1,070,638 was made by the defendant in the fulfillment of his regular duties, under the terms of the agreement, and that he made application for the patent while so employed, and that apparatus embodying the system in accordance with the disclosure and claims of the patent were built in the factory and at the expense of the plaintiff, for the requirements of a customer of the plaintiff in the regular course of its business. The plaintiff claims that it is entitled to the full right, title, and interest in the invention disclosed and claimed in the patent, and has requested the defendant to assign the patent and invention to the plaintiff, and offered to pay the necessary attorney and patent fees, but the defendant has refused

to assign the patent and invention to the plaintiff, and has refused to recognize the plaintiff's right thereto. The bill contains a prayer for an assignment of the patent by the defendant to the plaintiff, and for an injunction to restrain the defendant from granting any other assignment of or any license under the patent.

Upon the facts appearing by the verified bill and affidavit of the president of the plaintiff company, a restraining order was granted November 20, 1913, restraining the defendant from making any transfer of any rights under the patent or invention, and from granting any license thereunder, or placing any incumbrances thereon, without first advising the transferee, licensee, or mortgagee of the pendency of this action and of the plaintiff's claim to title, and without first advising the plaintiff of such transfer, license, or incumbrance. At the hearing for a preliminary injunction, the plaintiff relied upon the bill and affidavit upon which the *ex parte* restraining order and order to show cause were issued. The defendant produced affidavits and exhibits for the purpose of showing that the invention covered by patent No. 1,070,638 comes within the terms of the paragraph of the agreement reading as follows:

"It is understood that this does not apply to any patentable design you may discover not applicable to the line manufactured by this company."

It is apparent that the final determination of the suit will turn upon the construction of the above exception to the agreement for the assignment to the plaintiff of the applications and patents of designs discovered by the defendant while in the plaintiff's employ. The defendant in his answering affidavit states that since the granting of the letters patent on August 19, 1913, he has been taking preliminary steps to organize a company to handle the patent, and he had about concluded such negotiations for the sale and disposition of the patent upon very favorable terms, when the plaintiff's bill in equity was filed, and the restraining order obtained. It is therefore apparent that if the plaintiff is ultimately successful in its claim, it will be irreparably damaged if the defendant is permitted to proceed with the sale of the patent without notice to his vendees or assignees of the plaintiff's claim to title. The defendant avers that the plaintiff is not, as alleged in the bill, engaged in the manufacture and sale of electrical apparatus of all types and classes, but is engaged in the manufacture of specific appliances as follows:

"Motors, generators, and transformers, also an induction motor, starter composed of a transformer that they manufactured which, in connection with a switch, is assembled to make the starter, and is used to start an induction motor."

In support of this averment, the defendant offered in evidence the advertising bulletins of the plaintiff covering the period from May, 1910, to May, 1913. The affidavits of the defendant and of a number of patent experts and engineers explain the mechanical construction and functions of motors, generators, and transformers, and explain in detail the mechanical construction and functions of the defendant's control system for electric motors upon which the patent was issued.

The patent is designated as a "control system for electric motors." In the defendant's specification, he says:

"My invention relates to systems for automatically controlling electric motors, and has particular reference to the control of electrically driven feed carriages for friction or other saws, but I do not limit my invention thereto."

The first claim of the patent recites:

"In a system for controlling electric motors, an electric motor, a device driven by the motor against load of varying value, and means for maintaining the resistance to the said device at a substantially constant value, the said means including means for varying the speed of the motor inversely as the value of the resistance varies."

In the defendant's affidavit he avers:

"That the control system for electrically driven feed carriages for friction or other saws, which I invented and which the plaintiff company claims to have an interest in, belongs to an art or type of apparatus which is not germane to the specialties manufactured by the plaintiff company"

—and proceeds to "show how the invention in this patent is clearly differentiated from the motors, generators, and transformers which are the output of the plaintiff company."

The conclusion of Mr. Fairbanks, one of the defendant's experts, is—

"that the system of wiring and connecting electrical devices for the purpose stated in the Thullen patent is a separate line from the manufacture of motors, generators, or transformers."

The conclusion of Mr. Bonine, a consulting engineer, is that:

"The subject-matter of Mr. Thullen's patent, as will be obvious to any skilled electrical engineer, is therefore not in any way germane or related to the specialties of the Triumph Company, plaintiff herein; said specialties being the manufacture of motors, generators, and transformers."

Mr. Jones, an electrical engineer, concludes:

"I do not consider the invention of Mr. Thullen is in any way a part of the business conducted by the plaintiff, the Triumph Electric Company, since it is a foreign construction in which a motor is incidentally used to operate a mechanical carriage, and the gist of Mr. Thullen's invention lies in a special wiring outside of a motor or anything manufactured by the plaintiff company, together with a saw carriage and other mechanical parts."

Mr. Hughes, an engineer, concludes as his opinion—

"that the apparatus disclosed in the said Thullen patent drawings, and described in the specification thereof, is not applicable to any line manufactured by the Triumph Electric Co., * * * the Thullen invention being a system of 'control' rather than anything applicable to the manufacture of the motors shown in said Defendant's Exhibit A."

Mr. Taylor, an electrical engineer, expresses his opinion—

"that this patent, in its particular sense, is not intended for application directly to the product of the plaintiff, but is for the electrical control of electrically driven feed carriages of machines."

Mr. Weir, an engineer, concludes:

"The invention disclosed by this patent does not pertain to any appliance manufactured by the plaintiff, but does pertain to controlling systems applicable to friction saws and similar apparatus."

Mr. Temple, an electrical engineer, states that:

"The subject-matter of Mr. Thullen's patent is not in any way specifically or generally related to the particular products of the Triumph Electric Company, plaintiff herein, the said products being motors, generators, and transformers."

The gist of the defendant's expert testimony is to the effect that the defendant's system for a control of electric motors is differentiated from the motors, generators, and transformers themselves, and that, inasmuch as the plaintiff is not engaged in the manufacture of controllers for electric motors, and particularly for controllers for electrically driven friction saws, it follows that the apparatus invented by him is not applicable to the line manufactured by the plaintiff company. Without prejudging the construction which may finally be put upon the agreement between the parties, I do not think that this testimony fully meets the issue presented. It is apparent that the defendant's invention covers a controller for motors whether they be designated "prime movers" as in some of the affidavits, or "apparatus" as in others. The plaintiff's electric motors, as disclosed by its bulletins, offered in evidence by the defendant, are used for operating a variety of machines such as saws, lathes, or planes, and while the defendant's claim is that his patent is for the control of friction saws and carriages, it is obvious that the control of the saw and carriage is effected through the control of the motors operating them. It is by no means certain that the "patentable design" of the defendant is "not applicable to the line manufactured by" the plaintiff. Mechanically and physically at least, a controller is capable of being applied to motors which are in the line manufactured by the plaintiff. It appears, therefore, that there is a substantial question between the parties as to the construction of the agreement between them, and there is reasonable ground in support of the plaintiff's claim that the patent in suit does not come within the exception in the agreement.

I think, therefore, that a preliminary injunction should be granted to preserve the patent in statu quo by requiring notice of any disposition of the patent until a final determination of the right and title to it. The defendant, however, should be amply protected by bond in case the plaintiff ultimately fails to establish its claim and the defendant is, by notice of the pending suit, prevented from disposing of the patent. The amount of security to be entered will be fixed upon application of the plaintiff within five days, with notice to the defendant.

UTAH IMPLEMENT-VEHICLE CO. v. BOWMAN et al.

(District Court, D. Idaho, E. D. November 18, 1913.)

1. MECHANICS' LIENS (§ 5*)—STATUTES—CONSTRUCTION.

A mechanic's lien is entirely the creature of the statutory law of the state, which must be construed liberally with a view to effecting its object and doing substantial justice, without adding to or subtracting therefrom.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 3, 5; Dec. Dig. § 5.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MECHANICS' LIENS (§ 260*)—ENFORCEMENT—JUDGMENT—STATUTES—CONSTRUCTION—MORTGAGES.

Rev. Codes Idaho, § 5118, provides that no mechanic's lien shall bind any property, etc., for a longer period than six months after the claim has been filed, unless proceedings are commenced in a proper court within that time to enforce the lien, or, if security is given, then six months after the expiration of the credit, but no lien shall continue in force for a longer time than two years unless proceedings to enforce the same shall have been commenced. *Held*, that such section should be construed as though it provided that the lien should not continue unless proceedings were commenced in a proper court "against the person or persons against whose interest the lien is asserted," and hence, where a mortgagee of property was not made a party to a suit to enforce a mechanic's lien, he was not bound by the judgment, nor was the lien after the expiration of the statutory period of any effect as against the mortgagee's interest.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 456, 458-468; Dec. Dig. § 260.*]

3. REFORMATION OF INSTRUMENTS (§ 50*)—ATTORNEY'S FEES.

Where plaintiff sued for the reformation of a mortgage and to foreclose the same, he could not recover attorney's fees for the reformation, but only for services in connection with the foreclosure.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 201; Dec. Dig. § 50.*]

In Equity. Suit by the Utah Implement-Vehicle Company against Frank C. Bowman, as trustee in bankruptcy of the estate of N. C. Mickelson, bankrupt, and certain others. Decree for complainant.

St. Clair & St. Clair, of Idaho Falls, Idaho, for plaintiff.

O. E. McCutcheon, of Idaho Falls, Idaho, for defendant Bowman.

William A. Lee and John W. Jones, both of Blackfoot, Idaho, for defendant D. W. Standrod & Co.

DIETRICH, District Judge. A very brief statement of the facts will suffice to make clear the nature of the single question which has been argued and submitted for decision. The suit is brought to foreclose a mortgage given to the plaintiff by N. C. Mickelson on the 6th day of February, 1911, to secure the payment of a promissory note of the same date for \$12,575.75, which mortgage was, on February 21, 1911, recorded in the office of the county recorder of Bingham county, Idaho, where the property is situate. Mickelson later became a bankrupt, and his trustee is made a party defendant. The other defendant, D. W. Standrod & Co., a corporation, is the trustee for the Idaho Lumber Company and others, who claim liens upon or equitable interests in the mortgaged property. It is unnecessary to explain the nature of this trust further than to say that the interests of all beneficiaries thereof save one originated in mechanics' liens for services rendered and materials furnished in the construction of a building upon a portion of the mortgaged premises. The original validity of these liens is not now called into question, and for the purposes of the decision it is assumed that in due time the several parties filed their claims of lien in the form prescribed by law, and that within the statutory period they commenced proceedings in the proper state district court to enforce the liens, and that such suits were consolidated, and later a de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cree was entered adjudging the several claims to be liens upon the property of the mortgagor, and that thereafter the property was duly sold to satisfy the amounts adjudged to be due, at which sale Standrod & Company became the purchaser, as trustee for all concerned. It is further assumed that, while some of these claims were filed with the recorder shortly before and some shortly after the execution and recording of the plaintiff's mortgage, by relation the liens may have all antedated the lien of the mortgage. Although its mortgage was of public record when they were commenced, the mortgagee, the plaintiff here, was not made a party to the lien suits, and its contention now is that therefore not only is it not bound by such foreclosure proceedings, but also that through lapse of time the liens have been lost, and as to it they are no longer of any validity. The precise question therefore is whether or not a lien claimant under the mechanics' lien law of Idaho loses his priority of lien as against a junior mortgagee, by foreclosing his lien without bringing in and making a party to such foreclosure suit the mortgagee, the period provided by the statute in which proceedings may be commenced for the enforcement of the lien, expiring during the pendency of the suit.

[1] A mechanic's lien is wholly the creature of statute, and therefore the question must be referred to the statutory law of the state. In construing such statutes two principles are to be borne in mind: Upon the one hand, they are to be construed liberally, with a view to effecting their object and doing substantial justice; and, upon the other hand, we must take them as we find them. The question of policy is one exclusively for the Legislature, and it is our function only to ascertain, if possible, the intent of the statutes, and then administer them in such a manner as to give effect thereto.

[2] Section 5110 of the Idaho Revised Codes provides generally that every person performing labor upon, or furnishing materials to be used in, the construction of a building, has a lien upon the same for the work done or materials furnished. Section 5114 provides that such liens are preferred to other incumbrances attaching subsequent to the time when the building was commenced or the work done or materials furnished. Section 5115 requires that any person claiming a lien shall, within the period therein prescribed, file his verified claim therefor, containing certain statements of fact, in the office of the county recorder of the county in which the property is situated. Section 5118 is as follows:

"No lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien; or, if a credit be given, then six months after the expiration of such credit; but no lien shall continue in force under this chapter for a longer period than two years from the time the work is completed, or credit given, unless proceedings to enforce the same shall have been commenced."

Section 5124 provides that the general rules of civil procedure prescribed by the Code shall apply in proceedings to foreclose liens. No other provisions are thought to have any material relation to the ques-

tion under consideration, and it is apparent that, of those referred to, section 5118, which is set out in full, is of primary importance.

Admittedly, if no action at all is commenced within the period therein named, the lien lapses and absolutely ceases to exist as to all the world. The contention of the defendant, however, is that, under this section, "proceedings" are "commenced" when a suit to foreclose the lien is brought by the lienor against the owner of the property upon which the lien is claimed. The reasoning is that, in a suit of foreclosure of a mortgage or of a mechanic's lien, the owner of the title to the property is the only indispensable party, and that, while others may be proper parties, their presence is not essential to the validity of the decree which may be entered therein. It is doubtless true that the owner of the property is the only indispensable party to such suit, and in a case where he is the sole defendant the decree is not void; it is effective to the extent of cutting off his rights and estate, and doubtless a deed issued to a purchaser upon a proper sale had under the provisions of such decree operates to transfer his title to the purchaser. But, upon the other hand, it is also undoubtedly the case that incumbancers who are not made parties to such suit are in no wise affected by the decree, and their liens remain unimpaired. If not entirely aside from the point, therefore, it is certainly not conclusive of the question under consideration to say that the decree entered in the consolidated case in the state court, foreclosing the liens of the several claimants, is valid. Likewise a decree would be valid if the suit were prosecuted against but one of several part owners of the property; but in such case what would be the status of the lien as touching the interests of the other part owners? So the plaintiff here, conceding that the decree in the former suit is conclusive upon the parties thereto, contends only that it is in no wise bound thereby, and that, the time having long since elapsed for foreclosing the liens against it, they have therefore ceased to exist, so far as its interest is concerned. And it must be conceded that its rights were not, and could not be, affected by a suit to which it was not a party. The record in that case cannot operate even as *prima facie* evidence against it. If it were assumed that the lien claimants are not prejudiced by the lapse of time, still they could not now bring forward the decree as the measure or evidence of their rights, but as against the plaintiff they would be compelled to make proof *de novo* in support of their claims, the same as if such decree had never been entered. *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. 590, 32 L. Ed. 1001. And it follows that no proceedings were ever commenced to enforce the liens against the interest of this plaintiff.

The real question, therefore, is whether or not the commencement of a proceeding against one party in interest operates to keep alive the lien as to all parties in interest. It will be observed that section 5118 does not purport in terms to prescribe who shall be made parties to the suit, either plaintiff or defendant, and in giving to it a practical construction it is necessary to interpolate a designation or description of the parties. Defendant would make the clause, "unless proceedings be commenced in a proper court," etc., read, "unless pro-

ceedings be commenced in a proper court against the owner of the property," etc., whereas the plaintiff would have it read, "unless proceedings be commenced in a proper court against the person or persons against whose interests the lien is asserted," etc. After the most earnest consideration, I cannot escape the conclusion that this latter view is in substantial accord with the true intent of the Legislature. No lien, it is provided, shall bind the property for a period of more than six months, "unless proceedings be commenced in a proper court within that time to enforce such lien." But proceedings to enforce the lien against what and against whom? The natural answer is, the lien against the right or interest of any one against whose right or interest the lien is claimed or asserted. The proceeding is one to foreclose a right, an estate, an interest, and it should be instituted against all those whose rights, estates, or interests are claimed to be subordinate, and which may therefore be subject to foreclosure. Surely it is not sufficient merely to bring in such parties as will enable the plaintiff to procure some sort of valid decree. As already suggested, a suit by the claimant against one of several co-owners of the property might result in a valid decree; it would establish the lien as against the estate of such defendant, and the ensuing sale would effectually foreclose his right. But by no one, as I understand, is it contended that such a proceeding would operate to keep alive the lien upon the interests of other part owners. If, then, such an interest remains unaffected thereby, why should an exception be made in the case of a mortgagee or the holder of an estate or interest of a different character? The proceeding is to be commenced to enforce the lien, not against a single specified estate or interest, but against any estate, interest, or right which the lienor claims to be adverse and subordinate to his lien, and therefore subject to foreclosure, and the privilege of commencing a proceeding for such a purpose—that is, for any foreclosure or the foreclosure of any right or interest—is, as to such right, interest, or estate, limited to the specified period.

If now we turn from an analysis of the text to a consideration of the reasons for enacting the provision and the objects to be effected thereby, we are impelled to the same conclusion. We must assume that the Legislature acted neither arbitrarily nor capriciously; but, upon the other hand, the reasons must have seemed to it cogent for requiring suit to be commenced in so short a time. Manifestly, the principal, if not the only, purpose of such a limitation, could have been to require that the amount and dignity of the lien be judicially ascertained and established while the transaction out of which it arises is sufficiently recent to render the facts reasonably accessible to all parties concerned. Any dispute touching the amount of the claim, the date of its origin, or the time to which the lien relates, is thus to be conclusively settled while the facts are still fresh and the witnesses are available. Now it cannot be doubted that it is often quite as important to an incumbrancer, who is a stranger to the transactions upon which the claim of lien is based, to have the benefit of this protection, as to the owner himself, who is in a better position to know the facts and to preserve the evidence thereof. Dis-

putes not infrequently arise between mortgagees and lien claimants touching the priority of their respective liens, and inasmuch as the facts establishing the date as of which the mechanic's lien attaches, often rest entirely in parol, and can therefore easily be colored or perverted, it is important that the issue be promptly determined. If we give place to the view urged by the defendant, it could very well happen that after the lapse of years a mortgagor would for the first time learn or have reason to suspect that a title originating in the foreclosure of a mechanic's lien was claimed to be superior to the lien of his mortgage. Not having been made party to the suit, his natural presumption would be that the priority of his mortgage is conceded, and there would be nothing in the transfer of title or change of possession to put him upon his guard.

The argument that the limitation does not apply to a mortgage, because the validity and amount of a mechanic's lien may be established in a suit between the claimant and the owner of the property alone, and that the only issue in which the mortgagee is interested, namely, the date or relative dignity of the lien, may be tried out in a subsequent suit to redeem, in so far as it has any force at all, rests upon an erroneous assumption, which is that the mortgagee has no right to question the amount or validity of the claim of lien. These are issues which the incumbrancer equally with the owner may raise, and for that purpose the mortgagee is entitled to his day in court. If, for instance, a lien were asserted for the value of material which was never furnished for use in a structure covered by the mortgage, it must be clear that the mortgagee may, by showing the fact, defeat the lien or reduce the amount thereof. As was pertinently said in *Davis v. Bartz*, 65 Wash. 395, 118 Pac. 334:

"A mortgagee has something more than a mere right to redeem as against an antecedent lien. He has a right to contest its validity or assail its priority, if the evidence warrants either defense. He is entitled to his day in court upon these matters within the period fixed by the statute."

See, also, *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. 590, 32 L. Ed. 1001; *Davis v. Alvord*, 94 U. S. 545, 24 L. Ed. 283; *Brown v. Cornwell*, 108 Va. 129, 60 S. E. 623; *Eastmore v. Brinkler*, 113 Ga. 637, 39 S. E. 105; *Adams v. Central City Granite Co.*, 154 Mich. 448, 117 N. W. 932, 129 Am. St. Rep. 484; *Federal Trust Co. v. Guigues*, 76 N. J. Eq. 495, 74 Atl. 652.

Without prolonging the discussion, it is to be added only that upon the principal question the decided cases are not entirely in unison. Of those cited for the defendant, *De La Vergue Refrigerating Co. v. Montgomery Brewing Co.*, 57 Fed. 111, 6 C. C. A. 272, and *Monk v. Exposition, etc., Co.*, 111 Va. 121, 68 S. E. 280, it may be conceded, strongly tend to support its position. In *Cornell v. Conine-Eaton Lumber Co.*, 9 Colo. App. 225, 47 Pac. 912, it is made clear that the conclusion reached was the result largely, if not entirely, of the emphasis placed upon a provision of the statute not found in the Idaho law. In the others, namely, *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748, *Gamble v. Voll*, 15 Cal. 507, and *Gaines v. Childers*, 38 Or. 200, 63 Pac. 487, while certain language is used favorable to the defense,

the precise question was not involved, and they are, to say the least, not directly in point. Furthermore, it is to be added, the construction which the defendant places upon the two California cases seems to be out of harmony with the more recent decision in *Frates v. Sears*, 144 Cal. 246, 77 Pac. 905, where the court cites with apparent approval *Falconer v. Cochran*, 68 Minn. 405, 71 N. W. 386, which unquestionably supports the plaintiff's contention here.

Upon the other hand, it is thought that the conclusion we have reached has the unequivocal sanction of the following cases: *Davis v. Bartz*, 65 Wash. 395, 118 Pac. 334; *Deming-Colborn, etc., v. Union Nat., etc.*, 151 Ind. 463, 51 N. E. 936; *Union Nat., etc., v. Helberg*, 152 Ind. 139, 51 N. E. 916; *Stoermer v. People's Savings Bank*, 152 Ind. 104, 52 N. E. 606; *Green v. Sanford*, 34 Neb. 363, 51 N. W. 967; *Ballard v. Thompson*, 40 Neb. 529, 58 N. W. 1133; *Smith v. Hurd*, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661; *Hokanson v. Gunderson*, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354; *Falconer v. Cochran*, 68 Minn. 405, 71 N. W. 386; *Dunphy v. Riddle*, 86 Ill. 22; *Crowl v. Nagle*, 86 Ill. 437; *McGraw v. Bayard*, 96 Ill. 146; *Jaicks v. Sullivan*, 128 Mo. 177, 30 S. W. 890; *Badger L. Co. v. Staley*, 141 Mo. App. 295, 125 S. W. 779. I refrain from collocating other cases, cited as indirectly tending to the same result.

[3] There is, as I understand, no controversy over the amount due upon the Rodgers mortgage, including principal, interest, taxes paid, and attorney's fees; the last item being, according to agreement, \$300. Nor is there any controversy as to the amount of principal and interest due upon the plaintiff's mortgage. No evidence was introduced touching the amount of attorney's fee to be allowed plaintiff, but in the complaint it is alleged that \$1,200 is a reasonable fee, and in the answer it is denied that anything in excess of \$800 would be reasonable, and at the hearing counsel for the plaintiff stated that they would not contend for an amount in excess of \$800. Assuming therefore that the services of counsel rendered in, and in connection with, the suit, are of the reasonable value of \$800, for which the plaintiff is liable to its attorneys, it appears that part of these services have to do with the reformation of the mortgage, which contained an erroneous description, and the other part with the foreclosure strictly speaking. It is apparent, I think, that the plaintiff cannot recover attorney's fees expended for the purpose of reforming the mortgage. I have therefore concluded to allow \$600 for the services in connection with the foreclosure.

Counsel for the plaintiff are directed to prepare decree and to submit the same to opposing counsel before sending it to me for signature.

RICHARDSON et al. v. SOUTHERN IDAHO WATER POWER CO. et al.

(District Court, D. Idaho. November 12, 1913.)

1. REMOVAL OF CAUSES (§ 29*)—DIVERSITY OF CITIZENSHIP—SEVERAL DEFENDANTS—NOMINAL PARTY.

Where plaintiffs and one of the defendants were residents of the same state, the case could not be removed by the other defendants for diverse citizenship unless the resident defendant could be disregarded as a mere nominal party.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 69, 72, 74; Dec. Dig. § 29.*]

2. REMOVAL OF CAUSES (§ 57*)—NONRESIDENT DEFENDANTS—JOINDER—SEPARABLE CONTROVERSY.

Under the rule that all resident defendants to a controversy must join in a petition for removal, a petition by one of such defendants will not confer federal jurisdiction unless the controversy between the plaintiffs and the removing defendant is separable and can be fully determined without the presence of all of the other defendants.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 109; Dec. Dig. § 57.*]

3. REMOVAL OF CAUSES (§ 30*)—DIVERSE CITIZENSHIP—JOINDER OF RESIDENT PARTY—LIABILITY—NOMINAL PARTY.

Decedent, an employé of the G. Company, a foreign corporation in the construction of an electric power house, was killed by an electric shock received while passing over the concrete roof due to the charging of reinforcing steel used in the construction. An action was brought for decedent's death against his employer, the G. Company, and against the latter's superintendent, D., who was of the same citizenship as plaintiffs. D., however, was charged with no acts of misfeasance or of positive wrong contributing to decedent's death, but only with acts amounting to a failure to discharge his duty to his employer, while the G. Company's negligence consisted of its failure to use proper care in providing a safe place for decedent to work. *Held*, that D. owed no duty to decedent in that respect; his obligation being to the G. Company alone, and hence he was a mere nominal party whose joinder did not prevent the G. Company from removing the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 70; Dec. Dig. § 30.*]

4. REMOVAL OF CAUSES (§ 47*)—JOINDER OF DEFENDANTS—STATEMENT OF CAUSE OF ACTION.

The rule that, if the complaint fails as a matter of law to exhibit a cause of action against the resident defendant, his presence may be disregarded and the controversy considered as one wholly between plaintiff and the nonresident defendant, is subject to the qualification that the nature of the cause of action or controversy is what plaintiff in his pleadings has reasonably and in good faith declared it to be, and that plaintiff's right to retain the action in the state court may not be defeated by a mere failure through inadvertence or want of skill perfectly to state the facts constituting the cause of action.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 92; Dec. Dig. § 47.*]

5. REMOVAL OF CAUSES (§ 36*)—CITIZENSHIP—RESIDENT DEFENDANT—JOINDER—CAUSE OF ACTION—PLEADING—GOOD FAITH.

Where, in an action against a resident and a nonresident defendant, it is apparent that the facts have been fully stated, and they furnish no reasonable ground for contending for a liability of the resident defendant, it may be reasonably inferred therefrom that plaintiff was guilty of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bad faith in joining him and that his joinder was to prevent a removal of the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

6. REMOVAL OF CAUSES (§ 59*)—PETITION TO REMOVE—JOINT DEFENDANTS—LIABILITY—JOINDER.

Decedent, an employé of the G. Company, a foreign corporation having a contract to construct a power house for the S. Power Company, also a foreign corporation, having been directed by his superintendent to paint the roof on a higher portion of the power house, suffered an electric shock as he was passing over the concrete roof due to the reinforcing steel having become charged with electricity from certain high tension wires over which defendants other than the G. Company had caused a high voltage current to be transmitted to test certain new machinery, from which shock decedent subsequently died. *Held* that, while the G. Company might be liable for failure to furnish decedent with a safe place to work, the power company might also be liable for failure to use reasonable care to see that its premises on which decedent was an invitee were reasonably safe, and hence, though the ground of liability was not the same, both defendants might be properly joined, so that a petition by the G. Company to remove, in which the power company did not join, could not be sustained.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 112, 113; Dec. Dig. § 59.*]

At Law. Action by Polly May Richardson, widow of Walter W. Richardson, deceased, and another, against the Southern Idaho Water Power Company and others. On petition of defendant James A. Green & Co. for removal, the cause was removed to the federal courts, and plaintiffs moved to remand. Granted.

Frawley & Block and Luther W. Tennyson, all of Boise, Idaho, for plaintiffs.

Booth, Lee, Badger, Rich & Parke, of Salt Lake City, Utah, for defendant Jas. A. Green & Co.

DIETRICH, District Judge. The action was brought to recover damages for the death of Walter W. Richardson, who was killed on February 26, 1913, by an electric shock, received while he was employed as a painter upon the new power house of the Southern Idaho Water Power Company at American Falls, Idaho; it being alleged that the accident was due to the joint negligence of the several defendants. The plaintiffs, who are the heirs of the deceased, and the defendant Day, are residents of the state of Idaho; the other defendants, four corporations, are nonresidents. The action was commenced in the state district court, and upon the petition of the defendant James A. Green & Co. it was removed here. Upon behalf of the removing defendant it is contended that the complaint exhibits a separable controversy between it and the plaintiffs, and it is further alleged that the defendant Day was fraudulently joined as a defendant for the purpose of defeating the jurisdiction of this court. The plaintiffs filed a reply to the petition for removal, traversing the averments of fraudulent joinder; but the issue thus presented was, at the hearing of the motion

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to remand, submitted upon the face of the record, without other evidence.

It is shown by the complaint that the defendant Southern Idaho Water Power Company, being the owner of a power site at American Falls, employed the defendant James A. Green & Co. to construct a power house, and employed the General Electric Company to install therein the necessary machinery for generating and transmitting electric current. It does not appear very clearly just what the relation of the defendant Lynch-Cannon Engineering Company was to the project, but apparently it was associated in some manner with the General Electric Company in installing the machinery. The construction of the power house and the installation of the machinery were carried on concurrently, and, just prior to the accident, Richardson, who was in the employ of James A. Green & Co., was directed by its superintendent, W. F. Day, to paint the roof on the higher portion of the power house. In order to reach this roof it was necessary for him, and he was directed by his employer, to pass over the roof of the lower section of the building, which latter roof was constructed of concrete, reinforced with steel. Coming from an existing generating plant belonging to the power company, and penetrating the roof, and connecting with the machinery inside, were three high-tension wires, over which the defendants, other than Green & Co. and Day, had caused a current of high voltage to be transmitted, for the purpose of testing out the new machinery. These wires were not insulated at the point where they passed through the roof of the power house, and as a consequence, it is claimed, the steel reinforcement of the concrete roof became charged, and when Richardson stepped upon it he received the fatal shock. It is averred that the roof was negligently constructed, and that the wires were negligently carried through the same without insulation, and that all of the defendants knew, or by reasonable care should have known, of its dangerous condition, whereas Richardson was, without any want of care upon his part, ignorant thereof.

[1, 2] The objection to the sufficiency of the removal proceedings to confer jurisdiction assumes two phases, one involving the relation of the responsibility of Green & Co. for the accident to that of its superintendent, Day, and the other involving the relation of the responsibility of Green & Co. to that of the other defendant corporations. In the first place, both the plaintiffs and Day being residents of this district, the case does not present the requisite diversity of citizenship, unless Day can be disregarded as a defendant upon the ground that he is merely a nominal party. But a ruling in favor of the removing defendant upon this point is not in itself sufficient upon which to predicate the right of removal. It being a rule of law that all of the nonresident defendants to a controversy must join in the petition for removal, and the petition here being by Green & Co. alone, even if we disregard the presence of Day, the proceedings do not operate to confer jurisdiction, unless it be held that there is involved a controversy between Green & Co. and the plaintiffs which can be fully determined without the presence not only of Day, but of each of the other defendant corporations. If therefore the complaint exhibits a joint cause

of action against Green & Co. and any other one of the defendants, the motion to remand must be allowed.

[3] While the question is not entirely free from doubt, I am inclined to the view that, were Green & Co. and Day the only parties defendant, the cause should be retained upon the ground that Day is, under the allegations of the amended complaint, only a nominal party. He is charged with no acts of misfeasance, no acts of positive wrong, contributing to Richardson's death, but only with failure to discharge his duty to his employer. Green & Co.'s negligence, if any there be, consists in its failure to use proper care in providing a safe place for Richardson in which to work. Day owed no duty to Richardson in this respect; his obligation was to his employer alone. *Kelly v. Chicago & A. Ry. Co.* (C. C.) 122 Fed. 289; *Marach v. Columbia Box Co.* (C. C.) 179 Fed. 412; *Floyd v. Shenango Furnace Co.* (C. C.) 186 Fed. 539. The complaint therefore fails to state a cause of action against Day.

[4] Now authority is not wanting for the proposition that, if the complaint fails as a matter of law to exhibit a cause of action against the resident defendant, his presence may be disregarded, and the controversy considered as one wholly between the plaintiff and the non-resident defendant. *Nelson v. Hennessey* (C. C.) 33 Fed. 113; *Bryce v. Southern Ry. Co.* (C. C.) 122 Fed. 709; *Floyd v. Shenango Furnace Co.* (C. C.) 186 Fed. 539; *McAllister v. Chesapeake & O. Ry. Co.* (D. C.) 198 Fed. 660. I cannot go so far, however, as to accept this as a rule of universal application. It is well settled that for the purposes of removal the nature of the cause of action or controversy is what the plaintiff has in his pleadings reasonably and in good faith declared it to be. The plaintiff's right to retain the action in the state court should not be defeated by a mere failure, through inadvertence or want of skill, perfectly to state the facts constituting the cause of action, or where there is some doubt whether or not the facts disclosed should, under the rule prevailing in the state court, be held to constitute a cause of action against the resident defendant. In the one case the defect may be remedied by amendment, and in the other the plaintiff has the right to have the question passed upon by the state court. In general it is thought that the sufficiency or insufficiency of the facts stated in the complaint against the resident defendant bears upon the plaintiff's intent in making him a party, and is of evidentiary value only.

[5] In a case where it is apparent that the facts have been fully stated, and they furnish no reasonable ground for contending that the defendant is liable, the conclusion of bad faith in joining him as a defendant may be irresistible. And so under changing circumstances the fact of the insufficiency of the complaint will have different degrees of probative value. The action here was originally brought against Green & Co., the General Electric Company, and the Lynch-Cannon Engineering Company, all foreign corporations, and the American Falls Power Company, a corporation organized under the laws of Idaho. In the amended complaint the Southern Idaho Water Power Company, a foreign corporation, was substituted for the American

Falls Power Company, a domestic corporation, and the name of W. F. Day was entered. Considering these circumstances together with the fact that apparently the facts are fully stated against the defendant Day, and yet they are insufficient to constitute a cause of action against him, it would not be unreasonable to conclude that he is a nominal party only, and was joined merely to prevent removal; but in the view I have taken of the other phase of the case it is unnecessary to fully consider or to decide this point.

[6] As already stated, if a joint cause of action is stated against Green & Co. and any other one of the defendants, the removal proceedings do not give us jurisdiction. Let us consider, therefore, the relation of one of the other defendants, the Southern Idaho Water Power Company, to the accident. The record leaves no doubt that the plaintiffs in good faith, and not without reason to believe that they had a right so to do, joined this company as a codefendant with Green & Co., upon the theory that both are jointly responsible for the death of their intestate. As to Green & Co. and the Water Power Company, therefore, the case is one where there has been an attempt to join in good faith the two "defendants as for a joint liability in tort."

"It is well settled that an action of tort which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one." *Powers v. Chesapeake & O. Ry. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; *Chesapeake & O. Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Alabama Southern Ry. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; *Southern Ry. Co. v. Miller*, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. Ed. 732; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528.

The power company was the proprietor of the premises upon which the deceased was employed, and, while it did not rest under the obligation of a master to provide safe appliances and a safe place to work, still the deceased was there by its invitation, either express or implied, and it owed to him a measure of duty in guarding him against the consequences of hidden dangers. Generally speaking, this obligation is doubtless analogous to that which a proprietor owes to a guest or other person coming upon his premises by invitation. 1 *Thomp. Neg.* § 680; *Stevens v. United Gas Co.*, 73 N. H. 159, 60 Atl. 848, 70 L. R. A. 119; *O'Driscoll v. Faxon*, 156 Mass. 527, 31 N. E. 685. But it is unnecessary to define to a nicety just what the power company's obligation to Richardson was, or to hold that a cause of action has been stated against it with all the fullness that might be desired. It appears that in good faith the plaintiffs assert a claim against it, and that such claim is not without reasonable support, both in fact and law. It is exclusively for the court having jurisdiction of the cause to define with precision the extent of the defendant's duty and to determine whether or not the facts stated constitute a violation thereof.

However, as I understand, the moving defendant does not seriously

contend that a cause of action is not stated against the power company, but it most earnestly urges that the acts of negligence charged against Green & Co. are separate and distinct from those charged against each and all of its codefendants. In the sense that the defendants were not partners or jointly interested, or acting pursuant to some preconceived plan, the contention is doubtless correct; but it does not follow that they cannot be joined in the same action. Accepting as true the facts as they are alleged, the negligence of each and all the defendants was concurrent, and co-operated in causing the accident, and in case of co-operating or concurrent negligence the injured party may, at his option, sue the wrongdoers either jointly or severally.

"If the concurrent or successive negligence of two persons combined together results in an injury to a third person, he may recover damages of either or both." 1 Thomp. Neg. § 75; 23 Cyc. 433; 29 Cyc. 487.

An illuminating discussion may be found in *Graves v. City & Suburban Telegraph Association* (C. C.) 132 Fed. 387. See, also, *Goede v. City of Colorado Springs* (D. C.) 200 Fed. 99; *Railway Co. v. Martin*, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055. To adopt the view contended for by the removing defendant would be equivalent to holding that there has been a misjoinder of parties defendant, and that, in order to recover from them, it would be necessary for the plaintiffs to bring a separate suit against each one. Such should not be the law. According to the showing made by the complaint, each contributed to the accident, the injury was single, and the damage claimed is indivisible and is the result of the concurrent co-operating negligence of all.

In that view it is thought that the motion to remand must be allowed. An order will be entered accordingly.

Ex parte THAW.

(District Court, D. New Hampshire. December 17, 1913.)

No. 86.

1. EXTRADITION (§ 37*)—RIGHT TO BAIL.

A person charged with a misdemeanor only in extradition proceedings is entitled to bail as a matter of absolute right, both under the state and federal laws, unless his enlargement on bail would be a menace to the community.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 34, 44, 48, 50; Dec. Dig. § 37.*]

2. HABEAS CORPUS (§ 117*)—QUESTION OF SANITY—DETERMINATION—RES JUDICATA—REVIEW.

Where petitioner, charged with murder, was acquitted on the ground of insanity, and committed to an insane hospital, not as a criminal, but as a person whose liberty would be a menace to the community, he was a mere ward of the state, entitled to enlargement as soon as his mental condition became such that he was no longer a menace to the public peace and safety; and hence judgments in various habeas corpus proceedings to determine the question of sanity at the time the proceedings were instituted by which he was remanded to custody were not res judi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cata, and did not deprive him of the right to have such question re-examined in a subsequent application for bail in proceedings to extradite him after he had escaped to another state from the asylum.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 119, 120; Dec. Dig. § 117.*]

3. EXTRADITION (§ 37*)—SANITY OF ACCUSED—DETERMINATION—COMMISSION.

Where a person, committed to an insane hospital in New York, escaped therefrom and was arrested in New Hampshire, and extradition proceedings were instituted to return him to New York for alleged conspiracy to obtain his escape from the hospital, which was a misdemeanor, and he applied for bail pending the determination of the right of the demanding state to extradite him, the court had power to appoint an expert commission to determine whether his mental capacity was such at the time of the application that his enlargement on bail would not probably be a menace to the public peace.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 34, 44, 48, 50; Dec. Dig. § 37.*]

Petition of Harry Kendall Thaw for writ of habeas corpus. Commission appointed to determine whether petitioner's enlargement would be likely to menace the public.

See, also, 209 Fed. 56.

Drew, Shurtleff, Morris & Oakes, of Lancaster, N. H., and N. E. Martin, of Concord, N. H., for petitioner.

William T. Jerome, of New York City, and Bernard Jacobs, of Lancaster, N. H., for the State of New York.

ALDRICH, District Judge. Under the petitioner's motion to be admitted to bail, some appropriate method must be devised for inquiring into the public phase of the question presented. If we look to the face of the papers, it will appear that extradition is sought for a crime, declared by a New York statute to be a misdemeanor only, and not because he is an insane person escaping from custody. This reference to the nature of the charge is for the purpose of stating the present question, and not for the purpose of defining the limit or scope of inquiries to be made to specific or general questions which may possibly hereafter arise.

[1] For the purposes of the present question, therefore, we have a situation in which the right of bail exists, and the right is absolute whether viewed under the statutes of New York, the statutes of the state of New Hampshire, or the federal laws, unless liberty of the petitioner under bail would be a menace to the community. It would not be interesting to inquire into the historical oppressions or other reasons which led to making the right of bail absolute in this country, except to say that they were sufficient to warrant imperative declarations in Constitutions and statutes that persons charged with the lesser crimes shall be entitled to bail; and for putting courts and magistrates under the imperative mandate that bail shall be granted except in cases of grave crime.

The right of bail, however, is subject, like all other personal rights, to being influenced by considerations of public policy and public safety. This petitioner was put on trial some years ago charged with a high

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

crime, and was acquitted on the ground of insanity, and he was thereupon, under a New York statute, committed to the Matteawan Hospital for the Insane. As a result of these proceedings, and according to the theory of the subsequent New York cases in respect to them, the petitioner was held at Matteawan, not as a criminal, but as a person whose liberty would be a menace to the community.

[2] There is no pretense in any of the New York cases that there was any authority, under the New York law, for holding him, or suggestion of any purpose on the part of the learned judges dealing with the situation to hold him, beyond the time at which he would cease to be a person whose liberty would be a menace. Indeed, Justice Morschauser says in deciding one of the Thaw habeas corpus cases before him, referring to the verdict, and quoting the statute:

"The court must thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum until he becomes sane."

And again:

"Until he has recovered, or until such time as it shall be reasonably certain that there is no danger of a recurring attack of the delusion, or whatever it may be." *People v. Baker*, 59 Misc. Rep. 359, 361, 365, 110 N. Y. Supp. 848, 849, 852.

Mr. Justice Rich, in discussing the question of the constitutionality of the statute, and, in referring to the nature of Thaw's custody and to the statute (*People ex rel. Peabody v. Chanler*, 133 App. Div. 159, 168, 117 N. Y. Supp. 322, 329), says:

"Both are temporary expedients, exercised for the purpose of discharging the duty the state owes the public of protection from the danger incident to permitting freedom to a person mentally deranged."

And again, referring to the duty of the state:

"It is its duty to protect the public, as well as the unfortunate himself."

And again:

"He could not be detained a moment after establishing his restoration to sanity."

And it is pointed out by the learned justice that such duty is discharged and such authority exercised under the police power of the state. Again, Mr. Justice Jenks, in the course of his opinion in the same case, says:

"Such a commitment is not for the punishment of such a defendant, for there can be no punishment for him who has been acquitted; but it is for protection for the public, made in the exercise of the police power of the state. * * * The commitment can last only so long as the defendant is insane, and he has the right at any time under the law to have his sanity determined upon habeas corpus. * * * The order of commitment settles nothing finally or conclusively against the person committed."

Indeed, Justice Mills, in the course of his opinion, and in reviewing the various proceedings, in New York, involving Thaw's mental condition, said, that the prior hearings, and quasi judicial determinations, did not operate to put the question of present mental condition under

the *res judicata* rule; that Thaw was only to be held until his enlargement would not be a menace to the public; that he was not in a hospital as a criminal to undergo punishment, but there to be treated with consideration and privileges, not incompatible with discipline, with the hope that he might ultimately recover.

This New York decision was in 1909; it assumes that Thaw has the right to bring as many habeas corpus proceedings as he deems necessary to protect his legal rights; and that the question of mental condition is always open under such a proceeding. The reasoning of Justice Mills not only applied to the then present mental condition, but it reaches here and includes this proceeding, and extends into the future, and its force, in effect, ordains, not that Thaw's present condition would be a menace to the public peace and safety, if he were at large, but that the question of mental condition is now open, and that this court, and all future courts, having jurisdiction, and the responsibility of the question of Thaw's mental condition, must deal with it as an open one. *People ex rel. Thaw v. Lamb*, Superintendent of Matteawan State Hospital (Sup.) 118 N. Y. Supp. 388.

There have thus been several hearings in Thaw's case in New York upon habeas corpus; and it is perfectly correct, I think, to say that the theory of them all is that the petitioner was held under the police power of the state during such time as his liberty would be dangerous to himself and to the community, and that they make no suggestion whatever that any finding of fact upon a question relating to danger to himself or the community is conclusive upon any issue of fact involved in any subsequent proceeding. Indeed, it would be quite consistent with the theory of the New York authorities to say that if the petitioner were in Matteawan today, and his case were under hearing in New York upon habeas corpus, the fact of sanity or insanity, of menace or no menace, of danger or no danger, would not be accepted as one concluded by any of the previous findings or adjudications. The petitioner, being thus held under the duty of protection, and under police power exercised as a temporary expedient, escaped, and was subsequently apprehended and taken into custody in this jurisdiction.

Extradition proceedings were instituted before the Governor of New Hampshire. Subsequent to custody by New Hampshire state authority, and before executive action, habeas corpus proceedings were invoked in the United States court by the person escaping from New York protection, and in his petition it was alleged, speaking generally, that he was restrained of his liberty in New Hampshire without due process of law, and in contravention of the Constitution, and he is now held in custody by virtue of the authority of such a proceeding, and, alleging himself to be a citizen of Pennsylvania, he now moves for an order of bail.

The fact of Thaw's escape, not from a custody holding and punishing him as a criminal, but from New York's jurisdiction, guardianship, and protection, and the fact of his having been found here (something for which this jurisdiction is in no way responsible), operate to transfer, temporarily at least, and until the question of the right of extradition is determined, the duty and responsibility of protecting the com-

munity and of protecting the petitioner. This jurisdiction, speaking in the extradition sense, is for the present his asylum, and the duty of determining the question of menace, arising upon the motion to be admitted to bail, rests here, and questions about it must be solved here, and they have reference, as they would if the petitioner were at Matteawan and the questions were to-day raised in the New York courts, to his present mental status; and the question in respect to menace must be accepted here, as it doubtless would be accepted in New York, as an open question, to be solved upon appropriate ascertainments made in an orderly way.

In a recent discussion arising upon this motion for bail, the general questions involved in the extradition proceeding were referred to as questions involving such difficulties that they would necessarily require time, and because the question of time has some bearing upon the question of bail; and the New York habeas corpus cases are referred to in this rescript, not only because they are deemed to be authorities of weight and entitled to deference, but because it has been urged upon me with rather extreme emphasis that they ought to be accepted as conclusive of the question of present menace involved in the broader question of public protection, a view which I do not accept, and a view which I have no reason for thinking the New York courts would accept.

Under the extradition proceeding, the claim of New York is entitled to very favorable consideration, not because of alleged insanity, but because of the charge of a misdemeanor. In this sense it is not perceived that discharging the duty and answering the responsibility of dealing with the question of danger to the public peace and safety while the petitioner is within this jurisdiction, involves any antagonism to the attitude of the New York courts, and it is certain that it involves no lack of deference to the learned New York judges who have dealt with the difficult questions involved in the cases of this petitioner.

The petitions for the writs, and the answer, or replication, of the petitioner raise certain questions, and among them:

First. That, while upon the papers extradition is sought for the crime of conspiracy to escape, the real and substantial purpose is to procure extradition for "re-confinement" in the Matteawan Hospital, and thus that there is bad faith in the extradition sense.

Second. That the case is not an extraditable one, because on the face of the papers New York is seeking to have a person extradited whom it was holding under process directed against an insane person.

Third. That, upon the face of the papers, the commitment and the entire process since the verdict of acquittal is based upon an unconstitutional statute.

It is only necessary to state these questions to show that their proper solution will require considerable time here and elsewhere. Among the points which the answer raises against the constitutionality of the New York statute is that the statute contemplates commitment upon the verdict of the jury, based upon mental condition at the time of the alleged homicide, without a trial upon the question of mental condition

at the subsequent time of commitment, and that the statute does not furnish adequate remedies for relief.

Although the constitutional question involved was determined in New York by a divided court, and although a similar statute, which was sustained by the Supreme Court of the state of Washington, was, in respect to its enforcement, declared against by the United States Circuit Court for the district including the state of Washington, and although the Supreme Court of the United States expressly left the constitutional question in that case open, it would hardly be expected that much should be done here except to hear the parties and have the record put in shape for the Supreme Court, because, ordinarily, a court of first instance, in another jurisdiction, would not assume the responsibility of discharging a petitioner under habeas corpus proceedings upon the ground that a state statute, which had been declared constitutional by the highest court of the state, was not a valid one.

The other position, which relates to the crime described, and to the person described, raises a question whether the papers describe a crime and a person within the meaning of the federal Constitution, and therefore that position is one in respect to which the responsibilities here are somewhat different.

If it be true that there is no case in this country, or in England, where a person has been extradited to a demanding state or country which had adjudged him insane, and was holding him as an insane person, for corrective purposes, at the time of his escape and flight, and if this, therefore, is a case of first instance, it will readily be seen that the question presented is one of possibly far-reaching consequences, and one which would require careful argument by counsel and careful consideration by courts having the responsibility of making proper determinations. The questions involved are stated, not for the purpose of deciding them, or making any intimations about them, but as bearing upon the question of bail, in the sense that they are questions of gravity which will properly require time.

[3] Now, what shall be done with the petitioner pending the decision of these questions? Under the law, whether his right is tested by the New York law, the New Hampshire law, or the federal law, he is entitled to bail as a constitutional or statutory right, unless his liberty under bail would be a menace to the community. The right of liberty, however, like all other rights is subject to limitations or restraints put upon it by the necessities of public peace and well-being. The question, therefore, is one of a public character, and one not necessarily to be determined in an adversary or partisan contest. How shall the question be determined here? It is supposed that here, as well as in New York, such a question might be inquired into upon a hearing before the court, with numberless partisan expert witnesses for and against, and a long drawn out trial. A master might be appointed, with power to listen to the parties and their witnesses at an adversary hearing; or a suitable nonpartisan commission might be created, to make examinations of the petitioner and observe his conduct, and, after all has been done which should be done for the public interests, to report its opinion

on the question whether his being at large under bail would jeopardize the public peace.

I prefer not to appoint a commissioner for an adversary hearing, because such a hearing would involve a revival of undesirable agitation and an unnecessary disturbance of the public mind. I prefer not to hear it myself, upon adversary expert testimony, unless it is my imperative duty to hold such a hearing, and I think it is not, at least at this stage of the proceeding.

This particular question, under a motion for bail, being one of a public character, at least one having a public phase, and relating to the responsibility of protection, and one into which personal rights, aside from the right of the petitioner, enter very little, if at all, I have no doubt of my authority to create a nonpartisan commission to promote a nonpartisan inquiry in the interests of the public security and welfare. I shall, therefore, create a commission in whose judgment I would have more confidence upon a question of this kind than I would in my own based upon a public adversary hearing with partisan experts, and one which I think will better answer all possible public fears.

I think the particular question involved here has reference to the present mental condition in respect to probable danger and hazard, and not to the abstract question of unsoundness or insanity. Practically speaking, a question like the one under consideration could not be determined upon that abstract question, because a person might be insane, and at the same time absolutely helpless and absolutely harmless. It is doubtless because of this view that the theory of the New York courts is, that the question of mental condition should always be treated as an open one, and that Thaw should only be held until his mental condition is such that his liberty would not be dangerous to the public.

The theory of the New York judges being that Thaw was held at Matteawan as a ward of that state, and not as a criminal for purposes of punishment for crime, and, as he stands here in this extradition proceeding charged with a misdemeanor only, and as, under the motion, the right of bail exists here as a constitutional or statutory right as it would in New York, upon a charge of a misdemeanor only, unless his liberty would be dangerous to the public, and as upon that question here, as it would be in New York if he were there charged with a misdemeanor only and moving for bail, his mental condition in respect to present danger is open to inquiry, and upon the situation here, as between him and the jurisdiction of his present asylum, it becomes a question in all essential and substantial respects one of a public character, and there should be such an inquiry into his mental condition as will satisfy all reasonable considerations of the public good.

It is thought, therefore, that a commission comprising competent and reputable nonpartisan experts will be reasonable to the petitioner, and will best satisfy public concern, if any there be.

The commission is not appointed for the purpose of listening to experts upon an adversary hearing, but for making such observations and examinations as it sees fit to make as to Thaw's present condition; and, whether he is insane or not, its opinion is sought upon the single and

sole question whether it is reasonably probable that his liberty under bail would be dangerous to the public peace and safety.

Having made such observations and examinations as the commission sees fit, it will be open to the commission, upon the question of present danger, to give all interested parties leave to appear and offer evidence in respect to acts, if any, since his committal to Matteawan, tending to show personal violence, or any manifestations of a tendency or disposition to do physical harm. This will, of course, include the evidence of Mr. Nute, the marshal, and Mr. Drew, the sheriff, who have had the petitioner in keeping, and who have had recent opportunities to observe his conduct.

It is not intended that there should be a broad trial upon the general question of insanity, because it is not the purpose, in dealing with this particular question of public phase and menace, to embarrass any subsequent litigation where the broad question of insanity might be involved.

The theory of the New York courts being that Thaw's custody at Matteawan was not as punishment for crime, but for recovery of harmless or nondangerous mental poise, and the question here being only one of mental poise in respect to public danger, that question is the only one upon which the opinion of the commission is sought.

It is open to the commission at all times to make application for instructions, or for limitations or enlargements of the scope of the submission.

Let a commission issue to Hon. Frank Sherwin Streeter, of Concord, N. H.; Dr. Morton Prince, of Boston, professor emeritus, Tufts College Medical School, and physician for nervous diseases Boston City Hospital; Dr. George Alder Blumer, physician in chief and superintendent, Butler Hospital for the Insane, at Providence, R. I.; and Dr. Charles Parker Bancroft, superintendent of the New Hampshire State Hospital for the Insane, at Concord, N. H.—with authority and limitations not inconsistent with the suggestions contained in this rescript.

When the report comes in, the parties may have leave to be heard further on the question of bail.

In re THORSON BROS.

(District Court, E. D. Wisconsin. September 29, 1913.)

1. BANKRUPTCY (§ 184*)—VOID TRANSFERS—STATE LAWS—RULES OF PROPERTY.

The rule in Wisconsin, that chattel mortgages upon changeable stocks of merchandise of which the mortgagor is in possession with liberty to sell in the ordinary course of business and apply the proceeds to his own use are fraudulent and void, must be given effect in the bankruptcy court as a rule of property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
209 F.—61

2. CHATTEL MORTGAGES (§ 190*)—RETENTION OF POSSESSION BY MORTGAGOR—SALES.

Under St. Wis. 1898, § 2316b, providing that the mortgagor of any stock of goods or stock in trade of which he is in possession, and from which he is permitted to make sales and apply the proceeds upon the indebtedness, shall file a statement in writing of the aggregate amount of the sales, the amount applied on the mortgage debt, and the total valuation of the stock added every 60 days, that such mortgage shall cover and become a valid lien upon the property added to the stock, that if any mortgagor shall fail to file such statement the mortgage, as between the parties, shall be immediately due and payable, and shall cease to be a lien at the expiration of 15 days from the time fixed for such filing except as between the parties to afford the parties protection the mortgagor must not only be permitted to make sales and apply the proceeds on the indebtedness, but the actual application thereof must be maintained throughout, and where the mortgagor is permitted to remain in possession, sell the stock and apply the proceeds to his own use, the filing of the statements do not protect the parties, and the mortgage is fraudulent and void as to other creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 407-416; Dec. Dig. § 190.*]

In Bankruptcy. Proceeding against Thorson Bros. On a petition by E. C. LEEAN, attacking certain chattel mortgages as fraudulent and void, the referee held such mortgages void, and the Bank of Scandinavia petitions for a review. Affirmed.

The bankrupts, merchants, on different dates, executed to the respondent bank three several mortgages covering their stock of general merchandise contained in a store conducted by them to secure indebtedness aggregating \$4,875. Thereupon they continued the conduct of their business, selling from such stock and buying new goods, in the usual course. None of the proceeds, except a small portion used to pay interest, was applied on the mortgage debt. Every 60 days, the mortgagors signed and delivered to the cashier of respondent statements showing gross purchases added to and sales from, the mortgaged stock; and in each instance certified to the continued existence of the full amount of the debts secured by the several mortgages—in other words, negatived the application of proceeds of sale toward the payment of the debts. These statements were not "verified." They were filed by the cashier with the village clerk in whose office the mortgages were on file.

Bankruptcy having ensued, the trustee attacks the mortgages as fraudulent and void. By stipulation between the parties the stock of goods was sold, and their respective claims are now asserted against the proceeds.

The referee held the mortgages void, except as to furniture and fixtures and adjudged the trustee entitled to the fund. The respondent bank's claims are allowed as nonpreferred. It petitions for a review of the proceedings.

Browne, Browne & Smith, of Waupaca, Wis., for mortgagees.

H. J. Severson, of Iola, Wis., for trustee.

GEIGER, District Judge (after stating the facts as above). [1] The facts are conceded. Prior to 1887, under the law of Wisconsin—to which effect must be given as a rule of property—chattel mortgages upon changeable stocks of merchandise, the mortgagor being in possession, at liberty to sell in the ordinary course of business, and to apply the proceeds to his own use, were fraudulent and void. *Place v. Langworthy*, 13 Wis. 629, 80 Am. Dec. 758; *Steinart v. Deuster*,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

23 Wis. 136; *Blakeslee v. Rossman*, 43 Wis. 116; *Single v. Phelps*, 20 Wis. 398; *Anderson v. Patterson*, 64 Wis. 557, 25 N. W. 541.

[2] The last-cited case was decided in 1885. Chapter 241 of the Laws of 1887 (now section 2316b, Statutes 1898 of Wisconsin) provides:

"The mortgagor of any stock of goods or stock in trade of which he is in possession and from which he is permitted to make sales and apply the proceeds thereof upon the indebtedness existing between him and the mortgagee shall file a statement in writing of the aggregate amount of the sales made therefrom, the amount applied on the mortgage debt and the total valuation of the stock added every sixty days from the date of such mortgage with the town, city or village clerk in whose office said mortgage is filed. Such mortgage shall cover and be a valid lien upon the property added to such stock after its execution for the amount of the indebtedness remaining unpaid thereon. Such statement shall be verified by the mortgagor, his agent or attorney as being a true and correct statement of all sales made from the stock of mortgaged goods, the value of the additions made to the original stock since the date of the mortgage or the date of the last verified statement so filed and the amount paid on the mortgage debt since the execution of the mortgage or the filing of such statement. If any mortgagor shall fail to file the statement herein required within the time prescribed the mortgage, as between the parties thereto, shall be immediately due and payable, and at the expiration of fifteen days from the time fixed for the filing of such statement shall cease to be a lien upon such stock of goods or stock in trade except as between the mortgagor and mortgagee."

This section doubtless was aimed to provide some regulative or remedial measures in respect of mortgages on merchandise stocks. It seems to be limited to recognizing the validity of such instruments if these conditions concur and are complied with: (1) That the mortgagee may remain in possession and sell the stock. (2) That the proceeds of sale be applied toward the extinction of the mortgage debt. (3) That the mortgage lien attach to after-acquired goods. (4) That the sales, accretions, or substitution of stocks, and the application of proceeds of sale be evidenced by filing verified statements as prescribed.

It may be noted that, prior to the enactment of this statute, the adjudications were unequivocally to the effect that mortgages, whereunder the mortgagor was at liberty to make sales and apply the proceeds to his own use, were "fraudulent and void in law as against creditors; absolutely void as to them, beyond all aid from extrinsic facts." *Blakeslee v. Rossman*, *supra*. And in *Anderson v. Patterson*, it was said:

"That the inevitable tendency and effect of a mortgage, fair and valid on its face, but void because of some extrinsic or secret infirmity, must be to hinder and delay the creditors of the mortgagor in the collection of their debts, is perfectly obvious, and the parties thereto cannot be heard to say that they did not intend that such effect should result from their actions. * * * When property is mortgaged to one creditor to secure his demand, good faith to other creditors of the mortgagor requires that, if the same be sold, the proceeds shall be applied to the payment of the mortgage debt."

It is urged on behalf of the respondent bank that the statute, quoted, was passed to relieve the mortgagor from this rule of constructive and conclusive fraud; that an attack upon mortgages of merchandise

stock, like those before us, must be now supported by proof of actual fraud; that the trustee's case fails, because the proof here undisputedly shows the debt to be honest; that the proceeds of sale were "economically used in payment of their living expenses and in payment for merchandise and replenishing their stock—in short, because the referee expressly found:

"That the mortgages were given and received by the parties in good faith, with no actual intent to hinder, delay, or defraud creditors."

That the original position of the Supreme Court of Wisconsin has not been shaken by the enactment of this section is shown by the later cases of *Baumbach v. Hobkirk*, 104 Wis. 488, 80 N. W. 740; *Bank of Kaukauna v. Joannes*, 98 Wis. 321, 73 N. W. 997; *Franzke v. Hitchon*, 105 Wis. 11, 80 N. W. 931. True, as pointed out by counsel, in none of these cases was the scope or application of the statute expressly considered or determined; in fact, it was not referred to. But, the statute having been enacted many years ago, it is fair to presume that it was considered to be limited to the cases therein specified, viz., to those cases where a mortgagor of a stock of merchandise is in possession and "is permitted to make sales and apply the proceeds thereof upon the mortgage indebtedness"; and that it has no application whatever to a situation where, as here, the mortgagor is permitted to make sales and not apply the proceeds to such debt. It is necessary in order that parties, mortgagor and mortgagee, be afforded protection under this statute, not only that the mortgagor be permitted to make the sales and apply the proceeds as indicated, but that the actual application be maintained throughout, evidenced by filing statements which shall show such application whenever sales have been made. In other words, the parties to the mortgage must, at their peril, at all times maintain and be able to show, as prescribed, that the relation is one within the scope of the statute and not within the other rule which is equally in force. Therefore, when the respondent mortgagee permitted the mortgagor to remain in possession, sell the stock, and use the proceeds as it is conceded they were used, the relation was other than the one which is permitted and regulated by the section in question; and the statements filed, instead of protecting the parties, are quite conclusive evidence against them, no matter what the original intention may have been.

The final clause:

"If any mortgagor shall fail to file the statement herein required within the time prescribed, the mortgage, as between the parties thereto, shall immediately be due and payable and at the expiration of fifteen days from the time fixed for the filing of such statement shall cease to be a lien upon such stock of goods, or stock in trade except as between the mortgagor and mortgagee"

—supports this position. Under this, even though the proceeds are applied, the failure to file the statement renders the mortgage void. It would be incongruous to permit the parties to have the protection of the statute by filing statements, which disclose that the mortgagor

was selling the property and not applying the proceeds. The only purpose of the statute seems to be to regulate and protect the particular mortgages embraced within its terms.

The referee's decision in the matter is therefore affirmed.

THE ASHLEY.

(District Court, E. D. New York. December 6, 1913.)

1. COLLISION (§ 8*)—NAVIGATION RULES—EAST RIVER.

The East River is a narrow channel, but boats navigating therein are not bound by the so-called narrow channel rule, but are required to observe the New York statute by keeping as nearly as possible in the center of the river, at the same time observing the general rules as to passing port to port when meeting and that in crossing the burden is on the one having the other on her starboard hand.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 7; Dec. Dig. § 8.*]

2. COLLISION (§ 95*)—TUGS AND TOWS NAVIGATING EAST RIVER—FAULT.

The tug Volunteer, with a sand scow on each side, was passing down and diagonally across East River on an ebb tide to the entrance to Wallabout Channel, when on nearing the Brooklyn shore a car float alongside the tug Ashley came into collision with and injured one of the scows. The Ashley was coming up near the Manhattan shore, but turned across in time to intercept the Volunteer, so that at the time of the collision they were on crossing courses. The Volunteer gave a two-whistle signal indicating her intention to cross ahead, which was apparently misunderstood. *Held* that, as the Ashley had previously been on no certain course, the Volunteer was not the burdened vessel under the starboard hand rule, but was within her rights in keeping her course, and that the Ashley was in fault for so changing her course as to bring about the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*]

In Admiralty. Suit for collision by the Phoenix Sand & Gravel Company, as owner of the scow Cherry, against the steam tug Ashley. Decree for libellant.

Foley & Martin, of New York City (William J. Martin, of New York City, of counsel), for libellant.

James J. Macklin, of New York City, for claimant.

CHATFIELD, District Judge. On the evening of June 20, 1911, at about 9 o'clock, the tug Volunteer was proceeding down the East River with two loaded sand scows, the Cherry and Gelt, alongside. The tug was between the sand scows, which were drawn together slightly toward the bow and were about 100 feet in length, while the tug was some 78 feet long. A third scow had been left at Fourteenth street, Manhattan, and the Volunteer proceeded with the ebb tide down the East River until she passed the point marked "10 St. Buoy," at a distance of some 200 or 300 feet to the eastward or toward Brooklyn. She then took a course toward the Brooklyn shore in such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a direction as to carry her under the Williamsburgh Bridge, about one-third of the way out from the Brooklyn pier. The sand scows were intended to be taken into the Wallabout Channel immediately below the ferry slips which are just to the south of the Williamsburgh Bridge on the Brooklyn side.

It was about 9 o'clock in the evening, and the night was pleasant and clear, although there was no moon. The ebb tide had been running for several hours, and the testimony shows that a boat would be carried by the tide at the rate of about $2\frac{1}{2}$ miles an hour. The change in direction of the East River at the Navy Yard and the large opening caused by the Navy Yard (at the upper or northern side of which lies the entrance to the Wallabout Channel where the sand scows were bound) form an eddy which sends a current upstream along the Broadway ferry slips to a point well up toward the Williamsburgh Bridge. The master of the Volunteer testifies that this flood eddy extends several blocks above the Williamsburgh Bridge, along shore; but that particular point is immaterial in this case, for the Volunteer was out in the stream far enough to avoid the eddy until it reached substantially the point of collision. The existence of this eddy, however, makes it necessary for a boat coming down the East River with the ebb tide to go into the Wallabout or Navy Yard channels in a direction generally against the eddy tide, and thus to avoid being whirled around to such an extent as to make it impossible to reach the entrance to the Wallabout.

It is evident that a boat, proceeding from near the 10 St. buoy to the Broadway Ferry slips on the Brooklyn side would continuously show her green light to all boats further down the East River and coming up against the ebb tide.

The chart also shows that any boat coming up the East River, until it reached a point straight out from the Navy Yard, would show the red light to a boat coming down the river and not yet having passed the Williamsburgh Bridge.

A New York Central tug with a tow was coming down the river abreast of the Volunteer at about the 10 St. buoy, which she left to starboard some 50 feet. She overtook the Volunteer near what is known as the Third street reef, and passed the Volunteer some 200 feet to the west or to starboard.

As the Volunteer had come out from the New York shore and had then been further west than the New York Central tug, it is evident that in effect the Volunteer had crossed the New York Central's bows, and there is testimony on the part of the New York Central tug that a two-whistle signal was given by the Volunteer to the New York Central tow to indicate that the Volunteer was going to proceed toward Brooklyn. At any rate, the New York Central tow passed down to the west of the Volunteer, and, in order to obtain the benefit of the ebb tide, held near the center of the river until opposite Corlaers Hook, where she passed the Ashley, a powerful Jersey Central Railroad tug, having on her port side a car float loaded with 19 freight cars. The car float was some 280 feet in length and extended a considerable distance (about 130 feet) beyond the bow of the Ashley.

The Ashley had been coming up the New York side of the river to Corlaers Hook to take advantage of the protection of the shore against the ebb tide, and at this point made a turn toward Brooklyn. This turn is located by all of the witnesses in the case as having occurred nearly opposite, that is, straight out, from the upper pier on the Cob Dock in the Navy Yard, or nearly opposite the Corlaers Hook Park.

It is apparent from the testimony of all the witnesses that the turn was executed in such a way as to carry the Ashley and her float sharply across the river and to a point 400 or 500 feet from the continuation of the Brooklyn shore line down past the Navy Yard. The statements of the witnesses generally, as shown in the testimony, are based upon recollection some time after the accident. The testimony of the men from the New York Central tug is to the effect that the matter was fixed in their minds by conversations had the next morning, to the effect that a collision had occurred. They are positive as to what they saw, and are positive in stating that the Ashley passed to the stern of the New York Central tow, having come up on the New York side of that tow, and that no other railroad tug was in the vicinity. This accords with the testimony of the captain of the Volunteer, but is contradicted by the captain of the Ashley and his crew, who think that the only railroad tow in the neighborhood was that of a New Haven tug, which went down between them and the New York shore, and which forced them well out into the river towards Brooklyn, just opposite the Navy Yard.

The demeanor of the witnesses would indicate that each party was trying to be accurate in this respect, but the recollection of the New York Central's witnesses seems to be more trustworthy, and no trace of any New Haven tug in the river that night has been found. Testimony as to the situation, circumstances, and results of the collision is practically not in contradiction. The Volunteer, having blown a whistle to the Ashley, then blew an alarm, which it followed by another whistle and another alarm. The float of the Ashley coming in collision with the scow Cherry, caused some damage upon the forward starboard corner of the Cherry, while the overhang of the float plowed along the deck of the Cherry, burying itself in the sand and breaking down the bulkhead. The lines from the Cherry to the Volunteer were broken. Both the Ashley and the Volunteer reversed at or near the time of collision and moved apart, but the Cherry remained upon the bow of the car float, from which it was removed by the tug Gallagher, taken into the Wallabout, and placed near the dock, but in such condition as to list and leaking that it soon capsized and the load of sand was lost. The position of the collision seems to have been some 300 feet out from the lowest rack of the Broadway ferry. The exact distance from the shore makes no great difference, as the occurrence was, in any event, so far over toward the Brooklyn shore that the respective movements and rights of the boats control liability, and is affected by the distance from shore only in so far as it appears that the Ashley could not pass in shore nor proceed further straight ahead.

The Ashley testifies that the whistle signal from the Volunteer was

a one-whistle signal, indicating that it was to pass to port, and that the Ashley answered by a one-whistle signal, which was followed by an alarm from the Volunteer. The Volunteer testifies that it gave two signals of two whistles and also two alarms, indicating by the two-whistle signals that it was to pass across the Ashley's bow and pass starboard to starboard. The captain of the Ashley testifies that he saw the Volunteer when she was up the river under or above the Williamsburgh Bridge and as she emerged from behind the railroad tow, which he claims was that of a New Haven tug, but which appears to be the New York Central tow. The captain of the Ashley claims that he saw both lights of the Volunteer until just before the collision, when the lights changed to green only. This is manifestly impossible. The captain of the Volunteer testifies that he saw only the red light of the Ashley, until just before the collision, when he saw a reflection from the green light which immediately disappeared.

Whatever were the movements of the Volunteer, it is evident that she would see the red light of the Ashley practically up to the point of collision, and the question remains therefore, upon the facts, which was the burdened vessel, and whether, upon the courses and signals indicated, the Volunteer had the right to proceed toward Brooklyn in an attempt to enter the Wallabout across the Ashley's bows, or whether she was bound to hold her course down the East River and to pass the Ashley port to port, thus going under the Ashley's stern into the Wallabout, with the possible result of not being able to make the entrance to the channel.

It would seem from the testimony that the Volunteer must have given, as her witnesses testify, a two-whistle signal. The New York Central tug heard a two-whistle signal which they assumed was given to them, and they also testify that another two-whistle signal was given just before the alarm.

In view of the position of the boats and the intentions of the Volunteer, it is evident that a one-whistle signal could have been given to the Ashley only by mistake, for, at the time of giving such signal, the New York Central tug had not passed down the river sufficiently to either force the Ashley across to the Brooklyn shore, nor to bring the Ashley to a position where her turn toward Brooklyn could have already occurred, to a sufficient extent to prevent the Volunteer from crossing to the Brooklyn side. By the time that the New York Central tug was alongside the Ashley, the Volunteer was well over on the Brooklyn side, and a one-whistle signal to the Ashley seems impossible.

It must be held, therefore, that the Ashley either attempted to force the Volunteer to hold a course out in the river and allow the Ashley to proceed up the Brooklyn side, and thus to have changed the whistle signal—that is, crossed signals with the Volunteer—or else that the Ashley mistook the Volunteer's whistle and treated it as a one-whistle signal. The Ashley therefore was responsible for the collision, unless the Volunteer was bound to keep out of her way.

[1] The East River is a narrow channel, but it has been repeatedly held that boats navigating therein are not bound by the so-called narrow

channel rule and should respect the New York statute requiring navigation in the center of the river. *The Bay State* (D. C.) 153 Fed. 973; *The Oregon* (D. C.) 180 Fed. 299; *The No. 4*, 161 Fed. 847, 88 C. C. A. 665; *The Somerville*, 162 Fed. 681, 89 C. C. A. 473. But it has also been held many times, and it is evident that if two boats are meeting they are required to pass port to port under the general rule, or that if two boats are upon crossing courses the burden is upon the boat which has the other upon her starboard hand. The narrow channel rule is nothing more nor less in such a case than an application of the port to port rule in connection with the New York state statute. When, however, the presence of an eddy or a strong set of tide and the formation of the river makes it necessary to treat the channel as located upon one shore or the other all the way, by general custom, boats follow the line of the shore and do not take the middle of the river. In such case they are still bound by the general rules of navigation, and although neither of them may be considered a wrongdoer, and may be entitled to the protection of the obligatory rules of conduct from boats in the neighborhood, nevertheless any boat invoking a general rule of navigation as an excuse for its own acts or its allegations of fault must show that the rule is applicable.

[2] The claimant herein contends strongly that, because the *Ashley* was coming up the river in such a way as to show her red light while the *Volunteer* was coming down and crossing the river in such a position as to show her green light, the *Volunteer* had the *Ashley* upon her starboard hand when both boats were upon crossing courses, and that therefore the starboard hand rule required the *Volunteer* to keep out of the way of the *Ashley*, so long as the *Ashley* held her course and distance.

If the case were tested from these positions of the boats alone, there might be reason for the contention. But it appears that the *Ashley* was holding different courses at different times and yet throughout all of the times showing her red light. She came up the river from the Brooklyn Bridge by the New York shore. She crossed over to Brooklyn around or under the stern of another tow. She then proceeded toward Brooklyn in a general direction such as to head off the *Volunteer*. During all of this time her course was up the river to a point some two miles beyond. It cannot be said that she was holding any particular course with reference to the movements of the *Volunteer*. But, again, the *Volunteer*, under the starboard hand rule, would have been upon a crossing course only if those courses would intersect. According to the testimony of all the witnesses, the *Volunteer* would have passed ahead of the *Ashley* and gone down the Brooklyn side or into the Wallabout channel, several hundred feet from the *Ashley's* course at the time the first signal was given by the *Volunteer*. If therefore this was a signal indicating that the *Volunteer* would pass to starboard of the *Ashley*, and if the *Ashley* was then on a course generally up the river and had not reached a point where she would seem to be crossing the *Volunteer's* bow, then the *Ashley* was at fault for assuming that, by adoption of a course to head off the

Volunteer, she could make herself the starboard hand vessel and cross signals.

As has been said, the evidence that the Volunteer gave a one-whistle signal is not persuasive, and the case would seem to indicate that the Ashley, thinking to take the Brooklyn side of the river and not observing the New York statute by remaining in the center of the channel, but assuming that under custom and local conditions she could take advantage of the slacker tide and go up along the Brooklyn shore, mistakenly assumed that she had the right to force the Volunteer to pass her to port, and insisted on so doing until it was too late to avoid the collision.

The testimony shows that the Volunteer was backing before the collision and that her headway was considerably stopped. The Ashley must have been going at considerable speed, and, although there is some dispute as to the angle and the exact point at which the boat struck the scow, nevertheless the general testimony is that the bow of the car float, which projected over 100 feet beyond the Ashley, went into the forward starboard bow of the sand scow, and that the Ashley still had momentum enough to force the float partly through the scow and under her load. This would indicate that the Ashley was under greater way than the scow and bears against the contention of the Ashley that the Volunteer sheered across the course of the Ashley and floated down upon her thus causing a collision.

The libelant may have a decree.

THE C. S. HOLMES.

(District Court, W. D. Washington, N. D. Dec. 31, 1913.)

No. 2,539.

1. SEAMEN (§ 29*)—ACTION FOR INJURIES—LIABILITY OF VESSEL.

The owner of a vessel which was seaworthy and properly equipped and manned was under no duty to see that needed assistance was given to a seaman in the performance of his duties by other members of the crew, and a suit in rem will not lie against the vessel for an injury to the seaman because of the master's negligence in such respect.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

2. SEAMEN (§ 29*)—INJURY IN SERVICE—LIABILITY OF OWNER.

It is the duty of the owner of a vessel to furnish an injured seaman with proper medical care, and the master is his representative with respect to such duty, for whose negligence the owner is liable; but he is not liable for the negligence of a physician employed by the master provided the master exercised ordinary and reasonable care in the selection.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

3. SEAMEN (§ 29*)—INJURY IN SERVICE—LIABILITY OF OWNER.

The owner of a vessel is liable for the expenses of effecting the cure of a seaman injured in his employ so far as the cure is possible by ordinary medical means, and this liability exists even where the owner has

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not been negligent and may be enforced in rem, but any liability beyond that can only be based on negligence.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 186, 188–194; Dec. Dig. § 29.*]

In Admiralty. Suit by Gust Fondahn against the schooner *C. S. Holmes*. On exceptions to libel. Exceptions sustained.

Daniel Landon, of Seattle, Wash., for libelant.

Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for claimant.

NETERER, District Judge. The libelant seeks damages for personal injuries sustained on board the schooner *C. S. Holmes*, and for negligence of the master in furnishing medical treatment thereafter. The libel alleges that in December, 1912, libelant signed articles as an able seaman for a voyage from San Francisco, Cal., to Everett, Wash., and return, and that:

“While on said voyage * * * on the 3d day of January, 1913, at about the hour of 8 o'clock in the afternoon while the said schooner was being towed near Cape Flattery, the captain of said schooner gave orders for the libelant to go forward and let go the towline or sprig; that in pursuance of said order the libelant went forward and commenced to release the wire towline or sprig reaching from said schooner to the tugboat in the presence of the captain and the rest of the crew; that in order to release the same it became necessary for the libelant to have assistance; that the captain with the rest of the crew standing near by negligently failed to insist upon giving libelant assistance; that libelant alone was unable to prevent said towline or sprig from springing, and the end of the same struck libelant with great force and violence, causing a compound fracture of the right arm and injuring his back.”

Then follow the allegations of negligence in the furnishing of medical treatment, which will be discussed later.

[1] The claimant filed exceptions to the libel, the second paragraph of which reads as follows:

“That this action, instituted by a seaman in rem against a vessel to recover damages for personal injuries sustained by him aboard a seaworthy vessel at sea, is not an admiralty and maritime cause of action and is not within the jurisdiction of this honorable court.”

It will be seen that the negligence alleged is that:

“The captain with the rest of the crew negligently failed to insist upon giving libelant assistance.”

The issue raised by the exception is whether for such negligence the vessel is liable.

The members of the crew, “except perhaps the master,” must be considered fellow servants. *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760. Is the master a fellow servant of the other members of the crew?

“To put it most favorably for the libelant, the question was reserved in *The Osceola*, 189 U. S. 158 [23 Sup. Ct. 483, 47 L. Ed. 760].” *The Bunker Hill* (D. C.) 198 Fed. 587.

In *The Governor Ames* (D. C.) 55 Fed. 327, Judge Hanford held that there could be no recovery for the negligence of the officers of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

vessel, where the owner had furnished proper equipment, and a sufficient crew, and many authorities may be cited in support of such a holding. 25 Am. & Eng. Enc. of Law; *The City of Alexandria* (D. C.) 17 Fed. 390; *The Bunker Hill* (D. C.) 198 Fed. 587.

The true rule is that stated by Judge Ross in *Olson v. Oregon Coal & Navigation Co.*, 104 Fed. 574, 576, 44 C. C. A. 51, 53:

"It is undoubtedly true that the master represents the owner in respect to the personal duties and obligations which the latter owes to seamen, such, for instance, as the maintenance of the ship and her apparel in a safe and seaworthy condition, procuring repairs and supplies, the supplying of the crew with sufficient food and with medical attendance and care in case of injury and sickness, and for his neglect in any of those particulars the owner is liable."

In that case the owner was held not liable for the negligence of the master in leaving a hatch open, on the ground:

"That it was no more than negligence in the ordinary navigation of the ship, in which common employment all of the members of the ship's company were engaged."

In this case, the negligence being predicated upon the fact that the captain and the rest of the crew were standing near by and negligently failed to insist upon giving libelant assistance, it must be conceded for the purpose of the allegation that the owners had furnished a sufficient crew. Having furnished such a crew, were the owners bound to see, as various exigencies arose in the navigation of the ship requiring that assistance be given to one of the members of the crew, that the other members should go to his aid? To do so would make each member of the crew the personal representative of the owner, and overthrow every decision that has ever been written on the question. It not being the duty of the owner to see that such assistance was given libelant, the master cannot be said to have been the representative of the owner with respect to such duty, and for his negligence in such respect the vessel cannot be proceeded against in rem.

The allegations of the complaint in reference to negligence in furnishing medical treatment are as follows:

"That at the time libelant was injured as aforesaid the captain of said schooner ordered the same to turn back to Port Angeles, at which port she arrived at 3 o'clock the next morning; that, before landing at Port Angeles, this libelant requested the captain to be taken to Port Townsend; that said captain informed libelant that it would be too much expense to said schooner and that a marine doctor was located at Port Angeles; that, after waiting some four hours at Port Angeles on board of said ship, libelant, against his wish, was taken ashore, where the captain took him to a private doctor and represented to said doctor that he would be paid for his services through the marine hospital; that said doctor took charge of the case, and immediately thereafter the captain of said schooner informed the doctor that he (the libelant) was in the doctor's hands and off his own; that, about 11 o'clock of that same forenoon, this libelant was chloroformed by the doctor, and an attempt was made to set the bones broken; that by reason of the carelessness and negligence of the captain of said ship in turning this libelant, against his desire, over to an inexperienced, incompetent, and unwilling doctor, the work was done in an unskillful and wholly improper manner.

"That after remaining at Port Angeles three days the said doctor requested this libelant to put on his clothes, informing him that the representations, made by the captain to the doctor, regarding his pay, were false, and he

had better go to Port Townsend to the marine hospital; that libelant was unable to move or be moved, and after remaining there several days longer without proper attention he finally went to Port Townsend to the marine hospital; that at the time of arriving at Port Townsend, through the negligence and incompetency of said doctor at Port Angeles, the libelant's arm had become swollen and sore and he was threatened with blood poison; that it was thought impossible by the doctor in charge at said marine hospital to set said bones before treatment was had to reduce the soreness and swelling; that after several days an attempt was made by the physicians and surgeons in said marine hospital at Port Townsend to set the bones, but, owing to the fact that the ends had become infected and lost their power to knit, the work was unsuccessful, and as a result of the treatment received as aforesaid the bones so broken will never knit together, but will be a source of annoyance, pain, and suffering to libelant, and said arm will always be entirely useless; that during all the times herein mentioned the libelant has suffered excruciating pain, humiliation, and inconvenience, at times despairing of his life."

The fourth paragraph of the exceptions is as follows:

"That libelant has no cause of action against the vessel for damages alleged to have resulted from improper treatment of personal injuries sustained as alleged in the libel, by a physician at a port to which the vessel put back to obtain medical and surgical attendance for him, as alleged in the libel."

[2] It is the duty of the owner to furnish an injured seaman with proper medical care, and the master represents the owner with respect to this duty, and the owner is liable for the negligence of the master in that regard. *The Iroquois*, 194 U. S. 241, 24 Sup. Ct. 640, 48 L. Ed. 955; *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; *The Fullerton*, 167 Fed. 1, 92 C. C. A. 463; *The Sarnia* (D. C.) 137 Fed. 952; *The Troop* (D. C.) 118 Fed. 769; *Id.*, 128 Fed. 857, 63 C. C. A. 584; *The Scotland* (D. C.) 42 Fed. 925; *The M. E. Luckenbach* (D. C.) 174 Fed. 265. Where the master employs a physician, is the owner liable in all events for the negligence of that physician, or is he liable only where the master fails to exercise reasonable care in selecting the physician? No case in admiralty which decides that question has been found; it must be determined upon reason and analogy, having regard to the nature and character of the duty imposed.

The duty of an owner to select a competent physician is analogous to the duty of an employer to select competent fellow servants; both are duties imposed by law. It is well settled that the master is held only to the exercise of ordinary and reasonable care in the employment of a fellow servant, and is not an insurer of the competency of such servant. 26 Cyc. 1295.

The owner's duty is also analogous to the duty of an employer to furnish medical attendance in extraordinary cases when it is imperatively demanded or to that of one who collects fees from his employés and undertakes to furnish medical treatment, without making a profit therefrom.

"The master who conducts a hospital for the use of his injured employés, not for the purposes of gain but for charitable purposes merely, is not liable to a servant for injuries caused by the negligence of the physicians or attendants, unless reasonable care was not used in their selection. This is true although the expenses of running the hospital are provided for out of moneys retained from the monthly wages of a company's employés; there

being, however, no intention on the part of the company to make any profit. But where in consideration of a reduction in the rate of wages of all the men employed, and the consequent profit to be made by the company, the latter binds itself to furnish medical treatment to such of them as may get hurt or become sick while in its service, the company should bear the loss of improper treatment, since the law implies in such cases an undertaking to give proper treatment." 20 Am. & Eng. Encyc. of Law, 54.

"It is well settled that a master has performed his entire duty in respect to furnishing medical attention to a servant injured while at work, when he employs a person of ordinary competency and skill in the profession; and, having done so, he cannot be made liable for the carelessness or negligence of the person employed in the performance of his duties. So too where a hospital is maintained by a master for the sole purpose of relieving injured servants, without any intention of profit to himself, he is not liable to his servants for the malpractice of the physician employed, if ordinary care was exercised in selecting him, although the hospital is supported by the contributions of the servants." 26 Cyc. 1082.

The owner's duty cannot be analogous to the obligation of the employer who makes a profit in furnishing medical attendance, for the shipowner makes no profit, and is not required to keep a physician on board the vessel. The duty is one which arises out of and is governed by the circumstances of each particular case, and it is only for the negligence of the owner himself, or the owner's representative, the master, that the vessel can be held. The master is not negligent when he exercises reasonable care in selecting and employs a regularly licensed physician, believing him to be competent, and intrusts the injured seaman to his care, in the belief that such physician will render careful and competent treatment.

The libel does not allege that the master knew of the incompetency of the physician, or that he should have known of such incompetency and failed to exercise reasonable diligence in selecting him. The libel alleges that the master represented to the doctor that he would be paid for his services through the marine hospital, and that three days thereafter the doctor informed libelant that the master's representations were false. There is no allegation that these representations were untrue, or that the doctor manifested any unwillingness to the master to accept such terms of employment; nor are the doctor's statements binding upon the master or the vessel. The libel also alleges that the master took libelant to Port Angeles to a private doctor when libelant had requested to be taken to Port Townsend to the marine hospital. This cannot of itself constitute negligence, since it is manifest that an injured seaman cannot in every instance have the choice of physicians, regardless of expediency or expense. The master's duty to the owner requires that he should take such matters into consideration; and, while the humane duty to the seaman should have the greater weight, the master cannot be said to be negligent when he exercises reasonable diligence in employing a physician whom he believes to be competent to attend to the seaman's injuries. For all that appears in the libel, the master may have believed that the libelant would receive treatment as much calculated to effect a cure from the physician in question as from the marine hospital. Where there is no negligence of the master, the physician's negligence cannot be imputed to him or to the owner, and the vessel cannot be proceeded against in rem.

[3] The owner is liable for the expenses of effecting the cure of a seaman injured in his employ, so far as a cure is possible by ordinary medical means, and this liability exists even where the owner has not been negligent, and may be enforced in rem, and is not relieved by the negligence of the seaman, provided he has not been grossly negligent. *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; *The New York*, 204 Fed. 764, 123 C. C. A. 214; *The City of Alexandria* (D. C.) 17 Fed. 390. But the libelant is not seeking to enforce this liability by asking the recovery of expenses necessarily incurred or to be incurred in effecting a cure; there is no allegation in the libel which can be so construed. The third paragraph of the libel reads as follows:

"That he was prior to said injuries an able-bodied, healthy person of the age of 45 years, capable of and was earning the sum of \$45 per month and subsistence; that libelant will be to great expense in securing medical and surgical treatment for a long time to come; that ever since said injuries he has been and is now wholly incapacitated, and as he believes will ever be so; that by reason of the matters set forth herein, libelant has been damaged by the respondent in the sum of \$14,000."

It is manifest that the allegation "that libelant will be to great expense in securing medical and surgical treatment for a long time to come" is set forth merely as an element of the damages caused by the negligence of the physician, and such prospective expenses are sought to be recovered on that theory alone. The liability of the owner to pay for medical treatment, and his liability to pay damages, of which medical treatment is an element, are two different things. The first liability exists from the fact of injury; the second arises only where the owner is at fault either in causing the injury or its treatment. Even conceding that the owner is liable for expenses to be incurred, there is no allegation which brings libelant within such theory. The liability of the owner is only for expenses in effecting a cure so far as possible, by ordinary medical means; and this does not include extraordinary medical treatment, or treatment which extends after a cure has been as nearly effected as is possible in a particular case. *The Kenilworth*, 144 Fed. 376, 75 C. C. A. 314, 4 L. R. A. (N. S.) 49, 7 Ann. Cas. 202; *The Nyack*, 199 Fed. 383, 118 C. C. A. 67.

The exceptions are sustained.

McGOVERN v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. January 7, 1914.)

No. 2,580.

1. DEATH (§ 32*) — RAILROADS — EMPLOYERS' LIABILITY ACT — ACTION FOR BENEFIT OF ALIEN PARENTS.

Federal Employers' Liability Act April 22, 1908, c. 149, § 9, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, § 2, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325), creating a new liability on common carriers engaged in interstate commerce for death of an employé under certain circumstances to his or her personal representative for the benefit of the surviving widow or husband and children of such employé, and, if none, for the employé's parents, and, if none, then for the benefit of the next of kin

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dependent upon such employé, does not authorize a recovery for the death of an employé of a common carrier engaged in interstate commerce for the sole benefit of alien parents residing abroad.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 47, 48; Dec. Dig. § 32.*]

2. TREATIES (§ 8*)—EFFECT.

Citizens of Great Britain could not derive benefits under the Italian treaty with the United States, negotiated February 25, 1913, under the most favored nation clause, so as to authorize an action for their benefit for the death of their son while engaged in interstate commerce in the United States under Federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), where decedent's death occurred December 24, 1912, prior to the signing of the treaty.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 8; Dec. Dig. § 8.*]

At Law. Action by Bridget McGovern, as administratrix of the Estate of Peter McGovern, against the Philadelphia & Reading Railway Company. On motion for a new trial and for judgment non obstante veredicto. Motion for new trial ordered, and motion for judgment denied.

George Demming, of Philadelphia, Pa., for plaintiff.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The plaintiff brought suit as administratrix of Peter McGovern, deceased, against the Philadelphia & Reading Railway Company, under the provisions of the act of April 22, 1908, known as the Employers' Liability Act, and its amendment, to recover damages for the death of Peter McGovern. The action is alleged in the statement of claim to be for the benefit of Patrick McGovern and Bridget McGovern, the surviving parents of the deceased.

[1] At the trial it appeared that Patrick McGovern, the father, and Bridget McGovern, the mother, of the decedent, for whose benefit action was brought, are citizens of the kingdom of Great Britain and Ireland and residents of Ireland. At the conclusion of the plaintiff's testimony, the defendant submitted, *inter alia*, the following point for charge, which was refused by the court:

"(3) The evidence in this case, which is uncontradicted, shows that the parents of the decedent, to wit, Patrick McGovern and Bridget McGovern, for whose benefit this action is brought under the act of Congress of April 22, 1908, as amended April 5, 1910, are nonresident aliens, being citizens of and residents in Great Britain, and therefore they have no right under the said act of Congress for which this suit may be maintained, and you are therefore directed to render a verdict in favor of the defendant."

The refusal of the above point is assigned as error and reason for a new trial. The act, under which the suit is brought, establishes a new liability upon common carriers engaged in interstate commerce by which, in case of the death of an employé under the circumstances of negligence set out in the act, the carrier is liable to damages "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Under the Pennsylvania statute of April 26, 1855 (P. L. 309), permitting certain named relatives to recover damages for death occurring through negligence, it has been held that a nonresident alien has no standing to maintain such an action against a citizen of Pennsylvania. As was stated by Mr. Justice McCollum, in the case of *Deni v. Pennsylvania Railroad Co.*, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676:

"Our statute was not intended to confer upon nonresident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extraterritorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include nonresident alien husbands, widows, children, and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it. A nonresident defendant is not entitled to the benefit of our exemption laws, although the language of these laws may admit of a construction which would include him. It has been so held in a number of our cases. In this connection the language of Mr. Justice Sterrett, in *Collom's Appeal*, 2 Penny. [Pa.] 130, is pertinent. In delivering the opinion of the court he said: 'While nonresident debtors may perhaps be within the letter of the act, we do not think they are within its spirit. As was said by Mr. Justice Woodward in *Yelverton v. Burton*, 26 Pa. 351, and afterwards quoted approvingly by the present Chief Justice in *McCarthy's Appeal*, 68 Pa. 217, we do not legislate for men beyond our jurisdiction.' In one respect, at least, our act of 1855 resembles our exemption laws. It is intended, primarily, for the benefit of the family of which the deceased was a member. * * * We have a number of statutes which expressly confer rights upon aliens, but none which confers them by implication or inference. When the Legislature intends to concede to nonresident aliens the rights which our own citizens have under and by virtue of the act of April 26, 1855, it will say so."

The *Deni Case* was followed in the case of *Maiorano v. Baltimore & Ohio R. Co.*, 216 Pa. 402, 65 Atl. 1077, 21 L. R. A. (N. S.) 271, 116 Am. St. Rep. 778, where it appeared that the plaintiff was a resident of the kingdom of Italy and a subject of the king of Italy, and it was claimed that, under the treaty between the United States and Italy (Feb. 26, 1871, 17 Stat. 845), the plaintiff was entitled to the same rights as citizens of the United States. Article 3 of the treaty provides:

"The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting to the conditions imposed upon the natives."

It was held by the Supreme Court of Pennsylvania that the provisions in the treaty above referred to apply only to such citizens of Italy, as either with respect to their persons or property, are within the jurisdiction of the United States, and that the act of 1855 did not entitle an alien nonresident to sue.

The decision in *Deni v. Pennsylvania R. Co.* was followed by the Circuit Court of Appeals for this circuit in the case of *Fulco v. Schuylkill Stone Co.*, 169 Fed. 98, 94 C. C. A. 498, and by the Circuit Court of the District of Colorado in the case of *Brannigan v. Union Gold-Mining Co.* (C. C.) 93 Fed. 164. The Circuit Court for the District of Washington in the case of *Roberts v. Great Northern Ry. Co.* (C. C.) 161 Fed. 239, in interpreting a statute of the state of Washington,

arrived at the same conclusion. The case of *Maiorano v. Baltimore & Ohio R. Co.* was taken on error to the Supreme Court of the United States. Mr. Justice Moody, in rendering the opinion of the court (213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. 792), held that the construction of the state statute by the highest court of the state must be accepted by the federal Supreme Court. He further decided, however, that a fair construction of the treaty between the United States and the king of Italy, under which the plaintiff claimed, did not confer upon a nonresident citizen of Italy the rights bestowed upon citizens to maintain actions of this sort. In concluding, Mr. Justice Moody said:

"If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including all rights of action for himself or his personal representatives to safeguard the protection and security, the treaty is fully complied with, without going further and giving to his nonresident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety."

While the right of a nonresident alien to recover under the federal Employers' Liability Act has not been passed upon, I think the reasoning in the cases of *Deni v. Railway Co.* and of *Maiorano v. Baltimore & Ohio Railroad Co.* may well be applied to the statute in question. It is not to be presumed that Congress intended to legislate for the benefit of persons residing out of the jurisdiction of the state and federal laws. The right to recover damages for death is not a right at common law, and, when Congress undertakes to impose a liability upon interstate carriers for the benefit of their employes and the relatives of their employes in case of death through the carriers' negligence, in the absence of any provision to the contrary in a treaty or act of Congress, it must be presumed that such benefits are not intended for nonresident aliens.

[2] Counsel for the plaintiff calls attention to the treaty with Italy signed at Washington on February 25, 1913, under which the citizens of Italy are said to be entitled to exactly the same rights as the citizens of this country in the courts of this country, although, at the time of the occurrence, the citizens of Italy may be residing abroad. It is urged that, under the most favored nation clause in the treaties between this country and Great Britain and Ireland, the latter countries are entitled to the benefits and the rights arising under this treaty with Italy. Even if citizens of Great Britain derive the benefits claimed under the late treaty with Italy, that circumstance has no bearing on the question, for whatever rights the plaintiffs have in this case arose prior to the adoption of the treaty with Italy, as the death is alleged to have occurred on December 24, 1912.

It is concluded that the action cannot be maintained for the benefit of the parents of the deceased, and that the defendant's request for binding instruction should have been granted.

A new trial is therefore ordered. Defendant's motion for judgment n. o. v. is overruled.

JACKSON v. VIRGINIA HOT SPRINGS CO.

(District Court, W. D. Virginia. November 1, 1913.)

1. PLEADING (§ 41*)—DECLARATION—CONTENTS.

While it is not necessary and is improper for plaintiff in his declaration to anticipate and deny or avoid matter of defense, he must nevertheless allege all the facts essential to establish a prima facie case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 96; Dec. Dig. § 41.*]

2. INNKEEPERS (§ 9*)—DUTY TO FURNISH LODGING—DEFENSES—EXHAUSTED ACCOMMODATIONS.

An innkeeper is absolutely bound to furnish lodging to a traveler in proper condition as to health and conduct and who is ready to pay the proper charge, only provided the innkeeper's accommodations are not exhausted when the application is made.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 10, 11; Dec. Dig. § 9.*]

3. INNKEEPERS (§ 9*)—ACCOMMODATIONS—REFUSAL TO FURNISH—ACTION FOR DAMAGES—DECLARATION—CONTENTS.

In an action against an innkeeper for refusal to furnish plaintiff accommodations, a declaration failing to allege that the innkeeper's accommodations at the time plaintiff applied for entertainment were not exhausted was demurrable.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 10, 11; Dec. Dig. § 9.*]

At Law. Action by W. W. Jackson against the Virginia Hot Springs Company. On demurrer to complaint. Sustained.

Coleman, Easley & Coleman, of Lynchburg, Va., for plaintiff.

Caskie & Caskie, of Lynchburg, Va., John W. Stephenson, of Warm Springs, Va., and J. T. McAllister, of Hot Springs, Va., for defendant.

McDOWELL, District Judge. This is an action of trespass on the case against an innkeeper, brought by a proposing guest who was refused accommodation. The original declaration was demurred to for several reasons, but it has become unnecessary to discuss any of the grounds of demurrer except the failure of the pleader to allege that the defendant at the time in question had room for the plaintiff.

[1] The general rule in common-law pleading is that it is not necessary to state matter which would come more properly from the other side. Heard's Stephen Pl. (9th Am. Ed.) p. 349. It is also not necessary and, as a rule, is improper, to anticipate and deny or avoid matter of defense. 31 Cyc. 109. But it is necessary to allege at least a prima facie case. Heard's Stephen Pl., p. 351 [352].

[2] The duty of the innkeeper to furnish lodging does not exist if his accommodations are exhausted. In 2 Chitty Pl. (16th Am. Ed.) p. 531, it is said:

"An innkeeper is bound by the custom of the realm to receive travelers and guests at all hours and times if they tender and are ready to pay the cus-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tomary charge, are in a fit and proper condition as to conduct and health, and if there is accommodation for them."

In Justice Harlan's dissent in the Civil Rights Cases, 109 U. S. 40, 3 Sup. Ct. 43, 27 L. Ed. 835, the following is quoted:

"An innkeeper is bound to take in all travelers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation. * * *" Story, *Bailments*, §§ 475, 476.

And again:

"In *Rex v. Ivens*, 7 Carr. & P. 213, 32 E. C. L. 495, the court, speaking by Mr. Justice Coleridge, said: 'An indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him or such circumstances occurring as will dispense with that tender.'"

In 16 Am. & Eng. Ency. (2d Ed.) p. 525, it is said:

"If an innkeeper improperly refuses to receive and entertain any person coming to the inn as a guest, he is liable, in consequence of such unlawful act, to an action by the injured party for damages."

In 22 Cyc. 1074, it is said:

"An innkeeper, as one carrying on a public employment, is obliged to receive all travelers who properly apply to be admitted, provided he has room and they pay his reasonable charges."

And quotations of this same purport could be added almost indefinitely.

[3] The only forms for pleading in such cases that I know of are found in 2 Wharton's *Precedents of Indictments*, 911, and in *Hawthorn v. Hammond*, 1 Carrington & Kirwan, 404, 47 E. C. L. 403, which is cited by Chitty (2 Pl. [16th Am. Ed.] p. 533) as a precedent. In the indictment, as in the declaration in case, it is alleged that there was at the time sufficient room in the inn. As the duty to receive the guest does not exist unless there is room, I do not see that a prima facie cause of action is alleged unless the declaration contains an allegation that the defendant had room for the plaintiff. It is argued that the facts in this respect lie peculiarly within the knowledge of the innkeeper, and that therefore exhaustion of accommodation should be regarded as a matter of defense. This argument is making use of a mere (occasional) rule of evidence to overcome a rule of pleading. Prof. Thayer says that no one has a right to look to the law of evidence to determine the rules of pleading. Thayer's *Prelim. Treatise on Evidence*, p. 371. In 4 Wigmore, *Ev.* § 2486, p. 3525, it is said that the fact that one party has peculiar knowledge of certain facts affords no certain test for locating the burden of proof. And it is doubtful if we can properly say that the innkeeper has peculiar knowledge of the facts. In the vast majority of instances, if not always, the traveler knows whether or not want of room is the reason assigned by the innkeeper for refusing to receive him. And if so there is no ground for complaint unless the traveler knows, or afterwards learns, that this reason was untruthfully assigned. If he knows this at the time, or afterwards learns it, the innkeeper does not have peculiar knowledge of the facts. And it imposes no undue hardship on the traveler to re-

quire that he ascertain before he sues that the innkeeper did have room for him. The obligations of innkeepers are exacting and often onerous. That they should be subject to suit and put to the cost of making defense of want of room at the instance of a traveler who has not even made inquiry as to the truth of a refusal on the ground of want of room is an undue burden. As the mere refusal to receive a traveler, in proper condition as to health and conduct and who is ready to pay the proper charge, is not a breach of the innkeeper's duty, it follows that a declaration which fails to allege that the innkeeper had room for the plaintiff does not state a prima facie cause of action. It is true that it is alleged that defendant "unlawfully" refused to receive the plaintiff. But this is a statement of a mere conclusion of law. It is not a statement of fact. While it is true (*Wood v. Bank*, 100 Va. 306, 311, 40 S. E. 931) that it is only necessary to state the facts with such certainty that they may be understood by the defendant, the jury, and the court, still conclusions of law cannot replace necessary allegations of fact.

This ground of demurrer must be held good as to this count, and also as to all the remaining counts of the declaration.

After the demurrer had been sustained, the plaintiff filed an amended declaration. The other objections were cured; but, in order to have a ruling from the appellate court on the necessity of alleging that the defendant had room for such guest, plaintiff has intentionally failed to allege in this count that the defendant had room for the plaintiff. No further argument has been submitted, no further authority has been cited, and consequently I adhere to the former opinion filed in this cause. The rule that matter lying peculiarly within the knowledge of the adverse party need not be alleged gives way to the requirement that the declaration must allege a prima facie case. *Stephen's Pl.* (Heard) (9th Am. Ed.) p. 351 [352]; 1 *Chitty, Pl.* (16th Am. Ed.) top p. 245, bottom p. 317; 39 *Cyc.* 110; *Reed v. Railroad Co.*, 104 Ky. 603, 47 S. W. 591, 48 S. W. 416, 44 L. R. A. 823. In *Hortenstein v. Railroad Co.*, 102 Va. 914, 926, 47 S. E. 996, 1000, it is said:

"In actions for a tort the declaration must state sufficient facts to enable the court to say, upon demurrer, whether, if the facts stated are proved, the plaintiff would be entitled to recover."

To the same effect, see *Railroad Co. v. Hoffman*, 109 Va. 44, 63, 63 S. E. 432; *Railroad Co. v. Nicolopoulos*, 109 Va. 165, 168, 63 S. E. 443; *Cook v. Thompson*, 110 Va. 369, 371, 66 S. E. 79. If every fact alleged in this declaration were proved, still the court could not say that plaintiff would be entitled to recover—the defendant may have had no room for plaintiff. It may possibly be considered that there is a technical right of action set up in this count (as well as in some of the remaining counts) on the ground that it is an actionable wrong for an innkeeper, who has no room for a proposing guest, to "insultingly" decline to receive such guest. To my mind such right of action is not well pleaded; but, even if it were, I feel so well satisfied that this rather trifling cause of action is not what is really intended to be set up, that I would not feel justified in overruling the demurrer, and thus forcing plaintiff to bring his witnesses and go to trial on this cause

of action, when his real purpose is to have the upper court pass on another question and to avoid a trial unless the upper court sustains his contention above mentioned.

The demurrer to this count will be sustained.

In re J. M. FISKE & CO.

(District Court, S. D. New York. December 29, 1913.)

No. 494.

1. BANKRUPTCY (§ 272*)—ATTORNEYS FOR TRUSTEE—FEES.

The rule that, where attorneys for trustees in bankruptcy have conducted many contested suits in which amounts not extremely large are involved, they may receive 15 per cent. of the amount recovered, does not necessarily apply when a very large sum is involved and recovered, since the work done is the real thing to be paid for, and the amount recovered only to be considered as showing the responsibility involved and the success accomplished.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. § 272.*]

2. BANKRUPTCY (§ 272*)—ATTORNEYS FOR TRUSTEES—ATTORNEYS FOR RECEIVER—ALLOWANCES.

Where attorneys for trustees in bankruptcy were also attorneys for a receiver, the performance of whose duties lasted about five months, and the attorneys were allowed \$12,500, substantially all for general services outside the litigations which they subsequently conducted for the trustees, none of which was begun until after the trustees' appointment, such allowance should be considered in determining the amount to be allowed for the attorneys' services to the trustees.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. § 272.*]

3. BANKRUPTCY (§ 272*)—ATTORNEYS FOR TRUSTEES—FEES OBTAINED IN COLLATERAL LITIGATION.

Petitioners, who were attorneys for the trustees in bankruptcy, were also attorneys for a third person, who was plaintiff in a suit against K. in the proceeds of which the bankrupts were entitled to a twelfth interest. The claim against K. was compromised, and he, as part of the settlement, agreed to pay petitioners the fees in that suit and did pay them \$25,000. *Held*, that the amount so paid on the settlement of such suit was not material on the question of the amount to be allowed petitioners as the attorneys for the trustees.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. § 272.*]

4. BANKRUPTCY (§ 272*)—ATTORNEYS FOR TRUSTEES—ALLOWANCE.

Attorneys for trustees in bankruptcy, having been compelled to perform large and valuable services in the administration of an estate, and having collected \$52,500 and obtained reductions of claims filed, amounting in the aggregate to about \$180,000, thus increasing the dividends on valid claims about 17 per cent., *held* entitled to \$52,500 for their services.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. § 272.*]

In Bankruptcy. In the matter of bankruptcy proceedings of J. M. Fiske & Co. On application to the court to fix compensation of trustees' attorneys. Fees allowed at \$51,000.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Hays, Hershfield & Wolf, of New York City, petitioners in pro. per. Cass & Apfel, of New York City, for certain creditors opposing.

HOLT, District Judge. This is an application to the court to fix the compensation of the trustees' attorneys, the referee having certified, pursuant to rule 8 of the Instructions to Referees, that, in his opinion, the attorneys are entitled to more than twice the trustees' statutory fees.

The sum of \$65,000, which the trustees' attorneys suggest for an allowance to them in this case, is a very large amount of money—much larger than I have ever awarded as an allowance in any case. Some of the items, making up the aggregate suggested in the memorandum submitted, seem to me, in view of all the circumstances of the case, somewhat too large; the others seem to be entirely reasonable charges. In the case of *Ernst v. Mechanics & Metals National Bank*, the suit was unprecedented in its nature, involving the legal effect of the arrangements under which, for many years, brokers have been enabled to carry on their business by the certification of their checks by banks in advance of actual deposits to meet them. The questions of fact were complicated, the work of investigating and preparing the evidence onerous, the questions of law difficult, the defense ably and strenuously contested, the trial before Hon. Charles F. Brown as referee, and the hearings on appeal before Judge Hand, the Circuit Court of Appeals, and the United States Supreme Court involved counsel work of the highest ability, and the final result, by which about \$270,000 was collected, was pre-eminently successful.

[1] The petitioners ask for an allowance of \$40,000 for their services in this case. This amount is about 15 per cent. of the amount recovered, which, in the case of many contested suits, in which a large but not an extremely large amount is involved, constitutes a proper basis of charge. But when a very large sum is recovered, the same percentage does not necessarily apply. The work done is the real thing to be paid for; the amount recovered is only to be considered as showing the responsibility involved and the success accomplished. It is always difficult to fix the value of an attorney's services in a large litigation. I have no doubt that many lawyers of experience would say that the petitioners' services in this suit were worth \$40,000. But that is a very large sum of money to be paid for legal services in any suit, and, in my opinion, that amount is somewhat too large to be allowed in this case. Upon full consideration of all the circumstances of the case, and with the highest appreciation of the value of the petitioners' services in the suit, I have concluded that \$32,500 is a proper amount to be allowed for such services.

In the case of *Ernst v. Detmer*, the suit was carried through all the intermediate courts to the New York Court of Appeals, and about \$27,000 recovered. I think \$5,000 a reasonable charge in that case. In the case of *Ernst v. Levi* a settlement was made by which the estate received \$11,000 in cash and a release of a claim on a fund in the trustees' hands of about \$7,000. I think \$3,000 a reasonable charge for that service. In the case of *Ernst v. Morrison* about \$14,000 was

collected. I think \$1,500 a reasonable charge for that service. A number of other suits were brought in which judgments were recovered. Small amounts were collected, but that was not the attorneys' fault. I think \$500 a reasonable charge for those services. This makes a total charge of \$42,500 for services in litigations, some of which were unusually difficult and laborious, in which about \$325,000 was collected. The trustees also ask for \$15,000 for general services in the case outside of litigations. The estate, in addition to the amounts recovered by litigation, amounted to about \$100,000. The bankrupts were stockbrokers. They had done a large business. They owed over a million dollars. Such bankruptcy cases usually involve a great deal of difficult work, especially in the matter of conflicting claims to pledged securities which require elaborate hearings before the referee, and which in fact occurred in this case. The trustees' attorneys contested many claims filed, and obtained reductions of many of such claims, amounting in the aggregate to about \$180,000, thus increasing the dividends on valid claims about 17 per cent. The whole estate has been administered promptly, efficiently, and with unusual success.

[2] The attorneys for the trustees, however, were attorneys for the receiver. The receivership lasted about five months, and the petitioners, as attorneys for the receiver, were granted an allowance of \$12,500, which was all substantially for general services, outside of the services in litigations, none of which were begun until after the trustees' appointment. A considerable portion of the necessary general services of the attorneys therefore were rendered during the receivership, and such general services may properly be regarded as continuous during the receivership and the trusteeship. I think, under all the circumstances, that a further allowance of \$10,000 to the trustees' attorneys for such general services will be sufficient.

[3] It has been suggested that the amount paid to the attorneys on the settlement of the suit against James R. Keene should be taken into consideration. The petitioners were attorneys for the plaintiff in that suit, but that suit was not brought by the trustees. The bankrupts had a one-twelfth interest in the amount recovered in the suit. But although the claim against Mr. Keene grew out of the transactions in the Hocking pool which caused the bankruptcy of Fiske & Co., the conduct of that suit was strictly no part of the work of the attorneys as representing the trustees. As part of the settlement, Mr. Keene agreed to pay the fees of the attorneys, and paid to the petitioners \$25,000 as their fee. It is suggested that, if the lawyers' fees had been smaller, Mr. Keene would have paid more to the parties in settlement. But if he had increased the amount paid in settlement by the entire \$25,000, the benefit to the estate would have been only one-twelfth of that amount, or about \$2,000, and, if any amount were paid as fees, the amount paid in settlement and the consequent advantage to the creditors of the bankrupt would have been correspondingly diminished. I think therefore that the amount paid the petitioners by Mr. Keene, upon the settlement of the suit against him, is substantially immaterial upon the question of the amount to be allowed to them as trustees' attorneys.

[4] The entire business connected with this failure has undoubtedly been a very profitable one to the trustees' attorneys; but that is no reason why their claim to compensation in this matter should not be decided on the merits. The trustees' attorneys have already received \$1,500 on account, which should be deducted from the aggregate of \$52,500 allowed.

The result is that I fix the allowance to the trustees' attorneys at \$51,000.

THE ST. DAVID.

(District Court, W. D. Washington, N. D. December 26, 1913.)

No. 2,135.

1. ADMIRALTY (§ 20*)—JURISDICTION—MARITIME TORTS.

An action by an employé against a stevedoring company to recover for a personal injury received while loading or discharging a vessel, through the alleged negligence of the company, is not maritime and not within the admiralty jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 216, 225, 231; Dec. Dig. § 20.*]

2. ADMIRALTY (§ 37*)—JURISDICTION—JOINDER OF SUITS IN REM AND IN PERSONAM.

A cause of action in rem against a vessel for injury to a stevedore and one in personam against the owner for the same injury may be joined in a single suit in admiralty.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 335, 336; Dec. Dig. § 37.*]

3. ADMIRALTY (§ 1*)—JURISDICTION.

In exercising its constitutional jurisdiction a court of admiralty has no power to include a cause of action not within the maritime and admiralty jurisdiction on the ground of convenience.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1-17; Dec. Dig. § 1.*]

In Admiralty. Suit by Patrick McNiell against the barge St. David, the Coastwise Steamship & Barge Company, Incorporated, and the Griffiths & Sprague Stevedoring Company. On exceptions to amended libel. Sustained as to the Stevedoring Company, and overruled as to the other respondents.

James C. McKnight, of Seattle, Wash., for libellant.

Trefethen & Grinstead, of Seattle, Wash., for respondent and claimant.

CUSHMAN, District Judge. This matter is before the court upon exceptions to the amended libel; it being claimed, under the exceptions, that the cause of action is not one in admiralty, and that therefore the court is without jurisdiction. Further, it is claimed that the Washington Compensation Act for injured workmen has superseded any action that could be maintained in admiralty.

The libel is one in rem against the barge St. David, and in personam against the Coastwise Steamship & Barge Co., Incorporated, a corpo-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ration, claimant, owner of the said barge, and in personam against the Griffiths & Sprague Stevedoring Company, a corporation, libelant's employer.

Libelant is a citizen of the United States, and a resident of Seattle, King county, Wash. The barge *St. David* is a vessel of the United States. The respondent corporations are both corporations of the state of Washington.

The libel further alleges that libelant was injured by falling through an open, unlighted, and unguarded hatchway, alleged to have been in that condition through the negligence of the vessel and the respondent corporations.

Libelant relies upon the following authorities: *Benedict on Admiralty* (4th Ed.) §§ 16, 207, 132; 1 Cyc. 833; 1 Am. & Eng. Encyc. (2d Ed.) 663; *Workman v. New York City et al.*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314; section 1184, Rem. & Bal. Code; section 1182, Rem. & Bal. Code; *West v. Martin*, 47 Wash. 417, 92 Pac. 334; *Benedict on Admiralty*, §§ 127, 131, 128, 35; *Thompson v. Fred E. Sanders*, 208 Fed. 724, decided by Judge Neterer, October, 1913; Report of Atty. Gen. for 1911-12, at page 155.

The respondent and claimant rely upon the following authorities: *De Lovio v. Boit*, 7 Fed. Cas. 418; *Hughes on Admiralty*, p. 16; *Campbell v. Hackfeld*, 125 Fed. 696, 62 C. C. A. 279; *Benedict on Admiralty* (3d Ed.) § 308; *The Blackheath*, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236; *Wharton on Conflict of Laws* (3d Ed.) p. 1098; *The Lamington* (D. C.) 87 Fed. 752; *Smith v. Condry*, 1 How. 29, 11 L. Ed. 35; *The Egyptian Monarch*, 36 Fed. (D. C.) 773; *Ill. Cent. R. R. Co. v. Ihlenberg*, 75 Fed. 873, 21 C. C. A. 546, 34 L. R. A. 393; *N. P. R. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; *Louisville & N. R. Co. v. Whitlow's Adm'r*, 105 Ky. 1, 43 S. W. 711, 41 L. R. A. 614; *Clark v. Russell*, 38 C. C. A. 541, 97 Fed. 900; *Texas & Pac. Ry. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Bridger v. Railway Co.*, 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653; *Workman v. Mayor*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314; *O'Keefe v. Staples Coal Co.* (D. C.) 201 Fed. 131; *United States v. Port of Portland* (D. C.) 147 Fed. 865; *City of Boston v. Crowley* (C. C.) 38 Fed. 202; *Greenwood v. Town of Westport* (D. C.) 60 Fed. 560; *The Alaska*, 130 U. S. 201, 9 Sup. Ct. 461, 32 L. Ed. 923; *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; *Rundell v. La Compagnie Co.*, 100 Fed. 655, 40 C. C. A. 625; *Monongahela River, etc., Co. v. Schinnerer*, 196 Fed. 375, 117 C. C. A. 193; *The City of Norwalk* (D. C.) 55 Fed. 98; *Robinson v. D. & C. Nav. Co.*, 73 Fed. 883, 20 C. C. A. 86; *Ex parte McNiel*, 13 Wall. 236, 20 L. Ed. 624; *Steamboat Co. v. Chace*, 16 Wall. 522, 21 L. Ed. 369; *The Garland* (D. C.) 5 Fed. 924; *The General Foy* (D. C.) 175 Fed. 590; *The Wilamette* (D. C.) 59 Fed. 797; *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727; *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Perry v. Haines*, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73; *The Electron*, 74 Fed. 689, 21 C. C. A. 12; *Rodd v. Heartt*, 88 U. S. (21 Wall.) 558, 22 L. Ed. 654; *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed.

296; *Crimmins v. Booth*, 202 Mass. 17, 88 N. E. 449, 132 Am. St. Rep. 468; *The Henry B. Smith* (D. C.) 195 Fed. 312.

[1] So far as libellant's employer, the Griffiths & Sprague Stevedoring Company, is concerned, this court, sitting as a court of admiralty, is without jurisdiction to determine the question of respondent's negligence, for its alleged tort is not of a maritime character. *Campbell v. Hackfeld*, 125 Fed. 696, 62 C. C. A. 274. This decision of the Court of Appeals of the Ninth Circuit has been criticised by the District Court of Maryland, in the case of *Imbrovek v. Hamburg-American Packett Co.*, 190 Fed. 229, which decision was affirmed by the Circuit Court of Appeals of the Fourth Circuit. 193 Fed. 1019, 113 C. C. A. 398. But has been cited with apparent approval by the District Court of Maine, in *The James T. Furber*, 129 Fed. 808, and *The Mary F. Chisholm*, 129 Fed. 814; and by the Supreme Court in *The Blackheath*, 195 U. S. 361, at page 367, 25 Sup. Ct. 46, 49 L. Ed. 236.

In *The Clan Graham*, 153 Fed. 977, the District Court of Oregon sustained a libel in rem against the offending vessel, joined with one in personam against a stevedoring company, for an injury to a long-shoreman. In this case the court does not mention the case of *Campbell v. Hackfeld*.

[2] It is apparent, from an examination of the decision, that the only question presented to the court in the case of *The Clan Graham* was that of the propriety of joining a cause in personam and one in rem, and that its attention was not directed to the question of whether negligence of the stevedoring company, resulting in injury to a long-shoreman, was a maritime tort. The exceptions are therefore sustained as to the Griffiths & Sprague Stevedoring Company. They are overruled, so far as the barge and claimant thereto are concerned, upon the authority of *The Sailing Schooner Fred E. Sanders*, 208 Fed. 724, decided in October of this year by Judge Neterer, of this district.

[3] It has been contended that the court, having jurisdiction of the cause against the barge and claimant, should exercise jurisdiction over the stevedoring company, whose negligence is alleged to have concurred with that of the barge and its claimant in causing the injury. This argument, while persuasive, is purely one of convenience and cannot enlarge the court's powers. The constitutional grant of jurisdiction to courts of admiralty embraces "all cases of admiralty and maritime jurisdiction." Article 3, § 2. But, while the court's jurisdiction is over all such cases, in exercising such jurisdiction, it has no power or authority to include causes not within the maritime and admiralty jurisdiction, however convenient it might be.

UNITED STATES v. HAVENOR.

(District Court, D. Idaho, E. D. November 10, 1913.)

1. PUBLIC LANDS (§ 30*)—RIGHT TO PURCHASE—DEPUTY MINERAL SURVEYOR—"EMPLOYÉ IN GENERAL LAND OFFICE."

A deputy mineral surveyor is an officer or "employé of the General Land Office," within Rev. St. § 452 (U. S. Comp. St. 1901, p. 257), providing that officers, clerks, and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any public land of the United States, etc.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 48-50; Dec. Dig. § 30.*]

2. PUBLIC LANDS (§ 30*)—WHAT CONSTITUTES—POCATELLO TOWNSITE.

The Pocatello townsite in 1888 was a part of the Ft. Hall Indian Reservation, which on May 27, 1887, was relinquished to the United States by treaty which was ratified by Act Cong. Sept. 1, 1888, c. 936, 25 Stat. 452, which also provided for the sale and distribution of lots and blocks in the site. Section 7 provided that the Secretary of the Interior should make needful rules and regulations necessary to carry the act into effect; the funds to be derived therefrom after deducting expenses of surveying, appraisal, and sale to be deposited in the United States treasury for the benefit of the Indians. *Held*, that lots unsold in such townsite and subject to entry were "public lands," within Rev. St. § 452 (U. S. Comp. St. 1901, p. 257), prohibiting officers, clerks, and employés in the General Land Office from purchasing directly or indirectly or becoming interested in the purchase of public lands.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 48-50; Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5793-5795; vol. 8, p. 7772.]

In Equity. Suit by the United States to set aside a patent issued by the government to defendant for a town lot in the City of Pocatello, Idaho. Decree for complainant.

P. E. Cavaney, Asst. U. S. Atty., of Boise, Idaho, for plaintiff.

Witty & Terrell, of Pocatello, Idaho, for defendant.

DIETRICH, District Judge. The government brings this suit to set aside a patent issued to the defendant for a town lot in the city of Pocatello, Idaho, its contention being that defendant was a deputy mineral surveyor of the United States for the District of Idaho, and that therefore, under the provisions of section 452 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 257), he was disqualified from becoming a purchaser. Section 452 is as follows:

"The officers, clerks, and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

In the complaint it is charged not only that the defendant was a deputy mineral surveyor, but that he fraudulently concealed from the officers of the land department that fact, and thus induced them illegally to issue the patent. Defendant admits that he purchased the lot,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and that at the time of the purchase he was a deputy mineral surveyor, as alleged; but he denies that he was guilty of any fraudulent act or purpose. The record wholly fails to substantiate the charge of actual fraud, and that phase of the case may be laid aside without discussion; I have no doubt that the defendant made the purchase in good faith, without any thought that he was disqualified under the law. The real inquiry, therefore, is whether he was so disqualified.

[1] The question whether or not a deputy mineral surveyor is an officer or employé of the General Land Office within the scope of section 452 has been recently put to rest by the decision of the Supreme Court of the United States in *Waskey v. Hammer*, 223 U. S. 85, 32 Sup. Ct. 187, 56 L. Ed. 359. It is there distinctly held both that such a mineral surveyor is disqualified under the statute, and that, as a result of such disqualification, a patent issued to him in violation of the statute, confers no right. The rule thus announced is controlling here, and it follows as a matter of course that the plaintiff is entitled to the relief prayed for, if the lot was public land.

[2] The status of the lot is not called into question either in the answer or the argument; however, a brief explanation will not be out of place. The Pocatello townsite was, until the year 1888, a part of what is known as the Ft. Hall Indian Reservation. On the 27th day of May, 1887, by treaty, the Shoshone and Bannack tribes of Indians, who were then occupying the reservation, relinquished to the United States all their estate, right, title, and interest in and to that portion of the reservation which thereafter became the Pocatello townsite. This treaty was ratified by an act of Congress approved September 1, 1888, c. 936, 25 Stat. 452, wherein also provision was made for the sale and other disposition of the lands so relinquished. It was, in brief, provided that the ceded tract should be surveyed, laid off into lots and blocks, and, after due appraisement, sold in lots at public auction to the highest bidders. No lot was to be appraised at less than \$10 and no bid should be received for less than the appraised value of any lot. All lots not sold at the public sale provided for were to be thereafter subject to private entry at the appraised value thereof. Section 7 of the act provides:

"That the Secretary of the Interior shall make all needful rules and regulations necessary to carry this act into effect; he shall determine the compensation of the surveyor for his services in laying out said lands into town lots, also the compensation of the appraisers provided for in section 4, and shall cause patents in fee simple to be issued to the purchasers of the lands sold under the provisions of this act in the same manner as patents are issued to public lands."

The register of the local land office was empowered to conduct the public sale. The funds arising from the sale of the lands, after deducting the expenses of surveying, appraisement, and sale, were to be deposited in the treasury of the United States to the credit of the Indians. Apparently the lot in question was appraised at \$10, was not purchased at the public sale, and therefore became subject to private entry. It will thus be seen that, under the treaty, the title to the lands vested exclusively in the United States, and Congress committed to the Interior Department and to the General Land Office the duty and

responsibility of disposing of them. While the proceeds were to go to the Indians, and the method of disposition is in some respects different from that employed in disposing of other portions of the public domain, the administration of the act called for quite as great an exercise of disinterested and honest discretion as does the administration of any of the general public land acts, and it was quite as important that the officers, clerks, and employes of the General Land Office should be free from motives of self-interest in the administration of this law as in case of any of the other laws pertaining to the disposition of public lands. The phrase "public lands" is not always used in the same sense (*United States v. Blendaur*, 128 Fed. 910, 63 C. C. A. 636), and, in construing it, regard must be had for the scope and purpose of the act or section in which it is used, and in that view it is thought that, as employed in section 452 of the Revised Statutes, it should be given a meaning wide enough to embrace the land in controversy. True, deputy mineral surveyors exercise no control over, or discretion in, the matter of the disposition of the Pocatello townsite, but section 452 does not operate merely to disqualify employes of the land office from purchasing lands to which their duties directly relate. In the wisdom of Congress, it was provided that no employe of the Land Office, wherever he might be employed, or whatever might be his duties, should directly or indirectly become the purchaser of, or interested in the purchase of, any public land, wherever the same might be situated. A register or receiver of a United States land office in Idaho has nothing to do with the disposition of public lands in California, and yet, under the general prohibition of the section, he is disqualified from purchasing public lands in California. So here, while a deputy mineral surveyor may have nothing to do with the disposition of Pocatello townsite lots, he falls within the sweeping prohibition of the section, and is thereby disqualified from becoming a purchaser. It is possible that the purpose of the law might be accomplished by a more restricted provision, but that is a consideration addressed to the legislative rather than the judicial department of the government.

It follows that a decree must go in favor of the plaintiff. In view, however, of the fact that the defendant in good faith paid the purchase price of the lot, and that, so far as the record shows, no demand was made upon him to relinquish his patent or to reconvey the title to the government, before the suit was commenced, the decree will be without costs.

FORTY-TWO BROADWAY CO. v. ANDERSON, Internal Revenue Collector.
(District Court, S. D. New York. December 3, 1913.)

No. 487.

1. INTERNAL REVENUE (§ 9*)—CORPORATION TAX ACT—CONSTRUCTION—"NET INCOME"—INTEREST ON BONDED INDEBTEDNESS.

Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), imposes a tax on the net income of corporations, and paragraph 2 declares that such net income shall be ascertained by deducting from the gross income all necessary expenses actually paid within the year out of the income in the business, including all charges, such as rentals or franchise payments required as a condition to the continued use of the property, and (3) interest actually paid within the year on bonded or other indebtedness not exceeding the paid-up capital stock of the corporation outstanding at the close of the year. Complainant was a realty corporation organized to build and rent a building in the city of New York. It had a paid-up capital of \$600 and a bonded indebtedness of \$4,750,000 secured by mortgage, and during the year for which it was sought to be taxed it had no net income after deducting the interest on its bonded indebtedness from its gross income. *Held*, that subdivisions 2 and 3 should be construed together, and that the corporation was entitled to deduct interest paid on its bonded indebtedness in determining its taxability.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4779, 4780.]

2. TAXATION (§ 58*)—STATUTES—CONSTRUCTION.

Statutes imposing taxes are to be strictly construed against the government and liberally construed in favor of the taxpayer.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 134, 135; Dec. Dig. § 58.*]

In Equity. Suit by the Forty-Two Broadway Company against Charles W. Anderson, Collector of Internal Revenue of the United States of America for the Second District of New York. Decree for complainant.

Baldwin & Hutchins, of New York City, for plaintiff.

H. Snowden Marshall, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty., both of New York City, for defendant.

HOLT, District Judge. [1] This suit is brought to recover the amount of a tax paid under protest, imposed under section 38 of the Act of August 5, 1909, c. 6, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), imposing a special excise tax on the income of corporations. The plaintiff, the Forty-Two Broadway Company, is a corporation of the class commonly known as realty corporations, organized for the purpose of building and renting a building in the city of New York. Its paid-in capital is \$600, and its bonded indebtedness is \$4,750,000, secured by mortgages upon its real estate. Its property consists of the premises and the building on them at 42 Broadway, New York City. The land was purchased and the building constructed substantially upon borrowed money, to secure the repayment of which bonds were given by the corporation, secured by mortgages on the property.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The act in question imposes a tax upon the net income of corporations. The second paragraph of section 38 provides as follows:

"Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint-stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property. * * *

"Third. Interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint-stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits."

In computing the tax due from the plaintiff, the assessor deducted from the gross income the amount of interest on \$600, the capital stock, but refused to deduct any further amount for interest paid on the bonded indebtedness. If the entire amount paid by the plaintiff, during the year in question, as interest on its bonded indebtedness, had been deducted from the gross income, no net income would have existed, and no tax could have been levied. The question in the case therefore is whether, in computing the tax, the entire amount of interest paid on bonded indebtedness should be deducted.

It is obvious that the provision of the statute marked "third," above quoted, is a sufficient authority for the action of the assessor, if the other provisions of the statute and the general purpose of this legislation are not to be considered. The provision marked "third" provides specifically for the amount of interest paid on bonded indebtedness which is to be deducted in ascertaining the net income, and the claim that that provision of the statute is decisive of the case is very weighty. But the object of this statute was to impose a tax upon the net income of corporations. "Net income," of course, means gross income after deducting all outgo necessarily incident to the business. The proof in this case shows clearly that the plaintiff had no net income. It was doing business at a loss. A computation of its net income by a method which did not include as an item to be deducted the interest it was paying on its mortgages was an absurdity; and I think that the provision of the statute above quoted marked "third" may be deemed in this case modified by the provisions of the statute marked "second." The interest paid on the mortgages was one of "the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties," and it was a charge "such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property." If the interest on the mortgages had not been paid, the mortgages would have been foreclosed, the property sold, and the continued use and possession of the property and the entire business of the corporation terminated. Such a corporation as the plaintiff differs radically from most other corporations. The ownership of real estate by a corporation is usually a mere incident to the main business

of the corporation; but in such a corporation as the plaintiff the ownership and use of the real estate is usually the sole business of the corporation. In this case the capital stock was only \$600, while its bonded indebtedness was nearly \$5,000,000. Its sole property was real estate, which it has purchased on money borrowed on mortgage, and its sole business was the renting of such real estate. No method of computing its net income which did not include, among the items to be deducted from gross income, the amounts paid for interest on its mortgages, could bring out a correct result.

[2] The general rule in reference to statutes imposing taxes is that they are to be strictly construed against the government, and in case of any doubt as to their meaning they are to be given a liberal construction in favor of those subjected to taxation.

In view of this general rule, the peculiar character of this corporation, the gross injustice of imposing a tax on this defendant on the ground that it had a net income, when in fact it had not, and all the provisions of the statute, my conclusion is, notwithstanding the general rule in respect to the deduction of interest on bonded indebtedness contained in the provision of the statute marked "third," that the tax exacted in this case was unauthorized, and that there should be a decree for the plaintiff.

UNITED STATES v. GWYNNE.

(District Court, E. D. Pennsylvania. January 6, 1914.)

Nos. 3-5.

1. COURTS (§ 348*)—FEDERAL PRACTICE—EVIDENCE—ADMISSIBILITY—WHAT LAW GOVERNS.

Admissibility of testimony in criminal cases in the federal courts is determined by the laws of the states as it was when the federal courts were established by Judiciary Act 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 922; Dec. Dig. § 348.*]

2. WITNESSES (§ 61*)—COMPETENCY—HUSBAND AND WIFE.

At common law, as applied prior to 1789, a wife was not a competent witness for or against her husband on grounds of public policy, subject to the exception that she was entitled to testify against him in a criminal proceeding for injury to her involving a direct violence to her person; but such exception did not include injuries suffered by her prior to marriage, and hence she was not competent to testify against him in the prosecution for bringing her from one state to another for immoral purposes prior to marriage.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 163, 174-176; Dec. Dig. § 61.*]

Evan L. Gwynne was convicted of bringing Anna Ward from one city to another for immoral purposes, and moves to arrest of judgment and for a new trial. Motion for new trial granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
209 F.—63

John H. Hall, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa. Paul Freeman, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The defendant was indicted under the Mann Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), for the illegal transportation of one Anna Ward from Philadelphia to Baltimore. After the commission of the alleged offense, the defendant and Anna Ward were lawfully married, and the marriage relation existed at the time of the trial. The district attorney offered the wife as a witness. Defendant's counsel objected on the ground of privilege. The objection was overruled, and the witness was permitted to testify.

If it had been shown that the offense was committed during the existence of the marriage relation, the present motion would be overruled upon the ground stated by Judge McPherson in his memorandum in the case of *United States v. Rispoli* (D. C.) 189 Fed. 271, viz.:

"That the offense charged was against the wife's person as really as if the defendant were charged with threatening to inflict physical violence, or of having actually struck her. In cases where the wife's personal rights were concerned, the exceptions to the husband's privilege should be benevolently regarded, and the offense in question was essentially within the spirit of the long-established rule that allows her to testify in protection or in vindication of her right to be secure in her person against threat or assault, even by her husband."

[1] The admissibility of testimony in criminal cases in the federal courts must be determined by the law of the states as it was when the courts of the United States were established by the Judiciary Act of 1789. *United States v. Reid*, 12 How. 361, 13 L. Ed. 1023; *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429.

[2] It is too well established to be questioned that at the common law as applied prior to 1789 a wife is not a competent witness for or against her husband, and this is so, not on account of interest, but on the ground of public policy. *Stein v. Bowman*, 13 Pet. 221, 10 L. Ed. 129; *Graves v. United States*, 150 U. S. 121, 14 Sup. Ct. 40, 37 L. Ed. 1021.

A familiar exception to the well-known rule is in cases of violence upon her person, in which case the wife is a competent witness directly to criminate her husband, and it was because an offense under the Mann Act was held to come within the exception, where the wife was the injured party, that she was permitted to testify against her husband in the *Rispoli* Case. The industry of the assistant district attorney has not enabled him to point to any authority for extending the exception to the common-law rule to an injury committed upon the person of the woman prior to her marriage. The question does not seem to have been raised in the federal courts, but the decisions in the state courts in construing the exception to the common-law rule and the statutes establishing a similar exception to the common law are against the position of the government's counsel. The question is very thoroughly discussed in the case of *People v. Curiale*, 137 Cal. 534, 70 Pac. 468, 59 L. R. A. 588, in construing a statute, and by the Su-

preme Court of Tennessee in *Norman v. State*, 155 S. W. 135, where the rule of the common law was applied. It is apparent that the exception to the rule of privilege prohibiting husband or wife from testifying against each other applies only to injuries inflicted or threatened during the existence of the marriage relation. In other words, the exception deals with the parties in the marriage relation and not as to acts committed before the marriage. The ground of the relaxation of the rule is the necessity for the protection of the wife from personal or other injury at the hands of her husband during the marital relation. The rule is based upon public policy. As was stated by Mr. Justice McLean in *Stein v. Bowman*, 13 Pet. 209, 10 L. Ed. 129:

"This rule is founded upon the deepest and soundest principles of our nature—principles which have grown out of those domestic relations that constitute the basis of civil society, and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife would be to destroy the best solace of human existence."

If the exception to the rule is to be extended to cover acts committed prior to coverture, such extension is within the power of Congress and not of the courts.

It is urged by the district attorney that the exclusion of the wife's testimony in cases like the present will afford a means for defendants to escape punishment by the expedient of marrying the party injured who may be in many cases the chief and only witness for the government. The well-settled rules of evidence founded on sound reasons of public policy cannot be set aside to meet the exigencies of cases under particular statutes. It is the duty of the court to apply the law as it exists.

I am satisfied that there was error in permitting the defendant's wife to testify against him, and a new trial will therefore be granted.

THE PORTUGUESE PRINCE.

(District Court, S. D. New York. December 19, 1913.)

SHIPPING (§ 141*)—DELIVERY OF CARGO—CONSTRUCTION OF HARTER ACT.

The provision of Harter Act Feb. 13, 1893, c. 105, § 2, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946), making it unlawful to insert in a bill of lading any words whereby the obligations of the master "to carefully handle and stow cargo and to care for and properly deliver same shall in any wise be lessened, weakened or avoided" does not make improper a substituted delivery in accordance with long-established custom, nor render void a provision in a bill of lading authorizing delivery on a quay or into lighters, and providing that the goods shall "remain at consignee's risk and expense immediately after being placed into lighters or on the quay."

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497-499; Dec. Dig. § 141.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suit by Charles Stoffregen against the Prince Line. Limited, as owner of the steamship Portuguese Prince. Decree for respondent.

The steamship Portuguese Prince arrived at New York with a cargo of coffee in bags from various ports in Brazil on October 12, 1912, and on Monday, October 14th, at 10 o'clock a. m., commenced the discharge of her cargo at pier No. 7, East river, belonging to the New York Dock Company, one of the piers customarily used for coffee ships.

In pursuance of instructions from the dock company which represented the libelants and other consignees, and in accordance with established custom, when the coffee was discharged, it was placed by the stevedores of the steamship according to marks, each mark within a certain space, designated for it, inside the shed, and not far from the string piece of the dock. The bags were piled in the usual and customary manner tiered to a height averaging about 16 tiers. The coffee bags were approximately three feet long, two feet wide, and eleven inches thick. In making the piles, the two outside tiers, as was customary, were stowed, in order to insure stability, with their longest dimensions at right angles to the string piece and about two feet inside of it. This tiering went up eight tiers, then a second tiering of a similar kind was begun one-half bag further in than the lower eight tiers. Inside these two tiers the bags were stowed with their long dimensions parallel with the string piece. This method of piling bags is shown to have been followed for years without resultant accidents and to have been considered a safe method of tiering.

On Tuesday, October 15th, at or about 4 o'clock p. m., a pile of bags of Victoria coffee, for which the libelants held a bill of lading and on which they paid freight, was completed on a portion of the dock assigned by the dock company for them, not far away from the clerk's office at the inshore end of the pier. At or about 11 o'clock on the morning of Wednesday, October 16th, owing, as the evidence tends to show, to the bursting of some of the bags in the lower outside tiers of this pile, the pile fell against one of the dock doors, bursting it open and allowing 34 of the bags to fall into the river. Of these 30 were salvaged and delivered in a damaged condition to the libelants. The claim is for loss of 4 bags and damage to 30 bags.

The bill of lading contained, in clause 3, the following provision: "The goods to be discharged from the ship as soon as she is ready to unload, at the quay or into hired lighters if necessary, but at the expense and risk of the owners of the goods. The collector of the port is authorized to grant an order for the discharge of cargo when for New York immediately after entry of the steamer. Goods for transshipment to be taken delivery of as soon as they can be discharged from the steamer. The goods to remain at consignee's risk and expense immediately after being placed into lighters or on the quay."

The answer of the steamship company set up that the merchandise had been delivered before the accident occurred and was, at the time of the accident, at risk of the libelants as cargo owners, under the provision of the bill of lading quoted.

The libelants contended that under section 1 of the act of Congress approved February 13, 1893, entitled "An act relating to the navigation of vessels," etc., commonly known as the Harter Act, the clause of the bill of lading above quoted was void.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for libelants.

Convers & Kirlin, of New York City (John M. Woolsey, of New York City, of counsel), for respondent.

HOUGH, District Judge (after stating the facts as above). The Boskenna Bay (D. C.) 40 Fed. 91, 6 L. R. A. 172, entitles the respondent to a dismissal of this libel unless the very ingenious argument advanced in respect of the Harter Act shall prevail. By the second

section of that act it is declared to be unlawful to insert any words in any bill of lading whereby the obligation of the master "to carefully handle and stow cargo and to care for and properly deliver same shall in any wise be lessened, weakened or avoided."

The language of the bill of lading under consideration has long been familiar to shippers and their counsel; it is the ordinary form of words by which a carrier is authorized to make a substituted delivery. The form of words long antedated the Harter Act, and a substituted delivery, whether by contract or usage, has long been known to the law. The draftsman of the Harter Act is presumed to have known that there was more than one kind of delivery, or more than one method of making delivery. The obligation of the statute is not to deliver in any peculiar manner, or any one manner, or any special manner, but only to properly deliver.

The final question, therefore, is whether a reasonable substituted delivery based upon contract and strengthened by long custom is a proper delivery. It was a proper delivery before the passage of the Harter Act, and, during more than 20 years which have elapsed since that statute became effective, no case has arisen (so far as I know) in which the second section of the act has been applied to these familiar words of the bill of lading.

I do not think that they do apply, and it is therefore ordered that the libel be dismissed.

In re MANHATTAN BRUSH MFG. CO.

(District Court, S. D. New York. December 11, 1913.)

No. 491.

BANKRUPTCY (§ 316*)—CLAIMS—INDORSERS FOR BANKRUPT—PAYMENT—RIGHTS OF INDORSERS.

Bankr. Act July 1, 1898, c. 541, § 57i, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), provides that whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove the same, such person may do so in the creditor's name, and if he discharge the undertaking in whole or in part he should be subrogated to the extent of the rights of the creditor. *Held*, that where the indorsers of the bankrupt's notes paid certain amounts less than their full face value to the holders and were thereupon discharged from liability as indorsers, and the holders proved the notes for the entire amount as claims against the bankrupt's estate, the indorsers were not entitled to prove the amounts paid by them on the notes as claims against the estate, being only entitled to receive from the holders any overplus more than the total amount due on the notes after crediting the dividends received from the bankrupt's estate and the amount received from the indorsers.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 474-477; Dec. Dig. § 316.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Manhattan Brush Manufacturing Company. On motion for the allowance of claims of indorsers of certain notes made to the bankrupt for money paid to the holders for release of the indorsers' liability.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Abr. A. Silberberg, of New York City, for creditors E. & H. Levy and Isaac Polack.

James F. Carroll, of New York City, for bankrupt.

HOLT, District Judge. This is a motion for an allowance of two claims. The bankrupt has proposed a composition which has been confirmed. The money is ready to be paid under the composition. Part of each of said claims is based on promissory notes of the bankrupt held by the claimants. An order directing the allowance of that part of the claim is not objected to. Another part of each of said claims is based upon the payment of moneys by the claimants to the present holders of certain notes made by the bankrupt on which the claimants were indorsers. The holders of said notes have proved against the bankrupt their claim in full upon the notes, but the claimants have actually paid certain amounts to the holders on the notes, and thereby, under an agreement to that effect, have been discharged from their liability as indorsers. They ask to be permitted to prove against the bankrupts for the amount of such payments, and to receive the dividends on them agreed to be paid under the composition.

Section 57i of the Bankrupt Act provides that:

"Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor."

Under this section an indorser cannot prove against a bankrupt in his own name, whether the note is due or not due, and whether the indorser has paid anything on the note or not. The holder of the note proves the claim, and if he neglects to do so the indorser can prove in the holder's name, but not in his own name. If the indorser pays the note in whole or in part, the section quoted provides that he is subrogated to that extent to the rights of the holder. But this does not mean, in my opinion, that he can prove for such payment against the bankrupt. In a case where an indorser has paid the note in whole or in part, the holder of the note, if he should receive from the bankrupt its entire amount, would hold an amount equal to that which the indorser had paid in trust for the indorser, and would be obliged to reimburse him to that amount; but, where an indorser has paid in part, the holder is entitled to receive the entire dividends from the bankrupt under his proof as holder until the amounts paid to the holder in the shape of dividends from the bankrupt and the amount paid by the indorser pay the note in full.

In this case, if the dividends paid under the composition to the holder, together with the amount which has been paid by the indorser to the holder, shall exceed the amount due to the holder on the notes, the holder of the notes will be liable to pay the excess to the indorser in reimbursement. But unless the total amount received by the holder from both sources equals the entire amount due, the holder is entitled to receive the entire amount payable from the bankrupt. In my opinion, therefore, those parts of the claims which consist of a claim for

money paid by the claimants to the holders of the note cannot be made the basis of a claim against the bankrupt. Unless the total amount paid to the holders of the note pays the notes in full, the indorsers have no claim against anybody. If the total amount paid exceeds the amount due on the notes, the indorser has a claim against the holder of the notes for reimbursement to the amount of the excess. This is a direct claim against the holder for money received.

The motion is therefore granted as to the claim based on the notes held by the claimants, and denied as to the claims based on the amount paid upon the indorsement.

In re PICK.

(District Court, E. D. New York. December 11, 1913.)

1. ALIENS (§ 69*)—NATURALIZATION—CERTIFICATE OF DEPARTMENT OF COMMERCE AND LABOR.

Where, on an application of an alien for citizenship, it appeared that the required certificate of the Department of Commerce and Labor, stating the date, place, and manner of arrival of the applicant in the United States, had been issued, but had been mislaid, the applicant was entitled to substitute a copy, and have the copy added to the record in lieu of the original.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 147-153; Dec. Dig. § 69.*]

2. ALIENS (§ 69*)—NATURALIZATION—CERTIFICATE OF DEPARTMENT OF COMMERCE AND LABOR.

Where an applicant for citizenship presented a copy of a certificate of the Department of Commerce and Labor, stating the date, place, and manner of arrival in the United States, sufficient to comply with the Naturalization Law, it was not material that it was not in the particular form required by rule 5 of the Regulations of the Department of Naturalization, since the regulations of the department cannot overrule the definite provisions of the statutory law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 147-153; Dec. Dig. § 69.*]

In the matter of the application of Joseph Pick to be admitted a citizen of the United States. Granted.

Joseph Pick, in pro. per.

William J. Youngs, U. S. Atty., and Reuben Wilson, Asst. U. S. Atty., both of Brooklyn, N. Y.

CHATFIELD, District Judge. [1] The statute requires that there shall be filed, at the time of filing the petition with the clerk of the court, a certificate from the Department of Commerce and Labor stating the date, place, and manner of arrival in the United States. In the present case this was apparently complied with, and a certificate, filled out by the Commissioner of Immigration, of the Department of Commerce and Labor, giving the necessary information, handed to the clerk. The certificate has been mislaid, and a copy is now presented by the applicant for use on the hearing.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Upon the situation presented, the copy now filed may be added to the record, in lieu of the one which has been lost, and the applicant may be admitted to citizenship. The paper is sufficient under the law, and no regulation specifying any particular form of certificate can be insisted upon, if not necessary for compliance with the requirements of the statute.

[2] The objection presented on behalf of the United States, under date of October 31, 1913, that such a certificate shall be issued by the Department of Naturalization in a particular form, under rule 5 of the Regulations of the Department, cannot repeal the provisions of the statutes.

The cases of *Fok Yung Yo v. United States*, 185 U. S. 296, 22 Sup. Ct. 686, 46 L. Ed. 917, *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415, and *United States v. Bailey*, 34 U. S. (9 Pet.) 238, 9 L. Ed. 113, do not decide that a departmental regulation can overrule a definite provision of statutory law. In *United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591, the court said:

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

The case of *In re Schmidt* (D. C.) 207 Fed. 678, is exactly in point, and seems to be a correct statement of the law.

The applicant may be admitted.

SCHWARZ et al. v. HARRIS.

(District Court, D. Oregon. December 29, 1913.)

No. 3,095.

1. INTEREST (§ 39*)—JUDGMENT—SET-OFF—INTEREST-BEARING CLAIM.

Where defendant sought to set off a noninterest-bearing demand against one which clearly bore interest from the date judgment was entered, defendant was not entitled to object that plaintiffs were allowed interest on their judgment from its date, while defendant was only allowed a set-off without interest.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 83-89; Dec. Dig. § 39.*]

2. INTEREST (§ 50*)—EFFECT OF TENDER.

Where defendant's answer pleaded a set-off and declared his willingness to pay the difference that existed between the amount of plaintiffs' judgment and defendant's claim, but whether there should be a set-off was a question which was not determined until the case was finally disposed of, and a tender alleged in the answer was not proved, and there was no tender of money into court, plaintiffs were properly allowed interest after answer.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 114; Dec. Dig. § 50.*]

On application for interpretation of opinion.
See, also, 206 Fed. 936.

John A. Carson, of Salem, Or., for plaintiffs.
Martin L. Pipes, of Portland, Or., for defendant.

WOLVERTON, District Judge. I am asked to interpret my decision in this cause respecting the decree to be entered.

The plaintiffs are entitled to recover from the defendant the amount of their judgment heretofore rendered against Julia A. Kennedy as administratrix, together with interest from the date of the judgment, namely, June 19, 1906, at the rate of 6 per cent. per annum, to the date of the decision rendered herein. The defendant is entitled to offset this judgment in the sum of \$2,520, without interest.

[1] The situation is that the defendant sought to offset a nonbearing-interest demand against one which clearly bears interest from the date the judgment was rendered. The defendant ought not to complain that he has not been awarded interest, because it was by reason of his own wrongful acts that the plaintiffs were kept out of the possession of the hops.

[2] It is urged that interest ought not to be awarded on the judgment after the answer was tendered in the present suit, because the defendant declared his willingness to pay the difference then existing between the amount of the judgment and the defendant's claim. But the question whether there should be any offset at all was a vital one in the case, which was not determined until the case was finally disposed of. Furthermore, the answer alleges a tender, which was not proven, and there was no tender of the money in court.

THE LOUISA.

McGUIRE v. THAMES TOWBOAT CO.

(District Court, S. D. New York. December 9, 1913.)

No. 488.

TOWAGE (§ 11*)—STRANDING OF TOW—LIABILITY OF TUG—UNCHARTED ROCK.

A tug *held* not in fault for the stranding of her tow by striking a small submerged rock while following the usual and customary course through the channel of a river, where the rock was uncharted and not generally known to pilots in the neighborhood.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

In Admiralty. Suits by the Thames Towboat Company against the scow *Louisa* for salvage services, and by James F. McGuire, owner of the *Louisa*, against the Thames Towboat Company for negligent stranding of the scow. Decree for the Towboat Company.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Barry, Wainwright, Thacher & Symmers, of New York City (James K. Symmers and Earle Farwell, both of New York City), for Thames Towboat Co.

James J. Macklin, of New York City (Frank V. Barnes, of New York City, of counsel), for the Louisa and James F. McGuire.

HOLT, District Judge. These are two suits, one by the owner of the scow Louisa against the Thames Towboat Company to recover damages for the stranding on March 1, 1912, of the scow Louisa on a rock at the westerly entrance to the Mystic river, while the scow was being towed by the tug Miles Standish, owned by the Thames Towboat Company. The other action is brought by the towboat company to recover for salvage services in raising the scow. The question in the case is whether the tugboat was guilty of any fault which caused the scow to sink. If it was, the owner of the scow is entitled to judgment, and, if it was not, the towboat company is entitled to compensation for raising the scow. The scow sank by reason of striking a submerged rock. This rock was not marked on the chart, and was not generally known to the pilots of the neighborhood. One of the old pilots claimed to have known of it. But the pilots and mariners about the Mystic river and the region generally had never heard of it. It was a small boulder or peak which the officers of the Coast Survey had a good deal of difficulty in finding after its position was known. The tide that day was very low. The rock was situated about 10 or 11 feet below water at low tide, and near a buoy which marked the channel. The tug was proceeding on the port side of the buoy and near to it. The buoy was a midchannel buoy, which navigators had a right to assume could be passed safely on either side. The course which the pilot of the tugboat took was the usual and customary course.

In my opinion, the pilot of the tug was not at fault for the stranding. Pilots are required, of course, to have such a degree of expert skill and such knowledge of the channels, buoys, tides, and the general locality in which they undertake to act as pilots as is necessary to properly discharge their duty. But they are not insurers. If the pilot of a tug exercises the reasonable degree of skill and care which may properly be expected of a pilot, the tug is not responsible for injuries to the tow arising from hidden, unknown, and uncharted obstructions.

The libel in the case of McGuire against the towboat company is dismissed, and in the salvage case the libelant is entitled to a decree. If the parties cannot agree upon the proper amount of compensation, a reference will be ordered to determine it.

In re GILLESPIE.

(District Court, E. D. New York. December 29, 1913.)

BANKRUPTCY (§ 138*)—RIGHTS OF BANKRUPT—ASSIGNMENTS OF FUTURE SALARY.

Attempted assignment by a bankrupt of salary *held* ineffective as to salary earned after the bankruptcy, and a stay restraining payment to the bankrupt vacated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193-204, 206-209; Dec. Dig. § 138.*]

In Bankruptcy. In the matter of Daniel O'C. Gillespie, bankrupt. On motion to vacate stay. Granted in part.

Allen Caruthers, of New York City, for bankrupt.

Williams & Hamburger, of New York City, for respondent.

CHATFIELD, District Judge. The stay as to 10 per cent. of salary held by the city under a garnishee execution cannot be vacated until a discharge has been obtained. As to all other portions of salary earned since the adjudication, there seems to be no assignment of any rights in existence at the time of assignment and transferable by the assignee, or which could be transferred by the giving of a power of attorney. Hence there is no security as to any property which the trustee could claim even if discharge be denied.

As to the salary over 10 per cent., therefore, the application to vacate stay against the city paymaster, or the city, will be granted, and all creditors named will be restrained from interference with the after-acquired salary over the 10 per cent. named.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MEMORANDUM DECISIONS

ATCHISON, T. & S. F. RY. CO. v. O'CONNOR. (Circuit Court of Appeals, Eighth Circuit. November 17, 1913.) No. 3841. In Error to the District Court of the United States for the District of New Mexico. Action by Charles O'Connor, an infant, by Belle C. O'Connor, his mother and next friend, against the Atchison, Topeka & Santa Fe Railway Company. Judgment (197 Fed. 224) for plaintiff, and defendant brings error. Affirmed. Gardiner Lathrop, of Chicago, Ill. (Robert Dunlap, of Chicago, Ill., and H. L. Waldo and R. E. Twitchell, both of East Las Vegas, N. M., on the brief), for plaintiff in error. Francis E. Wood, of Albuquerque, N. M. (Marron & Wood, of Albuquerque, N. M., on the brief), for defendant in error. Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

PER CURIAM. This action was brought to recover damages for the death of Charles O'Connor, alleged to have been caused by the negligence of the railway company. The only error assigned and argued is the refusal of the trial court to instruct the jury at the close of all the evidence to return a verdict for the defendant: First, because plaintiff failed to prove that the engine and cars were moved down the track without signal or warning by ringing of the bell; second, because the evidence showed that deceased was aware of the dangers and had voluntarily encountered the risk of injury; third, because the deceased was guilty of contributory negligence in unnecessarily putting himself in a place of peril when there was a safer course open to him. We have carefully read the evidence certified to this court and are of the unanimous opinion that there was testimony sufficient to require each of the above matters to be submitted to the jury. They were so submitted by the trial court in a very careful charge, which covered all the issues and to which no exception was taken. There being testimony for the jury to consider and which was sufficient to support their verdict, we have no authority to interfere. A detailed discussion of the evidence would serve no useful purpose. The judgment will be affirmed; and it is so ordered.

COXE v. F. S. HARDY & CO. (Circuit Court of Appeals, Fifth Circuit. October 29, 1913.) No. 2507. Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge. In the matter of the Selman Heating & Plumbing Company, bankrupt; John S. Cox, trustee. From an order permitting F. S. Hardy & Co. to reclaim property, the trustee appeals. Affirmed. For opinion below, see 203 Fed. 777. See, also, 204 Fed. 839. Max J. Winkler, of Birmingham, Ala., and Victor H. Smith, of Pell City, Ala., for appellant. L. J. Cox, of Birmingham, Ala., for appellee. Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. We have examined the record in this case, and find that the facts were correctly found and the case properly decided by the trial judge, and that none of the assignments of error are well taken. The decree appealed from is affirmed.

EAGEN v. LAZARUS. (Circuit Court of Appeals, Third Circuit. January 17, 1914.) No. 1803. Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge. Action by G. F. Lazarus, as trustee in bankruptcy against James Eagen. Judgment for plaintiff (206 Fed. 518), and defendant appeals. Modified. Abram Salsburg, of Wilkes-Barre, Pa., and C. B. Little, of Scranton, Pa., for appellant. Burton W. Davis, of Wilkes-Barre, Pa., for appellee. Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

PER CURIAM. This is an action by a trustee in bankruptcy to set aside a preferential transfer of property. It was brought in equity, instead of at

law, because a transfer of real estate was involved, and the trustee proceeded upon the theory that a reconveyance might be necessary as a part of the relief. In view of the admissions made by the plaintiff in error, we need not recount the facts. He concedes that in effect a preferential payment of \$500 was made, and (in order to avoid further litigation) he also states that he has no objection to a decree being entered for that sum. This relieves us from discussing the case, for we agree that this amount is the proper measure of his liability. We therefore direct that the decree below be so modified as to order James Eagen to pay to the trustee, within a reasonable time to be fixed by the District Court, the sum of \$500, with interest from October 18, 1911. And we further direct that the costs of this court be paid by the bankrupt estate, and that the costs below be divided equally between the estate and James Eagen.

HERNDON v. CITY OF HENDERSON. (Circuit Court of Appeals, Fifth Circuit. November 13, 1913.) No. 2511. In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. Action at law by Charles Herndon against the City of Henderson. Judgment for defendant, and plaintiff brings error. Affirmed. Ben B. Cain, of Dallas, Tex., for plaintiff in error. H. B. Marsh, of Tyler, Tex., for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. The trial court correctly ruled that the plaintiff's claim in this case was barred by the ten-year statute of limitations. Judgment affirmed.

HERNDON v. CITY OF HENDERSON. (Circuit Court of Appeals, Fifth Circuit. December 1, 1913.) No. 2512. Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. Suit in equity by Charles Herndon against the City of Henderson. Decree for defendant, and complainant appeals. Affirmed. Ben B. Cain, of Dallas, Tex., for appellant. H. B. Marsh, of Tyler, Tex., for appellee. Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. The bill in this case was without equity and properly dismissed. Affirmed.

ILLINOIS CENT. R. CO. v. COMFORT. (Circuit Court of Appeals, Fifth Circuit. October 6, 1913.) No. 2459. In Error to the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge. Action at law by A. G. Comfort against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed. Edw. Mayes, of Jackson, Miss., for plaintiff in error. Marcellus Green and Garner W. Greeh, both of Jackson, Miss., for defendant in error. Before PARDEE, Circuit Judge, and SHEPPARD and FOSTER, District Judges.

PER CURIAM. A majority of the judges being of opinion that this case was correctly ruled in the court below, the judgment of the District Court is affirmed.

McCASLAND et al. v. TEXAS & P. RY. CO. (Circuit Court of Appeals, Fifth Circuit. December 1, 1913.) No. 2508. In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. Action at law by J. N. and Ortelle McCasland against the Texas & Pacific Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed. Thos. W. Davidson and P. O. Beard, both of Marshall, Tex., for plaintiffs in error. W. T. Armistead, of Jefferson, Tex., and F. H. Pren-

dergast, of Marshall, Tex., for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. In this case the trial judge peremptorily directed a verdict for the defendant. On careful consideration of the pleadings and evidence, we fully concur in the ruling. Affirmed.

MACKAY TELEGRAPH-CABLE CO. v. CITY OF PARIS. (Circuit Court of Appeals, Fifth Circuit. December 8, 1913.) No. 2535. Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. Suit in equity by the Mackay Telegraph-Cable Company against the City of Paris. Decree for defendant, and complainant appeals. Affirmed. Caswell T. Coffman and J. C. Marshall, both of Little Rock, Ark., for appellant. Edgar Wright, of Paris, Tex., for appellee. Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. The issues in this case are so largely controlled by the opinion of the Supreme Court in *Western Union Telegraph Company v. Richmond*, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710, that on its authority the decree appealed from is affirmed.

PEACOCK v. THIRD NAT. BANK OF FITZGERALD et al. (Circuit Court of Appeals, Fifth Circuit. October 29, 1913.) No. 2559. Petition to Superintend and Revise in the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge. Oliver C. Hancock, of Macon, Ga., for petitioner. John R. L. Smith, of Macon, Ga., for respondent. Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. The petition for review is denied. See, also, 203 Fed. 191.

PUGET SOUND MILLS & TIMBER CO. v. LOGGIE. LOGGIE v. PUGET SOUND MILLS & TIMBER CO. (Circuit Court of Appeals, Ninth Circuit. September 8, 1913.) No. 2270. Appeals from the District Court of the United States for the Northern Division of the Northern District of Washington. See, also, 194 Fed. 158. Kerr & McCord, of Seattle, Wash., for Puget Sound Mills & Timber Co. Dorr & Hadley, of Seattle, Wash., and J. W. Kindall, of Bellingham, Wash., for Loggie.

PER CURIAM. Appeals dismissed, pursuant to stipulation of counsel for respective parties, filed September 2, 1913.

SIMMONS v. STROMBERG-CARLSON TELEPHONE MFG. CO.† (Circuit Court of Appeals, Fifth Circuit. October 29, 1913.) No. 2468. Appeal from the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge. Suit in equity by the Stromberg-Carlson Telephone Manufacturing Company against C. Jerome Simmons. Decree for complainant, and defendant appeals. Affirmed. For opinion below, see 199 Fed. 256. James L. Anderson and Robt. C. Alston, both of Atlanta, Ga., for appellant. Orville A. Park, E. P. Johnston, and Geo. S. Jones, all of Macon, Ga., for appellee. Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. We have carefully examined the large record in this case in the light of the very able arguments and briefs submitted on hearing, and we conclude that the case was properly ruled and decided in the lower court. The decree, therefore, should be and the same is hereby affirmed.

SULLIVAN v. UNITED STATES.† (Circuit Court of Appeals, Fifth Circuit. December 8, 1913.) No. 2477. In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. Criminal prosecution by the United States against Frank Sullivan for viola-

† Rehearing denied January 5, 1914.

tion of the internal revenue laws. Judgment of conviction, and defendant brings error. Affirmed. Erwin J. Smith, of Denison, Tex., for plaintiff in error. J. W. Ownby, U. S. Atty., and J. B. Dailey, Asst. U. S. Atty., both of Paris, Tex. Before PARDEE and SHELBY, Circuit Judges, and CALL, District Judge.

PER CURIAM. The evidence warranted the submission of the case to the jury, and we find no reversible error in the rulings of the court in the trial. *Willingham v. United States*, 208 Fed. 137, No. 2400 of the docket of this court, recently decided, presented questions not raised in this case, and is not applicable. Finding no error assigned or patent in the record, the judgment of the District Court is affirmed.

UNITED STATES v. NEW YORK & P. R. S. S. CO. (Circuit Court of Appeals, Second Circuit. December 15, 1913.) No. 204. In Error to the District Court of the United States for the Southern District of New York. Action at law by the United States against the New York & Porto Rico Steamship Company. Judgment for defendant, and the United States bring error. Affirmed. See, also, 206 Fed. 443. A. S. Pratt, Asst. U. S. Atty., of New York City. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Judgment affirmed in open court.

WALTHAM WATCH CO. v. KEENE. (Circuit Court of Appeals, Second Circuit. December 18, 1913.) No. 67. Appeal from the District Court of the United States for the Southern District of New York. Suit in equity by the Waltham Watch Company against Charles A. Keene. Decree for defendant, and complainant appeals. Affirmed. For opinion below, see 202 Fed. 225. Crawford, Harris & Goodwin, of New York City (William G. Thompson, Nathan Matthews, Romney Spring, and George E. Mears, all of Boston, Mass., of counsel), for appellant. A. H. Rosenfeld, of New York City, for appellee. Before WARD and ROGERS, Circuit Judges, and HOUGH, District Judge.

PER CURIAM. The decree of the court below is affirmed.